

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 300 OF 2020

*(Arising from the decision of the District Court of Kinondoni (Hon. K.D Mhina, SRM) in
Civil Case No. 33 of 1999 dated 11th January, 2018.*

and

*Pursuant to the ruling of this court (Hon. Mlacha, J) in Misc. Civil Application No. 305 of
2020 dated 3rd December, 2018)*

**SALIM OMARI SALIM and ZUBERI MBWENI (Administrators of the estate of
the late MARIAM SELEMANI) APPELLANT**

VERSUS

**ALLY MOHAMED HANIU (Administrator of the estate of the late HIDAYA
JUMA HANIURESPONDENT**

JUDGMENT

14th December &, 2022& 17th February, 2023

MWANGA, J.

In the Judgement of the District Court by K.D Muhina, SRM, as he then was, declared the suit instituted by the appellant herein, who was the

plaintiff in Civil Case No. 33 of 1999 null and void and proceeded to dismiss it for non-joinder of the necessary party. His decision relied on the order of the High Court in Civil Appeal No. 184 of 2000 issued by Kimaro J, as he then was, which ordered trial *denovo* of Civil Case No. 35 of 1996 on the ground that, interested parties be joined as party to the suit.

It came to the knowledge of the trial magistrate in the course of composing the Judgement that, the appellant filed Civil Case No. 33 of 1999 in violation of the stated court order. That, the suit was filed without joining all interested parties. Consequently, the suit suffered total defeat and it was equally dismissed without costs.

The decision displeased the appellant. He therefore filed this appeal containing seven grounds, namely;

1. That the trial court erred in law and procedure for failure to assign the reasons for change of hands of magistrates during hearing of the suit.
2. The Honourable court erred in fact and law by dismissing the suit based on the issue which was not part of the issues framed by the court in the proceedings and without affording parties the right to heard before making his decision.

3. That the honourable court erred in fact and law by dismissing the suit on the ground that the order of this court in Civil Appeal No. 184 of 2000 (Kimaro, J) was not complied in respect of Civil Case No. 35 of 1996 while in essence it is the respondent who wilfully abandoned her case and the case at hand had no connection with this court's orders in Civil Appeal No. 184 of 2000.
4. That the Honourable court erred in fact and law by holding that it was incompetent before it for failure to join in the proceedings the seller of the suit land while there are undisputed facts in the record that the appellant had already obtained a decree against one Bakari Hussein, Juma Bakari Majota and Ally Kindamba at Kinondoni Primary Court.
5. That the Honourable court erred in fact and law by failure to evaluate the evidence before it and hold that the purported sale of suit land was executed by a person who had no title to pass.
6. That the Honourable Court erred in law and fact by failure to determine the suit based on the issues before it.
7. That the Honourable court erred in fact and law by failure to abide to the rules of pleading in relation to the evidence given in court by the respondent.

Before addressing the grounds of appeal and giving analysis on the detailed submission of the parties, it is pertinent to provide brief historical background of this matter.

Evidence as it was adduced shows that, in 1999 the deceased one Mariam Selemani owned a mud house No. 57, Kisutu Street in Kinondoni within Dar es Salaam Region. In that house, there were some tenants including Tarimo and W. Massawe. Some evidence suggests that one Bakari Hussein was also a tenant in that house.

According to Dar es Salaam City Council Tribunal, the title of the said piece of land passed from the deceased Mariam Selemani to Bakari Hussein, who sold it later to the deceased Hidaya Juma Haniu. The said Hidaya Juma Haniu, thereafter demolished the existing structure and reconstructed a new one.

Further evidence point out that, the process of procuring the said title from Mariam Selemani to Bakari Hussein is tainted with allegations of frauds and or forgeries believed to be engineered by the seller, Bakari Hussein. Moreover, the evidence tells that the said title passed from Bakari Hussein to the deceased Hidaya Juma Haniu when Mariam Selemani was still alive.

The transactions involving the disputed house led to series of criminal and civil complaints between the parties. Amongst them were: -

- i. In 1998, the deceased Mariam Selemani filed a case in Civil Case No. 142 of 1998 at Kisumu RMS Court with similar claim to the current one but, the same was withdrawn.
- ii. On the same year, the deceased Hidaya Juma Haniu filed a complaint in Criminal Case No. 199 of 1998 against one Athuman Omary, who use to collect rent from the tenants in the disputed house.
- iii. Civil Case No. 35 of 1996 at Kinindoni District Court between the deceased Hidaya Juma Haniu(Plaintiff/ Decree Debtor) Vs Bakari Hussein (Defendant/ Judgement Debtor) and Hadija Salum(Objector/ applicant) whereby the deceased Hidaya Juma Haniu who is the respondent herein was declared the lawful owner of the disputed house.
- iv. Civil Appeal No. 184 of 2000 against the decision of the District Court, whereby the decision of the district court was quashed and ordered trial *denovo* and joinder of necessary parties.
- v. Application No. 248 of 1996 filed to evict the tenants from the disputed house at the Regional Housing Tribunal of Dar es salaam

between the deceased Hidaya Juma Haniu(applicant) and the respondents were Tarimo and W. Massawe. In this application, the deceased Mariam Selemani filed an affidavit as interested party claiming that she was the lawful owner of the disputed house. On 28 January, 1998 the respondents were ordered to vacate the suit premise and the house was handed to the deceased Hidaya Juma Haniu.

- vi. Criminal Case No. 199 of 1998 at Kinondoni Primary Court whereby the complainant was deceased Hidaya Juma Haniu and the accused person was Athuman Omari who was found guilty of obtaining money by false pretence by unlawfully collecting rent from the disputed house. However, the same was quashed by the High Court in Miscellaneous Criminal Case No. 4 of 2000 on the ground that the issue involved was civil in nature.

The record reveals further that, four issues were framed after completion of the pleadings. These were; **First**, *who is the lawful owner of the property in dispute.* **Second**, *whether the defendant unlawfully demolished the property in dispute.* **Third**, *whether there was a trespass into the suit premises* and **fourth**, *what reliefs are parties entitled.*

There was a heated debate all alone in the course of hearing of this appeal. The appellant was represented by Mr. Thomas Brash and the respondent was represented by Mr. Juma Mtatiro, both learned counsels. Mr. Thomas Brash dropped fourth ground of appeal in the course of his submission.

One of the central arguments between the parties centred on the second and third grounds of appeal because that is what led to the decision of the trial magistrate. For clarity, the grounds were dismissal of the suit based on the issue which was not part of the issues framed by the court and without affording parties the right to heard before making of the decision and dismissal of the suit based on non-compliance of this court order in Civil Appeal No. 184 of 2000 by Kimaro, J. as he then. However, in the circumstances of this appeal, I am inclined to summarise submission of both parties as hereinafter.

In respect of the first ground of appeal, Mr Thomas Brash stated that the case file in Civil Case No. 33 of 1999 passed in the hands of several magistrates out of whom, four did not assign any reason for such transfer. According to him, it was only the fifth magistrate Hon. K.D. Muhina who heard the case to its conclusion had assigned the reason that the case has been assigned to him following disqualification of Hon. Kiriwa.

The learned Counsel argued that, non-assignment of reasons by other magistrates was in violation of Order XVIII Rule 10(1) of Civil Procedure Code, Cap. 33 R.E 2019 and, it has the effect of nullifying the proceedings. The counsel grounded his argument in the case of **Inter consult limited Vs Mrs Nora Kasanga and Methew Ibrahim Kasanga**, Civil Appeal No. 79/2015(Unreported).

Mr. Juma Mtatiro rebutted the argument, stating that no trial took place before the matter was re-assigned to Hon. Hon. K.D. Muhina, SRM who assigned reasons. Therefore, it was not fatal due to the fact that the said trial magistrate recorded the reasons as to why the matter had to proceed before him and, in fact, he was the one who recorded evidence by oath or affirmation in court.

Arguing on the second and third grounds of appeal, Mr. Thomas Brash was not pleased by the order of the trial court dismissing the suit basing on non-issue. It was his observation that, non- joinder of the person who sold the disputed house was not among the issues framed by the court. Henceforth, if the court had sought the importance of joining proper and necessary party, it had the duty to call the relevant parties to be addressed on the issue rather than deciding it *suo moto*. The counsel put emphasis that, failure to do so denied parties the rights to be heard as per

article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 and, in essence it becomes a nullity. He relied his argument in the cases of **Kumbwandumi Ndemfoo Ndossi Vs Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018(Unreported) and **M/s Consolidated Holding corporation and Another Vs Consolidated Investment (T) LTD**, Civil Appeal No. 65 of 2011(Unreported).

As to the third ground of appeal,it was the contention of the Counsel that, instead of dismissing the suit, the trial magistrate ought to invoke Order I Rule 10 (2) of Civil Procedure Code which provides opportunity for the court to order the necessary party to be joined. While addressing on the approach taken by the trial court, Mr. Thomas Brash cited the authority in **Kente, J. in Allan M. Mushumbushi Vs Honest Temba t/a Herera Supplies**, Land Case Revision No. 15 of 2013(Unreported) which held that failure to join a party is a serious issue, hence the court ought to strike out the case and not dismissal so as to give parties rights to file a fresh suit.

Adding some flavour to his submission, Mr. Brash submitted that, in the two cases, i.e Civil Appeal No. 184 of 2000 which originated from Civil case No. 35 of 1996, the appellant herein was not party to the case and orders issued therein was not the concern of the appellant. In the

circumstances, it was the counsel view that the said order could not have any adverse effect on Civil Case No. 33 of 1999.

For his part, Mr. Juma Mtatiro the leaned counsel supported decision of the trial court that the suit was properly dismissed because non-joinder of necessary parties renders the whole matter fatal. He reiterated the High Court decision in **Juma B. Kadala Vs. Laurent Mkande 1983 (TLR) 103** where it was held that, when a suit is for recovery of land the seller and the buyer must be joined to the suit.

In an attempt to save his appeal, it was the learned counsel view on his fifth ground of appeal that, had the trial court analysed and considered evidence adduced it would have discovered that the said Mariam Selemani was alive and, as the owner of the disputed house, she ought to sale her own house and not Bakari Hussein who claimed to be administrator of the estate of the deceased Mariam Selemani.

On the other hand, Mr. Juma Mtatiro while responding on the issue posed, he stated that Kinondoni District Court evaluated the evidence before it and observed further the sale agreement that, the owner of the property was Bakari Hussein who, sold the same to the deceased Hidaya

Juma Haniu. It was therefore his submission that, there is no way the appellant herein can by-pass the seller in the respective suit.

Tirelessly and submitting in favour of the sixth ground of appeal, Mr. Thomas Brash argued that, the trial magistrate failed to address the four issues framed by the court in that particular suit. He stressed that, all issues were supposed to be discussed one by one. The case of **Wilfred Moro Vs Sarah Lotti Mbise and 3 Others**, Civil Appeal No. 64 of 2020 was cited to show importance of resolving the framed issues before it, otherwise it becomes an error that could cause injustice to the parties.

Mr. Juma Mtatiro on the other hand had a different view and he laughed at the arguments of his fellow counsel. The learned counsel contended that, although the court framed the issues but, in the course of determination of the suit it met with a legal issue arose during the trial and in the pleadings; that was, the seller was not joined in the respective suit as per order of the High Court by Kimario J, he then was. Again, he reiterated his earlier position that, the only remedy was to dismiss the suit. The learned counsel stuck his argument under Order I Rule 3 of the Civil Procedure Code, Cap. 33 R.E 2002 and the decision in **Tanzania Railway Zorportion Vs GPB (T) Limited** Civil Appeal No. 218 of 2020(Unreported).

The Counsel added that, legally speaking Bakari Hussein is the source of the dispute to both sides on the basis that, when the deceased Hidaya Juma Haniu bought the disputed property, the ownership was already registered in the name of Bakari Hussein. Under the circumstances, the suit could not stand in absence of the necessary party i.e Bakari Hussein. He raised concern that, the deceased Mariam Selemani or administrator of the estate had no rights to sue the respondent because the property had already passed the ownership.

With reference to the seventh and last ground of appeal, **Mr. Brash argued that**, the trial court failed to abide by rules of pleadings for the reason that Civil Case No. 33 of 1999 was filed by a plaintiff and WSD was effected and the appellant claimed that there was trespass to his house and the one possessing the house stated that she bought the house from Bakari Hussein. He added further that, respondents vehemently denied through written statement of defence and stated that he bought the house through judgment of the court in Civil Case No. 35 of 1996 and there was no evidence in support of his claims after 14 years.

Additionally, the counsel argued further that, the respondent submitted a document showing that he had a "WILL" of Mariam Selemani given to Bakari Hussein, forgetting what were stated in their written

statement of defence. He was of the view that, parties are bound by their pleadings, hence the trial court ought to rule on according the the pleadings. In that regards, further reference was made in the case of **Yara Tanzania Limited Vs Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019 (Unreported).

In rejoinder, Mr. Thomas Brash stated that, it was the duty of the respondent to ensure that all necessary party were joined in compliance with the order of the court but unfortunately, she abandoned her case. Under the circumstances, the remedy was not to dismiss suit but rather to order that the necessary party be joined.

I have gone through the entire submission of the learned counsels and respective proceedings of the trial court at lengthy. The intriguing issue emerged here is that;

whether it was right for the trial court to dismiss the suit based on non-issue which was not framed by the court and without being addressed by the parties.

Before deliberating on the issues raised, let me first reproduce the court order in Civil Appeal No. 184 of 2000 by Kimaro J. as he then was,

which is one of the contentious matter in this appeal. The said order dated 30/04/2002 reads as follows;

*"We have not been able to secure the original file under such circumstances it will not be easy for this court to determine the appeal fairly because important information is missing, this appeal was filed since December, 2000...under such circumstances, I will quash and set aside the entire proceedings and judgment which was given in Civil Case No. 35 of 1996 and **order trial denovo all interested parties to be involved in the case**".*

In the end, the court quashed and set aside the proceedings in Civil case No. 35/1996 and ordered trial *denovo* before another magistrate with competent jurisdiction and **interested parties to be involved**. It was on the basis of non-compliance of this court order became the dead end of the suit in Civil Case No. 33 of 1999 before that trial court. It was held by the trial Magistrate that there was non-joinder of interested parties.

Mr. Thomas Brash, the learned counsel contended that this was not one of the issues framed by the trial court as it can be seen at page 20 of the typed judgment. He added that, if the trial magistrate saw the importance of dealing with that non-issue, he ought to call the parties to be addressed on the issue, failure of which renders his decision a nullity.

On the other hand, Mr. Juma Mtatiro learned counsel insisted that, the trial Magistrate was right in his decision and he had no any other option rather than dismissing the suit for non-joinder of the interested parties.

I tend to agree with the counsel Mr. Thomas Brash that non-joinder of the interested parties was not among the issues raised or framed by the court as it appears at page 20 of the typed judgment. The issues that were framed are;

- i. Who is a lawful owner of the property in dispute.*
- ii. Whether the defendant unlawfully demolished the property in dispute.*
- iii. Whether there was a tress pass into the suit promises.*
- iv. What relief are parties entitled.*

I took time extensively to go through various authorities submitted in respect of the matter and found out that the argument of Mr. Thomas Brash, is tenable in law. The court of Appeal of Tanzania in **Alisum Properties Limited Vs Salum Selenda Msangi**, Civil Appeal No. 39 of 2018 had this to say;

"We are increasingly of the view that, what was done by the learned High Court Judge to

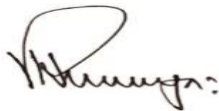
introduce the said now two issues in the course of composing the judgment was contrary to the law and principles of natural justice on the right to be heard. Basically, cases must be decided on the issues or grounds on record and if it is designed by the court to raise other new issues either founded 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 an opportunity to be heard by the court... This court has always emphasized that the right to be heard is a fundamental principle of natural justice that should be observed by all courts in the administration of justice'.

In the present appeal, what the trial magistrate did was against the fundamental principle of natural justice. Parties ought to be given the right to be heard on the very new issue arose in the course of composing the judgment, which was non-joinder of all interested parties.

For the foregoing, I hereby quash and set aside the District Court decision from which the appeal arose as it has legs on which to stand. This court cannot step into the shoes of the trial court and determine other grounds of appeal that were not discussed and determined by it.

In the circumstances, I remit the case file to the district court for it to hear the parties on the issue regarding non-compliance of court order for non-joinder of all interested parties and depending on the outcome of the said issue, determine the case according to law and compose fresh judgment. I order no costs as no party was at fault on the respective matter.

Order accordingly.



H.R. MWANGA

JUDGE

17/2/2023

ORDER: Judgment delivered in Chambers this 17th day of February, 2023 in the presence of both learned counsels for the applicant and respondents.



H.R. MWANGA

JUDGE

17/2/2023