IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 108 OF 2022

GONDO ENTERPRISES LIMITED ..... APPELLANT

VERSUS

ASHA SAID AWADHI ..... 1ST RESPONDENT

CHAI AUCTION MART ..... 2ND RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 277 of 2017)

JUDGMENT

10th March and 12th April, 2023

KISANYA, J.:

This is an appeal against the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu (the trial court). The appellant, Gondo Enterprises Limited who was the plaintiff in the trial court, is challenging the judgment dated 25th November, 2020 in Civil Case No. 277 of 2017, where the suit was not entertained for want of jurisdiction. Both respondents were the defendants before the trial court.

In the suit, the appellant claimed to be the owner of a business premises located at Buguruni Bus Stand, Dar es Salaam, which she leased from the 1st respondent, Asha Said Awadhi. The appellant sued the

respondents on allegation of breaking into his business premises and forcefully taking the hardware materials and cash money. Thus, the appellant prayed, among others, reliefs of payment of TZS 51,780,000 being value of the hardware materials, TZS 45,632,000/= being cash money stolen from his business premises, punitive damages to the tune of TZS 50,000,000/=, general damages of TZS 50,000,000/= and an order that the 1st and 2nd respondents' acts of entering into his business premises without a lawful order was illegal.

The 1st respondent disputed the appellant's claim. She contended, *inter alia*, that the appellant was evicted from the business premises after defaulting to pay rent for more than one year and a half. In addition to the written statement of defence, the appellant filed a notice of preliminary objection on the points of law to the effect that:

1. *The trial court was not seized with jurisdiction to entertain the suit.*
2. *There was no cause of action against the 1st respondent (the then 1st defendant).*

In its ruling dated 1st March, 2019, the trial court held the view that, the preliminary objection lacked merit. It is, however worth noting here that, in the course of determining the first limb of objection, the trial

court held that an evidence was required to prove existence of tenancy agreement between the appellant and another person not impleaded in the plaint. The issues framed during the final pre-trial conference were:

1. *Whether the 1st and 2nd defendants invaded the leased and business premises where the plaintiff conducts his business.*
2. *Whether confiscated properties of the plaintiff's items by the 1st and 2nd Defendants from the leased premises were justified.*
3. *Whether the items and cash money claimed by the Plaintiff in the sum of TZS 51,780,000/= and 45,632,000/= respectively, were at the time of eviction and were confiscated.*
4. *Whether the 1st Defendant leased the business premises to the Plaintiff.*
5. *What reliefs are parties entitled to.*

After a full trial, the learned trial magistrate found the fourth issue to have been answered in the affirmative. It went on to hold that it was not vested with powers to entertain the dispute and that the remaining issues would be resolved after the issue of tenancy is solved.

Dissatisfied with that decision, the appellant has filed the present appeal advancing the following grounds:

1. *The Trial Principal Resident Magistrate was functus officio to decide that the Trial Court cannot entertain the suit because it relates to a matter between landlord and tenant on account of the facts that same issues was long decided on 01.03. 2019.*
2. *The Principal Resident Magistrate erred both, in law and fact in failing to hold that the cause of action on the matter was parley a tortious liability on wrongfully and illegal impounding properties, as overwhelming established in the evidence tendered, both oral and documentary.*

This appeal was initially heard by way of written submissions filed by Ms Regina Kiumba, learned advocate for the appellant and Mr. Hilal Hamza, also learned advocate for the respondents. In the course of determining the appeal, I wanted to satisfy myself on whether the parties were accorded the right to be heard on the issue of jurisdiction which was the basis of the decision of the trial court. Therefore, parties were recalled and asked to address the Court on the foresaid issue.

On the first ground, Ms. Kiumba argued that the trial court was *functus officio* to decide that it cannot entertain the suit. She restated the settled principle of law that a court becomes *functus officio* upon making a final decision and that it cannot rehear on the same matter. To expound

her argument, the learned counsel cited the case of **Maria Chrysotom Lwekamwa vs Placid Richard Lwekamwa & Another**, Civil Application No. 549/17 of 2019 (unreported). Making reference to page 3 of the typed judgment, the court was *functus officio* to decide that it had no jurisdiction to hear the suit based on allegation of land while that issue had been determined in its decision dated 31st March, 2019.

As regards the second ground, Ms. Kiumba faulted the trial court for failing to hold that the cause of action on the matter before it was purely a tortious liability on wrongful entry and illegal impounding properties. She submitted that PW1 and Exhibit P1 shows that the respondents forcefully entered at the appellant's shop and impounded the properties inclusive of money totaling to TZS 97,412,000/=. It was her further contention that the evidence of DW1, DW2, and DW3 show that, acting under the instruction of the 1st respondent, the 2nd respondent entered the appellant's shop and evicted him, forcefully vandalizing his properties. She added that the 2nd respondent did not show up in the trial court. Ms. Kiumba was of the firm view that the 2nd respondent is an unregistered entity and that she who was picked by the 1st respondent to accomplish her desire of illegally carrying out the forcefully eviction and illegally confiscating the appellant's properties.

With regard to the issue raise by the Court, Ms. Kiumba submitted the issue of jurisdiction was raised by the trial court in the cause of composing the judgment. She also contended that parties were not given an opportunity to address the trial court on that issue. That being the case, she submitted that parties were denied the right to be heard and that the appellant was adversely affected on the decision arising from that issue. The learned counsel implored me to direct the trial court to ensure that parties are heard on the issue of jurisdiction.

On the adversary side, Mr. Hamza opposed the appeal. As for the first ground that the trial court was *functus officio*, the learned counsel submitted that the trial court did not make a final and conclusive finding on the preliminary objection on jurisdiction. To bolster his argument, he referred the Court to page 20 of the proceedings, where the trial court held that evidence was required to determine whether or not there was a lease agreement. On that account, he was of the view that the case of **Marial Chrystom Lwekama** (supra) is distinguishable as the matter there was heard and determined on merit.

Mr. Hamza went on to submit that one of the issues framed basing on the written statement of defence filed by the 1st respondent was

whether the defendant leased the business premises to the plaintiff. That being the case, he contended that the trial court evaluated the evidence that was before it in determining the framed issue and that it did not rehear the preliminary objection. Citing the case of **Abubakar I.H. Kilongo and Another vs R,** Criminal Appeal No. 230 of 2021, the learned counsel argued that the trial court was duty bound to determine the dispute by evaluating the evidence tendered during the trial.

Reacting to the second ground, Mr. Hamza submitted that the settled legal position is that the burden of proof lies on the party who alleges as provided under section 110 of the Evidence Act, Cap. 6, R.E. 2022. He further submitted that PW1 gave hearsay evidence which did not support his claim as hearsay evidence has no evidential value. To cement his argument, he cited the cases of **Ntigahera Elias vs R**, Criminal Appeal No. 150 of 2017, CAT at Tabora (unreported). Citing further the case of **Hemed Sid vs Mohamed Mbilu** [1984] TLR 113, he argued that the court was required to draw adverse inference against the appellant for failure to call his employee who allegedly saw the incident. It was his further argument that the appellant being a tenant who refused to pay rent cannot benefit from his own wrong as held in the case of

Lawrance Magesa t/a Jopen Pharmacy vs Fatuma Omary and Another, Civil Appeal No. 333 of 2019, CAT at DSM (unreported).

Responding to the issue raised by the Court, Mr. Hamza commenced by submitting that the issue of jurisdiction was raised as one of the points of preliminary objection. He also submitted that the trial court held the view that the said issue would be determined after evaluating the evidence. The learned counsel further submitted that the trial court started by addressing the fourth issue, whether the 1st appellant leased the suit premise to the plaintiff. He was of the view that upon resolving that issue in the affirmative, the trial court was enjoined to resolve the issue whether it had jurisdiction to entertain the matter.

Therefore, he invited the Court to dismiss the appeal with costs for want of merit.

In a rejoinder, Ms. Kiumba submitted that the trial court concluded that the preliminary objection crumbles thereby suggesting it decided the said issue. She reiterated her submission that the court became *fanctus officio* when it makes a final decision.

She further submitted that the contention that the appellant adduced hearsay evidence is not supported by the record. The learned counsel pointed out how the appellant gave direct evidence. Referring the Court to the case of **Abubakar I.H. Kilongo** (supra) cited by Mr. Hamza, she argued that the trial court did not evaluate the evidence. According to her, the trial court ignored the evidence of DW1 to DW5 as well as Exhibits D3, D4, P2 and P3. It was her further argument that there was no breach of the tenancy agreement for the case of **Lawrance Magesa** (supra) to apply. As for the issue raised by the Court, she submitted that nothing to suggest that parties adduced evidence on the issue of jurisdiction. She also contended that the fourth issue was not related to jurisdiction. Therefore, the learned counsel reiterated her submission in chief that parties were not heard on the issue of jurisdiction.

After a careful consideration of the submission of the learned counsel and the record, I am of the view that this appeal can be determined by discussing the first ground of appeal and the issue raised by the Court.

It is common ground that the trial court held the view that it had no jurisdiction to entertain the matter. The issue that arises is whether the trial court was *functus officio* to decide on the issue of jurisdiction. The law is settled that, an adjudicating authority becomes *functus officio* when it disposes of a case by passing or making an order finally disposing the case. Thus, the same court cannot reopen a final decision which has been drawn up and entered. See also the case of **Malik Hassan Suleiman vs. S.M.Z.** [2005] T.L.R. 236 where it was held that:

> *"A court becomes functus officio when it disposes of a case by a verdict of guilt or by passing a sentence or making orders finally disposing of the case, the learned judge became functus officio when he passed the judgment on 19th February 1998 and he was not clothed with the necessary jurisdiction to review his own decision subsequently"*

Coming to the instant appeal, it is not disputed that one of the points of preliminary objection raised during the trial was whether the trial court had jurisdiction to entertain the matter. However, as rightly submitted by Mr. Hamza, the trial court did not make a final decision on whether it was clothed with jurisdiction to entertain the suit. In its ruling dated 1st March, 2019, the trial court held, inter alia, as follows:

> *"In deciding as to whether this court has jurisdiction to entertain this matter the only issue for consideration and determination is whether this matter involves land matter or to be precise, whether the dispute at hand arose out of lease agreement."*

Upon considering the pleading before it, the trial court went on to hold that:

> *"Whether or not the Lease agreement in question exists, that is matter of evidence which cannot be determined at this stage of proceedings…Since the point raised by the learned defence counsel is solely based on the lease agreement between the plaintiff and another person not impleaded in the plaint obviously evidence is required to prove the allegation by the 1st defendant. The first limb of objection crumbles"*

In view of the above decision, I am of the view that the trial court did not arrive at a conclusion that it had no jurisdiction to entertain the matter. As the trial court held that evidence was required for it determine whether the dispute arose from the lease, I hold that it was not *functus officio* to determine that issue after analyzing the evidence adduced by the parties. Thus, the first ground of appeal lacks merits.

Second for consideration is the issue raised by the Court, *suo motto*, whether parties were accorded the right to be heard on the issue of jurisdiction. From the record of the trial court, it is clear that the issue of jurisdiction was not framed during trial. As rightly observed by Mr. Hamza, the Court addressed that in the course of composing the judgment. That was after determining, in the affirmative, the fourth issue namely, whether the 1st respondent leased the business premises to the appellant. I agree with Ms. Kiumba that the issue whether the trial court had jurisdiction to entertain the matter is different from the issue whether the 1st respondent leased the business premises to the appellant which was framed by the trial court.

Given the fact that the trial court had resolved that evidence was required to prove the issue of jurisdiction, it ought to have heard them on whether the evidence on record proved that the court was clothed with powers to entertain the matter. This was not done. I agree with Mr. Kiumba that, parties were not accorded the right to be heard on the issue of jurisdiction which formed the basis of the trial court's decision.

The law is settled that, cases must be decided on the issues on record. If the trial court finds it apposite to raise any other issue arising

from the pleadings or evidence adduced before it, the said issue should be recorded. Further, parties should be accorded a right to be heard on the added or amended issue. [See the case of **Mussa Chande Jape Vs Moza Mohammed Salim,** Civil Appeal No. 141 of 2018, CAT at Zanzibar (unreported)].

It should be noted that, the right to be heard is a constitutional right enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). Therefore, the courts of law are duty bound to ensure that parties are accorded an opportunity to be heard on the issue which is decided against them. It is trite law that, violation of the rule of natural justice on the right to be heard, results into any decision arrived at to be a nullity. See the cases of **Mbeya - Rukwa Autopafts Ltd v. Jestina George Mwakyoma** [2003] T.L.R 25 and **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza lboy**, Civil Application No. 33 of 2002 (unreported). In the latter case, the Court of Appeal observed that:

> *"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."*

From the above position, it was imperative for the trial court to give the appellant a right to be heard on the issue of jurisdiction basing on the evidence adduced before it. Since the appellants were not heard on the matter, I find that the judgment of the trial court to be a nullity. Since this issue suffices to dispose of the appeal, I find it not necessary to proceed to determine the second ground of appeal.

In view of the reasons stated afore, I hereby nullify and quash the judgment and set aside the decree of the trial court. In lieu thereof, I remit the case file to the trial court and direct it to compose a fresh judgment on the framed issues. In alternative, the trial court may wish to compose its judgment on additional or amended issue, including the issue of jurisdiction, but after according the parties with an opportunity to be heard. As the parties are not to be blamed for the anomaly, I make no order as to costs.

DATED at DAR ES SALAAM this 12th day of April, 2023.

S.E. KISANYA
JUDGE