

**IN THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**LAND APPEAL NO. 13 OF 2022**

**MARIA MGENDA** [Administrator of the Estate of  
the Late **MOHAMED MAYUNGA MGENDA**] ..... **APPELLANT**

**VERSUS**

**YASINI MOHAMED**..... **RESPONDENT**

(Being an appeal from the Judgment and Decree of the District Land and Housing  
Tribunal for Njombe District at Njombe)

(Hon. G. F Ng'humba (Chairperson))

Dated the 20<sup>th</sup> day of January, 2022

in

Land Application No. 27 of 2019

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**JUDGMENT**

Date of last order: 08.12.2022

Date of Judgement: 20.12.2022

**S.M. KALUNDE, J.:**

This appeal emanates from the decision of the judgment and decree of the District Land and Housing Tribunal for Njombe District at Njombe (henceforth "the trial tribunal") dated 20.01.2022 in Land Application No. 27 of 2019.

In that the respondent filed a suit against MARIA MGENDA in her capacity as the administrator of the estate of the late MOHAMED MAYUNGA MGENDA. The appellant and respondent are siblings. Their

dispute at the trial tribunal related to claims of ownership over a house located on Plot No. 23 Block "C" Mgendela Street in Njombe registered in the name of Yasini Mohamed (henceforth "the disputed suit property"). The respondent claimed to be the lawful owner of the suit property having been lawfully allocated since 1966. The appellant, on the other hand, insisted that the property was part and parcel of the estates of the late MOHAMED MAYUNGA MGENDA as thus was under her control as the administratrix.

Following full trial, the tribunal decided in favour of the respondent. The trial tribunal reasoned that the suit was filed approximately 53 years and thus was time barred. In arriving at that decision, the trial tribunal placed reliance on the provisions of section 9(1) of; read together with item 22 of the First Schedule to; **the Law of Limitation Act [Cap. 89 R.E. 2019]** (henceforth "the LLA").

Disgruntled, the appellant has lodged the present appeal wherein he is challenging the whole judgment and decree of the trial tribunal. In his memorandum of appeal, the appellant has raised five grounds of appeal which may be summarised as follows:

1. The trial tribunal erred in raising an issue suo motto and deciding on it without affording parties an opportunity to be heard;
2. The trial tribunal erred in holding that it had no jurisdiction to entertain the suit;
3. The trial tribunal erred in holding that the respondent was lawful owner of the suit property based on inconsistent evidence of the respondent;

4. The trial tribunal erred in pronouncing judgment in favour of the respondent based on weak and deceitful evidence adduced by the respondent; and
5. The trial tribunal erred in pronouncing judgment in favour of the respondent in disregard of the strong evidence adduced by the appellant.

By consent of the parties, leave was granted that the appeal be argued by way of written submissions. Submissions of the appellant were drawn and filed by learned counsel **Ms. Upendo Nakilo Mtebe** from Panacea Attorneys. The respondent enjoyed the legal services of **Mr. Mussa Bhagama**, learned advocate in drafting and filing his submissions. Submissions were duly filed in accordance with the schedule ordered by the Court, hence the present judgement.

Having considered the rival submissions, I think that the issue for my determination is only one, that is whether or otherwise the trial court was justified in raising the issue suo motto and decide upon it without having afforded the parties an opportunity to be heard.

At the outset Ms. Upendo faulted the decision of the trial tribunal on the ground that, whilst it was not wrong to raise the issue of limitation suo motto, the trial chairperson erred when it raised the issue suo motto and went on to determine on it without affording parties an opportunity to be heard on the same. The counsel argued that the right to be heard was fundamental right under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. According to the advocate, failure to afford the parties an opportunity to be heard was a fundamental irregularity which violated principles of natural justice. In

further support of this argument the counsel quoted cited the case of **Mbeya Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 25.

The learned counsel cited the case of **Charles Christopher Humphrey Kombe t/a Kombe Building Materials vs Kinondoni Municipal Council** (Civil Appeal 19 of 2017) [2022] TZCA 205 (14 April 2022 TANZLII); wherein the Court of Appeal stated:

*"Accordingly, the learned trial judge cannot be said to have committed any wrong in framing a new or additional issue which he thought necessary for determining the matter before him since the law permitted him to do so. The issue is whether after having framed an additional issue the trial judge afforded an opportunity to the parties to address him on that aspect.*

*Admittedly, the CPC does not specifically provide for that procedure, however, it is a settled law that after a new or additional issue is raised, the court must according, the parties an opportunity to be heard on such new or additional issue."*

The counsel stated that failure to afford parties the right to be heard rendered the trial tribunal decision a nullity. For this he cited the case of **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo** (Civil Appeal 161 of 2016) [2018] TZCA 224 (27 September 2018 TANZLII) where it was stated that:

*"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The was the first appellate court*

*raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so."*

In view of the above authorities, the counsel urged the court to allow the appeal and set aside the decision of the trial tribunal and costs of the present appeal.

Mr. Mhagama, learned counsel for the respondent conceded that the issue of limitation was not framed as an issue for determination but raised and determined by the learned trial chairperson suo motto without hearing the parties. His view was that a retrial be ordered so that parties may be afforded an opportunity to submit on the raised issue. Though he sought that nothing would change if a retrial was ordered. To support his argument, he cited the case of **Aloysius Benedicto Rutaihwa vs. Stanslaus Mutahyabarwa and 7 Others** (Land Appeal 22 of 2020) [2021] TZHC 6161 (27 August 2021 TANZLII).

In a brief rejoinder, the counsel for the appellant insisted that failure to afford the parties an opportunity to respond on the issue of limitation was a breach of principles of natural justice which invalidated the decision of the trial tribunal. He insisted that the appeal be allowed with costs.

On my part I have carefully read the records of appeal and considered the arguments submitted by the parties in light of the grounds of appeal. Admittedly, limitation of the suit was not among the issues which were framed as shown at page 2 of typed proceedings. It is also not in dispute that the learned trial chairperson sought the matter

was time barred in view of the provisions of section 9(1) of; read together with item 22 of the First Schedule to the LLA. This can be clearly seen at page 7 of the typed judgment where the trial tribunal made the following observation:

*"Kwa kuzingatia vielelezo vya mwenendo na hukumu ya Mahakama ya mwanzo Njombe vinaonyesha ni kwell Mahakama iliwataka wadaawa kuleta mgogoro huu katika baraza la Ardhi la Wilaya ya Njombe. Barua ya usimamizi/hati ya usimamizi wa mali ya Marehemu Mohamed Mayunga Mgenda inaonyesha kuwa marehemu Mayunga Mgenda alifarika 23/11/2966 na mgogoro huu umetokea miaka ya 2019 na hata msimamizi wa mali za marehemu ameteuliwa mwaka 2019.*

*Tangu mwaka 1966 mpaka 2019 ni yapata miaka 53 imepita. Sheria kuhusiana na mali za marehemu inatoa ukomo wa madai. **Kifungu cha 9(1) cha Sheria ya Ukomo Sura ya 89, Marejeo 2019** kinatoa muda ambao mali za marehemu zinatakiwa kudaiwa.*

*Muda wa kudai mali za marehemu unaanza kuhesabika siku marehemu alipofariki hii iliamuriwa katika shauri la **Dominicus M. Mvamba vs. Thadei Mwangunga and another, Land Appeal No. 10 of 2016, High Court of Tanzania at Iringa District Registry (unreported).***

*Kipengele cha 22 sehemu ya 1 ya Jedwali ya **Sheria ya Ukomo Suru 89, Marejeo 2019** inatoa muda wa kudai ardhi ni miaka 12. Kipengele hiki kinasomwa pamoja na **Kifungu cha 9 (1) Sheria** hiyo."*

In view of the above observations, the Court made the following conclusion:

*"Kwa kuzingatia Sheria ya Ukomo na muda wa madai ya mali ya marehemu madai ya mjibu maombi yapo nje ya muda.*

*Baraza baada ya kuona hayo linaona kuwa kwa kuwa mwombaji ameweza kuthibitisha madai yake juu ya nyumba gombaniwa kama **kifungu cha 110 cha Sheria ya Ushahidi Sura ya 6, Marejeo ya 2019** kinavyotaka, pia ametoa Ushahidi wenye nguvu na mzito kuliko ule wa mjibu maombi kama ilivyoamriwa katika shauri la **Hemed Said vs. Mohamed Mbilu (1984) TLR. 113**, eneo/nyumba bishaniwa ni mali ya mwombaji.*

*Kwa kuwa kiini Na. 1 kinampa ushindi mwombaji ni wazi kuwa mwombaji anastahili kulipwa gharama zake.*

*Kwa kuzingatia maelezo yote hapo juu baraza hili linakidhana na maoni ya mshauri kwa kuwa mjibu maombi madai yake yapo nje ya muda kwa mujibu wa **Kifungu cha 9 (1) kinachosomwa pamoja na kipengele cha 22 sehemu ya 1 ya Jedwali ya Sheria ya Ukomo Sura 89, Marejeo 2019.** Hivyo maombi haya yanakubaliwa kwa gharama, nyumba bishaniwa iliyopo kiwanja Na. 23, Kitalu C ni mali halali ya mwombaji, mjibu maombi hatakiwi kuingilia kwa namna yoyote ile nyumba ya mwombaji, na anatakiwa kulipa gharama za shauri hili.*

*Imeamriwa hivyo."*

From the above quotation of the judgment of the trial tribunal, there is no dispute that the learned trial tribunal chairperson based its decision on the issue of time limitation.

As rightly contended by Ms. Upendo, in accordance with Order XIV rule 1 (5) and 5(1) of **the Civil Procedure Code [Cap. 33 R.E. 2019]**, the court is empowered at any time before passing a decree to amend or frame a new issue in addition to those framed earlier on. However, I am also mindful of the settled position of law that after a new or additional issue is raised, the court must according, the parties an opportunity to be heard on such new or additional issue. This position was stated long time ago by the now defunct East African Court in the case of **Agro Industries Ltd. v, Attorney General [1990-1994] 1EA1**. In that case, the Court held as follows on that point:

*"A Court may base its decision on an unpleaded issue if it appears from the course of the trial that the issue has been left to the Court for decision... So long as a Court allows the counsel to address it on certain issues then the judge has to conclusively decide them."*

In the present case, the Court was justified in raising the issue of limitation, however, having raised the issue the Court was bound to invite parties to make submissions on the issue before arriving at its decision. As was held in **Mbeya Rukwa Autoparts and Transport Limited** (supra) in our country natural justice is not merely a principle of common law, it has become a fundamental constitution right Article 13(6) (a) which includes the right to be heard amongst the attributes of equality before the law.

In view of the above cited authorities, I am of considered view that, the manner in which the trial tribunal raised the issue of limitation suo motu and determine on the same without affording the parties an opportunity to be heard, has undeniably made the whole proceedings




and the judgment of the trial tribunal a nullity, and I hereby declare so. Since the case was not determined on its merits I see no reason to consider the remaining grounds of appeal.

In the view of the above, I will allow the appeal and thereby quash the proceedings in, and set aside the judgment and decree of the trial tribunal in Land Application No. 27 of 2019. In the circumstances, either party is at liberty to reapproach the court of competent jurisdiction if they so desire subject to rules of limitation. Considering the nature of the matter I order that each party shall bear its own costs.

**It is so ordered**

**DATED at IRINGA this 20<sup>th</sup> day of DECEMBER, 2022.**



  
**S.M. KALUNDE**  
**JUDGE**