IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 110 OF 2020

SAID MOHMED SAID ..... APPELLANT

VERSUS

MUHUSIN AMIRI).....1ST RESPONDENT

MUHARAMI JUMA ..... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mujulizi, J.)

dated 17th day of July, 2014

in

Land Case No. 17 of 2004

.....

JUDGMENT OF THE COURT

14th February & 25th April, 2022

LILA, JA:

The parties to this appeal litigated over a piece of land situate at Temeke Area in Dar es Salaam each claiming to be the lawful owner. The appellant is aggrieved by the High Court decision which dismissed his claims with costs.

The epicenter of the dispute between the parties in this appeal is a plot of land identified as Plot No. 207 Block "J" within Temeke District presently occupied and used for Islamic teachings, Almadrasat Manaara.

The appellant successfully instituted a suit in the District Court of Ilala at Kisutu (Civil Case No. 83 of 1988). As it were, the respondents were aggrieved. Their appeal to the High Court in Civil Appeal No. 30 of 1994 resulted in the nullification of the proceedings and judgment. An order for trial de novo was made (Hon. Mrema, J.). Instead of complying with the court order, the appellant instituted a fresh suit before the High Court (Civil Case No. 422 of 2000) founded on the same claim and the same parties. It was not smoothly received as it met a preliminary objection in which the court's pecuniary jurisdiction to entertain the matter was questioned as the value of the suit plot was below TZS. 12,000,000/=. The High Court (Msumi, JK) dismissed the matter upon sustaining the preliminary objection.

His desire to have his ownership of the land confirmed prompted the appellant to, again, access the High Court (Land Division) where he instituted Land Case No. 170 of 2004 which is a subject of this appeal. In its judgment, the High Court made a finding that it lacked jurisdiction on account of the matter being *res subjudice.*

The learned judge did not stop there. He was inclined to also determine the appeal on merits in the event his finding on jurisdiction

would be incorrect. Accordingly, he considered the evidence presented and found in favour of the respondent.

Both parties were aggrieved in one way or another. So, while the appellant appealed to this Court bringing to the fore six (6) grounds of appeal, the respondents advanced two (2) points of grievances by way of a cross-appeal. Along with them, the parties lodged written submissions in support and in opposition to the appeal and cross appeal. We commend them for their lucid and elaborate submissions.

However, given the course we have decided to take in resolving this appeal, we see no compelling reasons to recite both the points of grievances and the submissions thereof. Instead, we shall revert and refer to them whenever we shall find necessary and relevant.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas both respondents had the services of Mr. Daimu Halfani, learned counsel. Both sides had nothing to add to their respective submissions which they fully adopted.

Upon our serious examination of the points of grievances by both sides, the respective submissions and the record of appeal, we are convinced that this appeal may succeed or fail only by the determination of the sole issue whether it was proper for the trial judge to raise *suo*

motu and determine the issue whether the High Court had jurisdiction without affording the parties the right to be heard. That complaint forms the crux in the appellant's additional ground which states:-

> *"That the learned trial judge erred both in law and fact by raising an issue of jurisdiction of the court suo motu and unilaterally proceeding to make a finding without affording parties right to be heard."*

It is common ground from the parties' respective submissions that they have no quarrel with the facts as narrated above. The appellant, further, acknowledged the settled legal position that the issue of jurisdiction can be raised at any time and even by the court *suo motu*. However, his contention is that the parties were not given opportunity to address the court on the question of jurisdiction. In bolstering his assertion, he cited to us the Court's decisions in **Wegesa Joseph M. Nyamaisa v Chacha Muhogo**, Civil Appeal No. 161 of 2016 (unreported), **Mbeya-Rukwa Autoparts and Transport LTD v Jestina George Mwakyoma** [2003] T.L.R. 251 and **EXB 8356 S/SGT Sylvester S. Nyanda v The Inspector General of Police & The Attorney General**, Civil Appeal No. 64 of 2014 (unreported) in which

the Court held that the right to be heard is fundamental the violation of which renders the entire proceedings and judgment a nullity.

On the other hand, although they did not expressly state so, the respondents, at page 7 of their reply submission, seem to agree with the appellant that the issue of jurisdiction based on the matter being *res-subjudice* was raised by the court when composing the judgment and the parties were not heard on it. Such fact is manifest in the reply submission where they stated that:-

> *"...Likewise, he would not have dismissed the suit or stay it because the parties were not heard on the point of res subjudice but were heard on the merits of the suit..."*

Recourse to the record of appeal is indispensable for a thorough and exhaustive determination of the complaint under discussion. It is manifestly clear at page 82 that three issues were framed and agreed by the parties for determination in that suit. We take the liberty to recite them thus:-

> *"1. Whether the plaintiff is the rightful owner of the suit premises.*
>
> *2. Whether the defendants have trespassed into the suit premises*
>
> *3. What relief are parties entitled to."*

These were the points in question in the suit subject of litigation. As issues are material propositions of fact or law by one party and denied by the other in their respective pleadings, parties are expected to lead evidence proving or disproving certain facts according to the issues drawn. Issues guide parties in their litigation. The more so, a trial judge is obligated to decide the case on the basis of the issues on record. As to what should a judge do in the event a new issue crops up in the due course of composing a judgment, settled law is to the effect that the new question or issue should be placed on record and the parties must be given opportunity to address the court on it. We are fortified in that position by our earlier decision in **Scan-Tan Tours Ltd v The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported) where, after referring to **Mulla** in his book on **The Civil Procedure**, Vol. II, 15th Edition at page 1432 and the cases of **Hadmor Productions v Hamilton** (1982) 1 All ER 1042 and **Blay v Pollard & Morris,** 1930 1 KB 311, the Court concluded that:-

> *"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given opportunity to address the court on those questions."*

The Court went on to insist that a decision of the court should be based on the issues which are framed by the court in consultation with the parties and failure to do so results in a miscarriage of justice.

In the instant case, it is vivid, at pages 130 to 132, that the learned trial judge, when composing the judgment, raised and determined the issue of *res-subjudice* which was not among the issues framed for determination and, after referring to the provisions of section 8 of the Civil Procedure Act Cap. 33 R. E. 2002 (Now R. E. 2019) and section 54 of the Land Disputes Courts Act, Cap. 216 R. E. 2002 (Now R. E. 2019) and the case of **Richard Julius Rukambura v Issack N. Mwakajila and Another,** Civil Appeal No. 3 of 2004 (unreported), he was convinced that the court lacked jurisdiction to entertain the suit on account of the existence of another case based on the same claims and between the same parties being conducted parallel to the one that was before him. In arriving at that conclusion he had, at page 130 of the record, reasoned that:-

> *"...RM Civil Case No. 83 of 1988 between the same parties and the same subject matter was ordered to be heard "**de novo**". For all intents and purposes by that order that suit was re-opened and was alive at all material times..."*

The learned judge went on state, at page 132, that:-

> *"Courts of law cannot sanction duplicity of actions over the same dispute in different courts. That would amount to sanctioning abuse of the process of the court, in breach of express provisions of the law..."*

As rightly submitted by the parties, nowhere in the record of appeal were the parties heard on the co-existence of the two suits in two different courts between the same parties and on the same subject matter. A fact borne out by the record is that two witnesses were heard for both sides and the matter was then scheduled for judgment. We are, therefore, not hesitant to hold that the respondents are perfectly correct in their contention that the parties were heard on the suit only. It is therefore plain truth that parties were not heard on the issue of *res sub-judice* 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 1977 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 to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned; "

In giving effect and interpreting that article the Court, in **Mbeya-Rukwa** case (supra), emphasized 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 attributes of equality before the law..."

And, in the case of **I. P.T.L. v. Standard Chartered Bank (Hong Kong) LTD,** Civil Revision No.1 of 2009 (unreported) the Court categorically stated that:-

"no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties ***so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice...***" (Emphasis added)

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

rights is given? 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 the same decision would have been reached had the party been heard (See **Abbas Sherally and Another v. Rabdul Sultan H.M. Fazalboy,** Civil Application No.33 of 2002 (unreported) and **I.P.T.L. v. Standard Chartered Bank** (supra).

Now, subjecting the facts in the present case to the above legal position, it turns out to be clear that the irregularity committed by the learned judge vitiated the judgment. The only remedy available is to nullify the judgment which we hereby do. This accords with the stance the Court took in an akin situation in the case of **Wegesa Joseph M. Nyamaisa v. Chacha Muhogo,** Civil Appeal No. 161 of 2016 (unreported) where the Court stated:-

> *"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 way 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."*

With this finding, the need to consider other grounds of appeal does not arise save for ground one (1) in the cross appeal which raised a pertinent question whether the High Court had mandate to determine the suit that was before it. The complaint runs thus:-

> *"1. The High Court erred in law and fact when it entertained a time barred suit to its finality."*

Under this heading, the respondents asserted in their submission that they raised a point of objection in their written statement of defence that the suit was incompetent for being time barred and should be dismissed with costs but the same was dismissed by the High Court following their failure to prosecute, to wit; failure to file submissions as it was ordered. They pressed that the court was enjoined to determine the objection it being basic as it touched on the mandate (jurisdiction) to determine the suit. As an authority to that stance they referred the Court to it's decision in the case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and Two Others** [1995] TLR 155. The appellant took the opposite view. He elaborately explained how the suit could not be caught in the web of being time barred. However, the details are not relevant here and so we are unable to accept the invitation to determine the merits of that complaint because the objection was not first determined on merit by the High Court hence

precluding the Court from dealing with it in terms of section 4(1) of the appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA). We therefore have no advantage of appraising ourselves with the learned judge's finding on it. We, however, agree with the respondents that the High Court erred for not acting on the wakeup call made on its authority to adjudicate the suit before it. Times without number this Court has maintained that jurisdiction is the first issue the court should ask itself before acting on any matter placed before it for determination. For instance, in **Tanzania Revenue Authority v. Tango Transport Company LTD**, Civil Appeal No. 84 of 2009 (unreported), the Court stated that:-

> *"Principally, objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained.*
> *The law is well settled and Mr. Bundala is perfectly correct that a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court suo moto, as it goes to the root of the trial (See,* ***Michael Leseni Kweka; Kotra Company Ltd; New***

Musoma Textiles Ltd. cases, *supra). Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests."*

Unfortunately, in our present case, despite being raised, the learned judge did not wish to address the issue of jurisdiction to which he was obligated to consider even by raising it *suo motu.* Instead, he proceeded to hear and determine the suit without, first, ascertaining if the suit was lodged within time. Time bar touches on the jurisdiction of the court. That was, in our decided view, an error which cannot be condoned. Simply stated, even upon failure by the respondents to lodge submissions in support of the objection, the trial judge ought to have asked the parties to address him on that issue so as to satisfy himself if the court had the requisite authority to hear and determine it. In the circumstances we hereby invoke the powers of revision vested on the Court under section 4(2) of the AJA, and hereby nullify the ruling and order crafted on 5/5/2005 and pronounced on 9/5/2005 dismissing the point of objection on the jurisdiction of the High Court to determine the suit. We direct the preliminary point of objection be heard and determined afresh ahead of composing a fresh judgment in accordance with the law in the event the objection is not sustained.

In fine, we allow the appeal. We finally order the record be remitted to the High Court for compliance with the above orders. We make no order for costs.

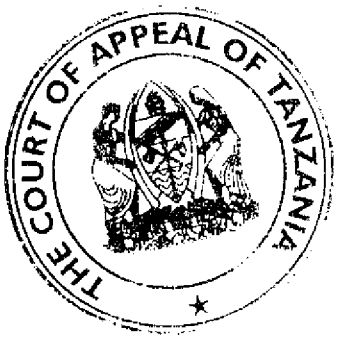
DATED at **DAR ES SALAAM** this 19th day of April, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of April, 2022 in the presence of Appellant in person and in absence of the respondents, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL