IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 233 OF 2023

(Arising from the Judgement and decree of the District Land and Housing Tribunal for Ilala at Ardhi House, Land Application No. 189/2021 between NyumbaMussa VS. AbdulwahidAbdallah Mohamed and another delivered by Hon. Kirumbi, Chairperson on 16th May 2023)

ABDULWAHID ABDALLAH MOHAMED .....1ST APPELLANT

SAMIR GULAMABBAS DATOO.....2ND APPELLANT

VERSUS

NYUMBA MUSSA NYUMBA.....RESPONDENT

JUDGEMENT

Date of last order: 2/2/2024

Date of Judgement:28/02/2024

MWAIPOPO, J:

This is an Appeal filed by Abbduwahid Abdallah Mohamed and another against the Judgment and Decree of the District Land and Housing Tribunal (DLHT) for Ilala at Ardhi House, Ilala in Land Application No. 189/2021 between Nyumba Mussa Nyumba against Abdulwahid Abdalah Mohamed and another, delivered by Hon. Kirumbi Chairperson on 16th of May 2023. In the said Application the Respondent filed an Application against the Appellants claiming for the following reliefs;

a) A declaratory decree that plot No. 54 Block "C" Kariakoo Area within Ilala Municipality is

theApplicant's owned property and it was mortgaged to the Respondents.

b) A declaratory decree that the Applicant pay the Respondent ***TZS. 77,708,000/=*** as the mortgage monies.

c) A declaratory decree that the Respondent names in the Certificate of Occupancy Tittle No. 48776 for plot No. 54 Block "K" Kariakoo area be removed by the Registrar of Title and the Applicant be declared the Solemnly(sic) legal owner of the suit property.

d) Payment of general damages to the Applicant as may be assessed by they Misc Tribunal for rental business.

e) The Respondents be condemned to pay the Applicant's costs.

f) Any other reliefs to Tribunal may deem fit and just to grant.

Upon hearing the parties the Tribunal proceeded to issue the decision in favour of the Applicant/Respondent as follows;

1. *Mkataba wa ubia baina ya mdai na wadiwa unatamkwa kwamba haupo tena kwani wadaiwa wameuvunja.*
2. *Mdai anatamkwa kwamba ni mmiliki pekee wa nyumba bishaniwa kiwanja Na. 54, Kitalu "K" Kariakoo.*

3. *Majina ya wadiawa katika hati ya umiliki Na. 48776 yanaondolewa na madai anabaki kuwa mmiliki pekee wa kiwanja bishaniwa.*
4. *Mdai awalipe wadaiwa kiasi cha Tshs. Milioni moja na kumi (110,000,000/=). Kama jumla ya kiasi cha pesa wadaiwa walichotumia kuikomboa nyumba bishaniwa kutoka Benki ya EXIM na pia kumpatia mdai.*
5. *Kila upande ubebe gharama zake.*

Aggrieved by the said decision, the Appellants has approached this Court with his Memorandum of appeal containing eleven grounds of Appeal as follows;

i. *That the said Hon Chairperson erred in law and fact by holding that the Respondents had breached 28th August 20009 Joint Venture Building Agreement without pointing which clause had been breached.*
ii. *That the said Hon. Chairperson erred in law and in fact by delivering judgment in favour of the applicant that is in contradictory with the testimonies of the same applicant.*
iii. *That the said Hon. Chairperson erred in law and in fact by holding that the Respondent's written statement of defense had breached order VIII, R3 & 4 of the Civil Procedure Code, R.E. 2019.*
iv. *That the said Hon. Chairperson erred in law in law and fact by holding that he does not agree*

with defense testimonies that the applicant had failed to handover to the Respondents vacant possessions of the disputed property and this issue had been brought while the case is on progress.

v. *That the said Hon. Chairperson erred in law and fact by holding that both P1 and P5 there is no clause which require the applicant to hand over vacant possessions of the property to the Respondents.*

vi. *That the said Hon. Chairperson erred in law and fact by holding that why the Respondents did not construct the dispute property between 2009 and 2012 bearing the fact that the case was opened in 2012.*

vii. *That the said Hon. Chairperson erred in law and fact by delivering a ruling on Preliminary Objection (PO) Preferred by the applicant that it contradicts itself thus denying the respondents rights in admitting their exhibits.*

viii. *That the said Hon. Chairperson erred in law and in fact by holding that the respondents did not adduce evidence in law that prevented the respondents from constructing modern premises as was agreed.*

ix. *That the said Hon. Chairperson erred in law and in fact by not ordering specific performance in*

terms of the applicant's and Respondent's testimonies available options to solve the issue.

x. *That the said Hon. Chairpersons erred in law and facts by awarding the applicant reliefs which were never prayed in the applicant's application to his oral testimonies.*

xi. *That the trial erred in law and in facts by ordering to the applicants refund to the respondents the sum of Tshs. 110,000,000.00*

Pursuant to the timetable filed by the Court both parties argued the Appeal by way of Written submissions, in accordence with the timetable directed by the Court. The written submissions by the Appellants were filed by the learned Advocate Silas Adam Nziku and those of the Appellant were filed by learned Advocate Zarina Salama Nassor.

In determining the appeal, the Court was guided by the records, i.e Judgment, Decree and Proceedings of the Tribunal as well as written submissions presented by the parties as supported by laws and various authorities.In the course of my analysis, I will begin with ground No. (iii) which states that;

That the said Hon. Chairman erred in law and in fact by holding that the Respondent's Written Statement of Defence had breached Order VIII, Ruled 3 and 4 of the Civil Procedure Code, R.E 2019

Arguing in support of their Appeal, the Appellants have contended in their written submissions that Tribunal erred in law and in fact by holding that the Respondent's Written Statement of Defence had

breached Order VIII Rule 3 and 4 of the CPC Cap 33 RE 2019. In support of their ground of appeal they have argued that Regulation 3 (2) (a) to (f) of the Land Dispute Courts (District Land and Housing Tribunal) Regulations of 2003, have prescribed how Applications should be instituted at the Tribunal in terms of the 2nd schedule of the said Regulations. That under of Regulation 7(4) of the Land disputes Courts Regulations of 2003, it is specifically stated that the Respondent in filing a Written Statement of Defence (WSD) shall not be required to follow any format and the Tribunal shall be guided by the contents and not format. In that regard, the Appellants submitted that, were the law had provided how Written Statement of Defence should be, the provisions of order VIII Rule 3 and 4 of the Civil Procedure Code Cap 33 RE 2019 do not apply for whatsoever reason.

Likewise, Regulation 12 (1) and (2) of the Land Dispute Courts Regulation 2003 allows a Respondent who had not filed a Written Statement of Defence, at the commencement of hearing, after reading of the Application by the Chairperson, be required to admit or deny the claim. Therefore all the case law authorities cited by the trial Tribunal to boost or support its decision are irrelevant to the facts of this ground of appeal. The Appellants argued further that, the findings of the Trial Tribunal contradict itself with its own ruling delivered on 12/4/2022 arising from the point of preliminary objection in Land Application No. 189/2021 contained in the un-typed and un-numbered un- numbered proceedings which held that: the Tribunal while dispersing justice is not obliged to follow the Rules of Civil Procedure Code Cap 33 RE 2019 and the Evidence Act.

In rebuttal, the Respondents began by citing the well settled principle contained in Order VIII Rule 3 and 4 of the Civil Procedure Code Cap 33 RE 2019 which states that the Written Statement of Defence should not contain evasive denials. He argued that this is an obvious overlook on the part of the Court as the requirements of law should not be ignored once breached, hence the Trial Chairperson was right to hold that the Defendants breached Order VIII Rule 3 and 4. Arguing further on the said principle, the Respondent cited the case of **Beda Mgaya T/A BefcaTechnical and Supplies Vs. The Hon. Attorney General and another Civil case No. 112/2019, Misc Court of Tanzania at DSM District Registry o**n page 6 where it was held that;

It need not be emphasized that as stated above, for purpose of Order VIII, Rule 4 it is incumbent for the Defendant to clearly deny every material allegation made against him.

In that regard, he submitted that, as adduced by the Appellants counsel in his submission, that at the Tribunal they are guided by the contents and not format of the Written Statement of Defence this is well established in Regulation 7 (4) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, GN 124 which provides that:-

(4) The Respondent shall not in preparing his Written Statement of Defence be required to follow any format and the Tribunal shall be guided by the contents and not format.

Thus the Respondent humbly prayed for this ground to be dismissed based on the views that the Tribunal is well guided by the contents and not the format of the Written Statement of Defence. The Appellants Written Statement of Defence contains evasive denial in its contents but

it was taken into consideration as it was not expunged from for the pleadings, bearing in mind that in framing issues the trial Tribunal is guided by the pleadings which include the Written Statement of Defence. However, with their evasive Written Statement of Defence, the Appellants still got a chance of defending themselves. The trial Tribunal elaborated the same by way of reasoning only. Hence the Respondent found that this ground falls short of merit.

In rejoinder, the Appellants reiterated their submissions in Chief.

Having careful gone through the submissions of the parties in respect of this ground of appeal, my duty is now to analyze it in order to establish whether it has merit. In order to satisfy myself with the submissions of the parties, I have gone through the records of the Tribunal and noted that the Respondent in this Appeal Mr. Nyumba Mussa Nyumba filed an Application before Tribunal against the Respondent on 12/8/2021 claiming for the following reliefs;

g) A declaratory decree that plot No. 54 Block "C" Kariakoo Area within Ilala Municipality is the Applicant's owned property and it was mortgaged to the Respondents.
h) A declaratory decree that the Applicant pay the Respondent ***TZS. 77,708,000/=*** as the mortgage monies.
i) Adeclaratory decree that the Respondent names in the Certificate of Occupancy Tittle No. 48776 for plot No. 54 Block "K" Kariakoo area be removed by the Registrar of Title and the Applicant be declared the Solemnly(sic) legal owner of the suit property.
j) Payment of general damages to the Applicant as may be assessed by they Misc. Tribunal for rental business.

k) The Respondents be condemned to pay the Applicant's costs.

l) Any other reliefs to Tribunal may deem fit and just to grant.

On 26th October 2021, The Respondents who are now the Appellants filed their Written Statement of Defence denying the allegations contained in the Respondents Application. The Application was then set for hearing whereby the Tribunal framed issues and parties proceeded to adduce evidence before the Tribunal.

At the completion of the hearing the Chairperson began analyzing the evidence whereby in the course of analyzing the 1st issue, the Chairman began by stating that the Appellants/ Respondents then, had contravened the requirements of Order VIII Rule 3 and 4 of the CPC since their Written Statement of Defence had contained general and evasive denial statements without containing specific responses. The the Chairman cited the case of **Beda V. Mgaya t/a Befca Technical and Supplies**(Supra) and the case of **Fikirini IssaKocho Vs. Computer Logix and others Civil case No. 151/2020** which were all to the effect that, it is insufficient for the Defendant to simply say that " he puts the Plaintiff to proof of several allegations in the Plaint for purposes of Order VIII Rule 4, it is incumbent for the Defendant to deny every every material allegation made against him.

The Honourable Chairman went on to state as follows;

> *"Madhara ya kuleta majibu ya utetezi ya aina hiyo yapo katika kesi waliyo rejea hapo juu ya* ***BEDAI Mgaya t/a Bepla Technical and Supplies*** *ambapo Mheshimiwa Jaji Masabo alisema na nukuu;*

"as it falls short of the requirement of order VIII Rule 4 and entitles the Plaintiff for judgement on admission under Order XII Rule I Rule 4"

The Honourable Chairman went on to state that;

"Kwa tafsiri siyo rasmi, Mheshimiwa Jaji alisema kwa kuwa majibu yautetezi yamekiuka amriya VIII Kanuniya 4, mdai anastahili hukumu ya wadaiwa kwa kukubali madai kwa mazingira ya kesi hii na msimamo huu wa kisheria, mdai anastahili kupata hukumu ya wadaiwa kwa kukubali madai.

The learned Chairman continued stating in his own words that;

Kwa mazingira ya kesi hii na misimamo huu wa kisheria, Mdai anastahili kupata hukumu ya wadaiwa kukiri kosa chini ya amriya XII, Kanuni ya 4 ya Sheria ya Mwenendo wa Madai, sura ya 33 RE 2019"

However, despite declaring Judgement on admission against the Appellants/Respondents on page 11 paragraph 3 of the Judgment and without engaging parties the right to be held, the learned Chairman proceeded to analyze issues and evidence forming part of the case and deliver another Judgment within the same Judgment against the Appellants/Respondents.

It is my position that the Regulations of the Tribunal allow resorting to the CPC whenever there is a need to do so in the interest of justice especially in situations where there are no specific provisions within the Regulations governing the procedures in the Tribunal. Further, the

tribunal Regulations also emphasize on it being guided by the contents and not format. I share the views of the Respondents in this regard.

The provisions of Order VIII Rule 3 and 4 require the Defendant in his Written Statement of Defence to deny specifically every allegation contained in the Plaint and not responding by way of evasive denial.

In the cases cited by the learned Chairman in his Judgment, he has statedthat, the effect of the general denial is Judgment on admission as per Order XII Rule 4. The said Order XII reads as follows;

Any party may at any stage of a suit, were admissions of facts have been made either on the pleading or otherwise, apply to the Court for such Judgment or order as upon such admissions he may be entitled to, without waiting for the determination of other question between the parties and the court may upon such Application make such order or give such Judgement as the court may think just.

Coming back to the issue at hand especially its procedural aspect and without going to the merits of whether there has been evasive denial or not as observed above, the Hon. Chairman while analyzing the issue of evasive denial referred to the provisions of Order VIII and stated that the effect of filing a written statement of defence containing a general denial is admission as per Order XII Rule 4. However, as indicated above in my Judgement, the provisions of Order VIII of the CPC, require parties to lodge a notice of Judgment on Admission when they want the Court to give decision in their favour. In the situation at hand, this was not the case, as the issue was raised by the Court itself. The Tribunals Chairman raised the issue suomotu after parties had finished to adduce

evidence and at the stage when the chairman had began to determine the case and composing his Judgement. Indeed there was no notice previously filed by the Applicant to apply for Judgement on admission as per the provisions of Order VIII Rule 3,4, and Order XII Rule 1 and 4 of the CPC Cap 33 of the Laws RE 2019. Therefore, upon raising the said issue the Tribunal proceeded to analyze it unilaterally and give its positionon page 11 of the Judgementthat the Respondent deserved to be given Judgement on admission.

Since the Chairman raised the issue suomotu, it ought to have given the parties an opportunity to address it on the very issue of evasive denial and consequently judgment on admission before pronouncing its position. I find that this was wrong on the part of the chairman since it denied the parties the opportunity to be heard of the issue contrary to Article 13(6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended which requires parties to be afforded the right to be heard whenever matters concerning their rights are being determined in a court of law.

In the case of **Said Mohamed Said versus Muhusin Amiri and Another Civil Appeal no. 110/2020 DSM** , it was stated that;

It is therefore plain truth that parties were not heard on the issue of res-subjudice which the learned judge raised and unilaterally determined in his Judgment. Following that we are inclined to agree with the parties that they were denied the right to be heard which is a violation of the constitutional right enshrined in Article 13(6)(a) of our Constitution of the United Republic of Tanzania which states that;

(a)When the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a hearing and the right of appeal or other remedy against the decision of the court or other agency concerned"

The Court went to state 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 among the tributes of equality before the law. No decision must be made by any Court of justice, body or authority entrusted with the power to determine rights and duties so as adversely affect the interest of any person without first giving him a hearing according to principles of natural justice.

The next issue to deal with is what are the legal consequences of failure to afford a party ahearing before any decision affecting his rights is given?

The Court of Appeal in the case of **Said Mohamed Said** (supra) stated that;

Settled law is to the effect that any breach or violation of that principle renders the proceedings and orders made therein a nullity even if thesame decision would have been reached had the party be heard.

See also the case of **Depson Balyagativs Veronica J. Kibwana, Civil Appeal No 21/2021, CAT, DSM** where the Court of Appeal

affirmed the position that it is not proper and just for a court of law to make a finding of fact against a party without affording him an opportunity to plead to or adduce evidence to rebut it.

Further despite contravening the procedure and pronouncing his position on the judgment on admission in favour of the Applicant/Respondent, the Hon. Chairman proceeded to analyze the evidence tendered by the parties. Following its second analysis, the Tribunal once again delivered its Judgment in favour of the Respondent this time based on issues contained in the pleadings filed by the parties. Therefore in the similar Judgment there are two decisions in favour of the Applicant/Respondent. One arrived by engaging the parties on their pleadings another one on an issue which was not contained in the pleadings of the parties, evidence or issues framed by the court and worse enough without engaging the parties to give their position (See page 11 of the Judgment of the Tribunal). The issue of Judgment on admission was not either formulated as an issue for parties to address themselves on it.

Therefore in order to ensure that there are elements of fairness in the trial and justice, I proceed to quash and set aside the Judgment, decree and proceedings conducted before A.R. Kirumbi Chairman and order that the file be remitted to the District Land and Housing Tribunal for Ilala at Ilala with directions to proceed with the hearing of case before another Chairman and Assessors in compliance with the procedures to be followed as explained above and that the same pleadings be used for purposes of hearing. I further order that the Tribunal prioritizes the schedule of hearing with a view to finalizing the matter within a short period of time preferably within seven months from the date of this

Judgment. This ground alone is sufficient to dispose the Appeal. I will not labor into other grounds.

In the end I proceed to allow the appeal based on ground no. 3 of Appeal albeit on different reasons of procedure as narrated above. I grant no order for costs.

For avoidance of doubt I reproduce the orders as follows;

1. The judgment, Decree and Proceeding of the DLHT in Land Application No. 189 of 2021 are hereby quashed and set aside.
2. I remit the case file to the District Land and Housing Tribunal for Ilala for retrial before another Chairman and Assessors in compliance with the law and procedures as analyzed above. The same pleadings be retained for hearing.
3. The case scheduling be given priority with hearing to end within seven months from the date of judgment.
4. Appeal is allowed.
5. No order as to costs.

S. D. MWAIPOPO
JUDGE
28/02/2024

Judgement delivered this 28th day of February, 2024 in the presence of learned counsel Zarina Nassoro holding brief for learned advocate Silas Nziku for the Appellants and also representing the Respondents, is hereby certified as a true copy of the original.

S.D. MWAIPOPO
JUDGE
28/02/2024