HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

LAND APPEAL NO. 32 OF 2022

(Arising from Ex parte Judgment in Land Application No. 216 of 2019 of the District Land and Housing Tribunal at Kigoma Before: Hon. M. Mwinyi, Chairperson)

EMMANUEL KAYANDA HOSEA

(Administrator of the Estate of the late HOSEA KAYANDA NTAMALENGELO) ..... APPELLANT

VERSUS

DAGRAS HOSEA KAYANDA.....1ST RESPONDENT

SPECIOZA DOMINIC.....2ND RESPONDENT

BABU JUSTIN MOLLEL.....3RD RESPONDENT

IDRISA SELEMANI YUSUF.....4TH RESPONDENT

Date of last Order: 25/04/2023

Date of Judgement: 30/06/2023

JUDGEMENT

MAGOIGA, J.

The Appellant, **EMMANUEL KAYANDA HOSEA** aggrieved by the ex-parte judgement of the District Land and Housing Tribunal for Kibondo dated 03/07/2020 in Land Application No.216 of 2019 now appeals against the

said whole judgment and Decree of the trial Tribunal to this Court armed with 7 grounds of appeal, couched in the following language, namely:-

1. That, the learned trial Chairman grossly erred in law and facts and misdirected himself that the Tribunal had no pecuniary jurisdiction for the case which was transferred from the Ward Tribunal for the purpose of engaging the service of Advocate and held in favour of the Respondents;
2. That, the learned trial Chairman grossly erred in law and facts by deliberately totally failed to properly recording evaluate and analyse evidence of the applicant and is witness and held decision in favour of the respondents;
3. That, the learned trial Chairman grossly erred in law and facts by totally failed to correctly interpret the law and authorities and held in favour of the respondents;
4. That, the learned trial Chairman grossly erred in law and facts by framing three issues, making misdirection on answering one issue and ignoring to make any findings on the two remained issues.
5. That, the learned trial Chairman grossly erred in law and fact when composing his ex parte judgment, he framed new issue suo motto and decided it in favour of the Respondents without availed

opportunity to the applicant to address it and decided in favour of the respondents;

6. That, the learned trial Chairman grossly erred in law and facts by totally failed to hold that the 1st and 2nd Respondents had no locus standi to sale probate land without the consent of the Administrator of the Estate or the family members;
7. That, the learned trial Chairman grossly erred in law and facts by not considering at all the written submission by the appellant and held in favour of the respondents.

In the end, the appellant prayed that, this appeal be allowed in the orders as in the memorandum of appeal.

It is imperative now to state the brief backdrop to this appeal for better understanding this landed dispute. In the Ward Tribunal of Kibondo, the appellant (as administrator of the estate of the late Hosea Kayanda Ntamalengelo) instituted Land Case No. 79 of 2019 against the abovenamed respondents for recovery of piece land sold to the 3rd and 4th respondents by 1st and 2nd respondents. Vide Misc. Land Application No. 216 of 2019, on 08/10/2019 the applicant successfully moved the District Land and Housing Tribunal for an order of transfer of those proceedings to itself to accommodate the applicant's desire to have legal representation. The said Land Application was registered as

APPLICATION NO. 93 OF 2019 but was later on 29/04/2020 amended and registered as Land Application No. 216 of 2019.

Briefly, the Appellant's claims against the respondents in the said Land Application was for declaration that the sale of the land to the 3rd and 4th respondents by the 1st and 2nd respondents be null and void, the 3rd respondent to demolish his structure, costs of the application and any other reliefs the Tribunal deem just and fit in the circumstances of this landed dispute to grant.

On the other hand, as the record shows, the respondents didn't appear to defend their case nor filed any response to the application despite all efforts to serve them. By the order of the Tribunal dated 28/4/2020, the application was ordered to proceed ex-parte.

Having heard the appellant's case, the trial Chairman delivered its judgement on 03/7/2020 dismissing the application for want of jurisdiction and proper procedure to join 3rd and 4th respondents as co respondents in the dispute.

It was against the above background; the appellant preferred this appeal to this Court faulting the trial Tribunal findings. In the end, the appellant prayed that, this appeal be allowed with the former prayers affirmed.

At the hearing this appeal before this Court, the appellant was represented by Mr. John Nyamronge, learned advocate; while the the respondents were present and unrepresented. Both parties were ready for hearing.

Mr. Nyamronge started by submitting on the first ground by faulting the trial chairman for failure to observe that the transfer of the case was made by the order of the Tribunal based on engagement of the advocate and not on the amount claimed.

On the 2nd ground the counsel faulted the chairman for using the reasons which were not clear to arrive at his conclusion. To support of this ground, Mr. Nyamronge cited the case of **Tanzania Breweries Limited vs Antony Mingi,** 2016 CAT Mwanza in which it was held that any decision must contain reasons or else the decision becomes arbitrary. Guided by that stance, Mr. Nyamronge urged this court to find merits in this ground as the proceedings shows that the chairman was biased and acted without reason.

On the third ground, Mr. Nyamroge faulted the chairman for failure to interpret the law and authorities, particularly Order I Rule 3 of the CPC for contradicting that the nonjoinder of the defendant was fatal. In support of this he cited the case of **Claud Roman Saibony and 4**

Others vs Baraka and 4 others [2019] TLR CAT where it was held that failure to join a party do not by itself be enough to fault the decision unless those not joined were affected.

Guided by the above stance, it was the appellant's counsel submissions that in this appeal the trial chairman wrongly invoked the issue of jurisdiction and made finding not supported by record. To buttress his argument, the counsel cited the case of **Milcom vs James R. Ruthel and 2 others [2017] TLS 424** where it was held that failure to join all respondents do not take away fruits of justice. What is to be looked at is the substance of the case. The counsel pointed out that, the point was raised suo motto without hearing parties but again went on declaring rights of the parties. On that note he prayed this point be allowed.

On the 4th ground, Mr. Nyamronge faulted the chairman for framing one issue on jurisdiction without determining other issues. He referred to page 5 the judgment. To support his stance the counsel cited the case of **Sheik Hamed Said vs Registered Trustees of Manyama Masjid,** [2005] TLR 61 where he framed four issues but confined himself to one issue.

On 5th ground, Mr. Nyamronge went on faulting the chairman for raising an issue suo motto and compose the judgment without affording the appellant the right to be heard. According to the counsel for the appellant, the issue of jurisdiction and joining of parties was suo motto framed and decided contrary to the Rules of natural justice thus contravened article 13 of the constitution.

He referred this court to the case of **Jamary Hamed vs CRDB Bank Ltd [2019] TLS CR 99 CAT** underscoring the point that new issue when raised parties to the case have to be heard and failure of which renders the decision nullity.

Mr. Nyamronge arguing ground number 6 submitted that, the chairman was wrong to hold that the 1st and 2nd Respondents had no locus standi to buy the probate land without consent of the administrator and other family members. He strongly resisted that it was erroneous and wrong. He cited the case of **Solomon Sinwa Netinku vs Neterian Simon Mollel and 2 others,** [2018] **TLR 561 HC.** The 1st and 2nd Respondents had no good title to pass to the buyers hence the sale was void abi initio. On that note the counsel reasoned that the sellers had no saleable interest because the disputed plot was one of the probate

properties subject to distribution. He, thus, urged this court to find that the sale was void for want of interest to pass to the buyers.

Finally on the 7th ground, Mr. Nyamronge faulted the chairman for failure to consider written submissions without assigning any reason. In support of this ground, Mr. Nyamronge cited the case of **Tanzania Breweries Limited vs Antony Nyingi,** [2016] TLS CR 16 CAT that both arguments have to be considered and give reason for rejecting one side. According to Mr. Nyamronge, this was not done in this case.

In sum, Mr. Nyamronge prayed that this appeal be allowed by granting orders prayed in the grounds of appeal with costs.

The 1st respondent, **Dagras Hosea Kayanda** in reply to the appeal generally argued that the disputed plot was not a property of the deceased but it was his own property which he sold. On other issues raised, the 1st respondent argued that they had nothing to do with him. He therefore prayed this appeal be dismissed with costs.

Addressing this court in reply, the 2nd respondent, **Specioza Dominick** told the court that the disputed plot is not forming part and parcel of the Probate properties. She submitted that the plot was given to Hosea in 1980 by his father so not forming part of the estate. She argued further that she was married in 1988 and the land in question was given

to them undisturbed since then until when her father-in-law died in 2014 is when the appellant wants to disturb the peace. It was her submission that, every heir had already been given his/her shares. She faulted the administrator of estate for selling his part and causing chaos in the family. Finally, she prayed the appeal to be dismissed with costs.

The 3rd respondent, **Babu Justin Mollel** in response submitted that the appellant had no right to claim a land not belonging to him. He strongly argued that they bought the land from lawful owners. He then asked this court to dismiss the appeal with costs.

On his part, the 4th respondent, **Idrisa Seleman Yusuf,** had nothing new to submit but told the court that he concurs with what the 3rd respondent said fully and others.

In rejoinder, Mr. Nyamronge reiterated his earlier on submission and replied that justice should be seen to be done.

This marked the end of hearing of this appeal. The noble task now of this court is to determine the merits or otherwise of this appeal after hearing the rivalling parties' submissions. However, before going into that hill task, I have noted through reading the record of the trial Tribunal proceedings and rivalling submissions of the learned counsel for the appellant and respondents that there are some facts not in

dispute between parties, which will assist this court to do justice to this appeal. These are: **one,** there is no dispute that the appellant and the 1st respondent are blood brother. **Two,** that the 1st respondent and 2nd respondent are husband and wife. **Three,** no dispute that the 1st and 2nd respondent sold the dispute plots to the 3rd and 4th respondent for Tshs.2,800,000.00.

However, what is in serious dispute, in my considered view, in this appeal, is the justification of sale of land in dispute to the 3rd and 4th respondents by 1st and 2nd respondents, the jurisdiction issue and the suo motto framing of issues without hearing parties.

In determining this appeal, I find apposite to deal with legal grounds of jurisdiction issue as raised in the first ground of appeal and the suo motto raising an issue without affording parties rights to be heard. These two in my considered opinion suffices to determine this appeal. I have seriously considered the arguments and the record of appeal in this appeal and found out that, the issue of jurisdiction was through back door inserted in the issues alleged framed by the trial chairman, and in my considered opinion, without involving the advocate for the appellant. I will explain. **One,** the trial chairman did no sign the paper which is alleged to have drawn issues which were three but the 4th issue, is obvious, was added later because, at any rate, if the chairman felt to

have no jurisdiction was to determine the application, was first to invite parties to address him on the point. But as the record stands, this issue was suo motto raised and determined at the detriment of the appellant. This was wrong and it vitiate the whole proceedings and judgement. **Two,** much as the application to transfer the Ward Tribunal proceedings were preferred by formal application vide Misc. land Application No 216 of 2019 and a decision to that effect made, it was wrong for the trial chairman to raise the same and decide it without hearing parties. This further signifies that the issue of jurisdiction, as rightly observed above, was suo motto raised because had the trial chairman invited parties to address him on the same, the learned advocate Hope Kawawa could have assisted the Tribunal not to plunge into this legal morass. This was not done. **Three,** even in the final submissions filed by the learned advocate for the appellant with leave of the Tribunal, an issue of jurisdiction, was not among the matters that were canvassed showing and proving my observation that it was the trial chairman own design. **Four,** I have as well observed that, at all strength of imagination, the amount claimed in the application was Tshs.5,600,000.00 which was well within the jurisdiction of the trial Tribunal and not even the Ward Tribunal. The trial Tribunal chairman, thus, misdirected himself into raising an issue that was nonstarter between parties and consequently

occasioned failure of justice in this appeal. The course taken by trial Chairman was unwarranted and uncalled for him.

The ball did not end there, but on the 5th ground, which main complaint was that the trial Chairman suo motto framed an issue which was decided without affording parties right to be heard. The respondents never replied on this point. Without much ado, I agree with Mr. Nyamronge that the issue of joining the 3rd and 4th respondents was suo motto raised in the judgement and parties were denied right to be heard. This is very clear at page 2 of the typed judgement whereby the trial Chairman stated as follows:

"In suo motto this honourable court raised another issue to wit:

iv. whether it is proper to join 3rd and 4th respondents as co-respondents in the matter at hand"

No doubt the above quoted extract was done without affording the appellant rights to be heard. In my strong considered opinion, this was fatally wrong and vitiate the whole judgement. The right to be heard in our jurisdiction is fundamental that this court and the Court of Appeal of Tanzania have repeatedly held that **'right to be heard is not only cardinal principal of natural justice but also a fundamental right constitutionally guaranteed under article 13(6) (a) of the**

Constitution of the United Republic of Tanzania as amended. For that reason, any decision arrived in contravention of it will not be left to stand even if the same decision would be reached had the party been heard.' See the cases of **Shule ya Sekondari Mwilamvya Vs. Kaemba Katumbu, Civil Appeal No.323 of 2021, CAT (Kigoma) (unreported), Abbas Sherally and another Vs. Abdul Sultan Haji Mohamed Fazalboy, Civil Appeal No.33 of 2002, CAT (Unreported).**

Now with the two legal grounds found merited in this appeal, I find no need to consider other grounds raised for will be for academic and futile exercise as of now.

Therefore, on the totality of the above reasons, I find merits in the first and fifth grounds of appeal. I allow them and consequently, I find the proceedings and judgement of the trial Tribunal a nullity for violation of right to be heard. Thus, I consequently exercise by powers under section 43(1) (a) and (b) of the Land Disputes Courts Act, [Cap 216 R.E. 2019] by revising and set aside the proceedings, judgement and decree of the District Land and Housing Tribunal of Kibondo and order that for the interest of justice, this case file be reverted back to DLHT of Kibondo to be heard before another competent chairman to try this suit.

In the circumstances, and bearing in mind it is the trial Tribunal which mishandled the proceedings by suo motto invoking matters not applicable, I order each party to bear his/ her own costs in this appeal.

It is so ordered.

Dated at Kigoma this 30th day of June, 2023.

S. M. MAGOIGA
JUDGE
30/06/2023