IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO , J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 39 OF 2018

ALISUM PROPERTIES LIMITED ..... APPELLANT

VERSUS

SALUM SELENDA MSANGI *(As Administrator of the Estate of the late SELENDA RAMADHANI MSANGI)* **.....RESPONDENT**

(Appeal from the Judgment and Decree of the High Court of Tanzania Dar es Salaam District Registry, at Dar es Salaam)

(Feleshi, J.)

dated the 5th day of February, 2016
in
Land Case No. 67 of 2010

JUDGMENT OF THE COURT

10th & 24th June, 2022.

KEREFU, J.A.:

The main issue of controversy between the parties to this appeal is the ownership of a parcel of land described as Plot No. 33/4 situated at Kunduchi Beach, Dar es Salaam measuring 1.773 hectares covering the area with beacons YK 390 and BV 438 on one side and YK 389 and 321 on the other side (the disputed land). It was the appellant's claim before the High Court that the respondent had trespassed into the disputed land and continued to occupy it without her permission. Thus, the appellant prayed for the eviction of the respondent from the disputed land and that she be

declared the lawful owner of that land. The appellant also prayed for permanent injunction restraining the respondent from encroaching and trespassing into the disputed land, payment of mesne profits at the tune of TZS 5,000,000.00 per month from 31st December, 2008 to the date of judgment and costs of the case.

The essence of the appellant's claim as obtained from the record of appeal indicate that, in 2008, the appellant purchased the disputed land from one M/S Concern Worldwide Ltd and upon the said sale, the disputed land was transferred to her in 2009 as evidenced by a certificate of occupancy No. 33244 by M/S Concern Worldwide Ltd dated 13th October, 1987 which was admitted in evidence as exhibit P1. John Mshero Mweta, the appellant's estates officer who testified as PW1 stated that at the time of the said sale, they did not know the boundaries of the disputed land, thus by its letter dated 27th February, 2009, the appellant approached the Land Surveyor at the Kinondoni Municipal Council and requested him to identify and recover the beacons of that land. In its letter dated 31st March, 2009, the Land Surveyor informed the appellant that one of the beacons, to wit, YK 321 was in the respondent's land. Subsequently, PW1 and Mariam Roshanali (PW3), a shareholder and also one of the appellant's

directors, approached the respondent and informed him that he had trespassed into the appellant's land, but the respondent refused to vacate the area as he told them that, initially the whole area was his and he later sold parts of it to Prof. Sarungi and M/S Concern Worldwide Ltd. That, there was unsettled disputed between the respondent and M/S Concern Worldwide Ltd. PW3 stated that, at the time of purchase of the disputed land, the seller did not tell them about the existing dispute between her and the respondent. Thus, they informed their advocate one Jessie Mnguto about the dispute and they instituted a suit as indicated above.

On his part, the respondent disputed the appellant's claims and averred that the disputed land belongs to him and has been in continuous occupation of the same since 20th November, 1967 when it was given to him, as a gift, by his employer of European descent, one John W. Eichler, the original owner. The respondent produced a document written and signed by Mr. John W. Eichler and himself witnessed by one Daudi Ricardo, the brother-in-law of John to prove the said transfer. The said document was admitted in evidence as exhibit D1.

The respondent went on to state that, the disputed piece of land was erroneously extended by the surveyor who was commissioned by the M/S

Concern Worldwide Ltd in the course of applying for the grant of certificate of occupancy in or prior to 1982 whereas beacon YK 321 was inserted without his knowledge or consent. The respondent stated that, he consulted Mr. Ricardo, the then director of M/S Concern Worldwide Ltd on the matter and several meetings were held where Ricardo acknowledged that they had mistakenly intruded into the respondent's land and undertook to rectify the survey records, but that was not done till the disputed land was sold to the appellant. That, when the appellant acquired the disputed land from M/S Concern Worldwide Ltd, the said misunderstanding was yet to be solved. It was his averments that M/S Concern Worldwide Ltd was not entitled to dispose the disputed land that falls within his land. Finally, the respondent challenged the appellant's suit that it was time barred and prayed that the same should be dismissed with costs.

From the pleadings and for the purpose of determining the controversy between the parties, the High Court framed and recorded the following three (3) issues which were agreed upon by the parties as indicated at page 69 of the record of appeal:

1. *Who as between the plaintiff and the defendant is the lawful owner of the disputed land;*
2. *Who as between the plaintiff and the defendant has encroached the disputed land; and*
3. *What reliefs are the parties entitled to.*

Having heard the parties, the learned High Court Judge, invited counsel for the parties to file their final written submissions. It is noteworthy that, in his final written submissions, the learned counsel for the respondent, among other things, challenged the competence of the appellant's suit that; **one,** it proceeded with the hearing after expiry of the speed track assigned to it; **two,** the appellant's suit was time barred having been instituted after lapse of twelve (12) years. Both issues were challenged by the counsel for the appellant.

In its judgment, the learned High Court Judge considered mainly the issue of the expiry of the speed track and dismissed it for lack of merit. He then proceeded with the determination of the merit of the case, specifically on the issue of ownership of the disputed land where he only considered exhibits D1 and D3 and observed that the appellant had no *locus standi* to institute the suit against the respondent but M/S Concern Worldwide Ltd who was not made a party to the suit. On that basis, the learned High

Court Judge reserved determination of the issue of competence of the appellant's suit on account of time limitation by stating that the same would have been worth discussing, if M/S Concern Worldwide Ltd was made a party to the suit. In his own words found at page 220 of the record of appeal, the learned trial Judge observed that:

> *"Furthermore, this fact was made clear from the statement by M/S Concern Worldwide Ltd that she would resolve the dispute with the respondent who was not made a party during the handing over of Plot 33/4. For that matter, the appellant lacks locus standi to sue over the same. The one with locus standi to sue was M/S Concern Worldwide Ltd who had that right before and who did not incorporate the said piece of land during the sale to the appellant and if he did, he did it by making misrepresentation of facts concerning the size of the subject matter in Plot 33/4 to the appellant. Actually, that would suffice to make the sale agreement between her and the plaintiff voidable...Being the case, I reserve the issue of time limitation for that would have been worth for discussion in case the M/S Concern Worldwide Ltd was made a party to this suit."*

He then concluded the suit by stating that:

"In the upshot, from the above analysis, the 1st and 2nd issues are to the effect that the defendant is the lawful owner of the disputed land. Pursuant to section 99 (1) (a) of the Land Registration Act, [Cap. 334 R.E. 2002], I order the Registrar of Titles or any other authority for the time being vested with such powers to rectify Title Deed regarding Plot No. 33/4 Kunduchi Beach Dar es Salaam with Title No. 33244 covering an area of 1.773 hectors to exclude the disputed area after causing the Director of Survey and Commissioner for Land to make their requisite adjustments."

Aggrieved by that decision, the appellant lodged this appeal. In the Memorandum of Appeal, the appellant has preferred five (5) grounds of complaints. However, for reasons which will be apparently shortly, we do not deem it appropriate, for the purpose of this judgment, to reproduce them herein.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Samson Mbamba, learned counsel whereas the respondent was represented by Messrs. Yahaya Njama and Daimu Khafan, both learned counsel. It is noteworthy that, both learned counsel for the parties had earlier on filed their written submissions in support of and in opposition to the appeal as required by Rule 106 (1) and (7) of the

Tanzania Court of Appeal Rules, 2009 (the Rules) which they sought to adopt at the hearing to form part of their oral submissions.

It is also necessary, at the outset, to remark on a preliminary procedural matter we addressed ahead of the hearing of the appeal. Initially, when the appeal was called for hearing on 13th August, 2021, it transpired that the respondent had passed away on 21st February, 2021 and a copy of his death certificate dated 16th March, 2021 with Registration No. 100000121275 was availed to that effect. The hearing of the appeal was adjoined on that account to allow the deceased family to appoint a legal representative to administer the estate of the deceased respondent. Again, on 10th June, 2022, when the appeal was called for hearing, Mr. Njama informed the Court that, vide Probate and Administration Cause No. 105 of 2021, Mr. Salum Selenda Msangi was appointed by Kawe Primary Court on 18th May, 2021 as a legal representative of the estate of the late Selenda Ramadhani Msangi. A letter of administration of Mr. Salum Selenda Msangi was availed in Court to prove that fact. Then, Mr. Njama moved us informally to join Mr. Salum Selenda Msangi in this appeal in the place of the deceased respondent. There being no objection from the counsel for the appellant, we acceded to the prayer and in terms of Rule 105 (1) of the

Rules joined Mr. Salum Selenda Msangi in this appeal in the place of the deceased respondent.

Having heard the parties on 10th June, 2022 and upon thorough perusal of the record of appeal, we wanted to satisfy ourselves on the propriety or otherwise of the decision of the High Court on account of; **one**, the failure by the trial court to determine the issue raised by the respondent that the appellant's suit was time barred for having been instituted after lapse of twelve (12) years; and **two,** whether it was proper for the learned High Court Judge to raised new issues, on the *locus standi* of the appellant to institute the suit against the respondent and a non-joinder of a necessary party (M/S Concern Worldwide Ltd) to the suit, in the course of composing the judgment without according the parties right to be heard on those issues. As such, we invited the counsel for the parties to address us on those issues.

In his response, Mr. Mbamba faulted the trial court for failure to determine the issue of time limitation raised by the respondent. It was his argument that the said issue being crucial was supposed to be determined first before going to the merit of the case. Mr. Mbamba also faulted the procedure adopted by the learned High Court Judge of raising new issues

in the course of composing the judgment without according the parties right to be heard on them. It was his argument that, the proper procedure which was supposed to be adopted by the said Judge after he had raised those issues, was to invite the parties to address him on those matters and determine them in accordance with the law. He contended further that, the said omission had the effect of rendering the decision pronounced by the trial court null and void. He thus urged us to exercise powers vested in the Court under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) to revise and nullify the decision of the High Court and order it to determine those issues after hearing both parties.

In response, Mr. Daimu conceded to the submissions and the prayers made by his learned friend. He emphasized that the omission made by the trial court, to hear parties on the new issues on *locus standi* of the appellant on the suit and on non-joinder of M/S Concern Worldwide Ltd as a necessary party to the suit, was serious as it made it impossible for it to determine the issue of time limitation raised by the respondent. It was his argument that the issue of time limitation was very crucial in determining the jurisdiction of the trial court to entertain the appellant's suit. On that basis, he also urged us to nullify the trial court's decision and find it

appropriate to remit the case file to the High Court to determine those issues after hearing the parties.

From the above submissions of the learned counsel for the parties, it is clear that they are at one that it was not proper for the learned High Court Judge to determine the suit without first considering the issue of time limitation raised by the respondent. The learned counsel, were equally at one that, it was not proper for the learned High Court Judge to raise new issues *suo motu,* in the course of composing the judgment without according the parties the right to be heard.

We respectfully, share similar views, because it is evident at page 32 of the record of appeal that, the respondent challenged the competence of the appellant's suit for being time barred at the initial stages of the trial as found at paragraph 15 of his written statement of defence. The said issue featured prominently, not only in the pleadings by the parties, but also in the final written submissions by both counsel for the parties found at pages 164 to 187 of the record of appeal. However, in its decision found at page 220 of the same record, the learned High Court Judge reserved determination of the said issue on account of failure by the appellant to join M/S Concern Worldwide Ltd as a necessary party to the suit. This, as

rightly argued by both learned counsel, was improper. The said issue having bearing on the competence of the suit and the jurisdiction of the trial court to entertain the suit, was required to be determined first, before the learned trial Judge venturing into the merit of the case.

It is an elementary principle of law that an issue raised by the parties should be resolved. Therefore, the trial court is required and expected to decide on each and every issue before it, hence failure to do so renders the judgment defective. We are supported in that position by the cases of **Alnoor Shariff Jamal v. Bahadir Ebrahim Shamji,** Civil Appeal No. 25 of 2006 (unreported) which quoted with approval a Kenyan case of **Kukal Properties Development Ltd v. Maloo and Others** (1990) E.A. 281 when faced with a similar situation, it stated that, *"A judge is obliged to decide on each and every issue framed, failure to do so constitute a serious breach of procedure."* We are alive that the cited case discussed the determination of the framed issues, but since the issues are framed out of pleadings and points of controversy between the parties, the principle is also applicable in the matter at hand as far as determining point in controversy between the parties is concerned.

It is therefore our considered view that, since the trial court, in the instant appeal, was alerted from the pre-trial stages on the said issue, it ought to have delt with it before going to the merit of the case, but that was not done, hence rendering the decision arrived thereto a nullity.

It is also clear that the jurisdiction of this Court on appeal is to consider and examine matters that have been considered and decided upon by the High Court and subordinate courts with extended jurisdiction. There is plethora of authorities on this matter. See for instance the case of **Celestine Maagi v. Tanzania Elimu Supplies (TES) and Another,** Civil Revision No. 2 of 2014 (unreported) where this Court stated that:

> *"The power of the Court on matters arising from the lower courts are only exercisable in two ways. First, by way of appeal. And second by way of revision. This is provided under S. 4(1)-(3) of the Act. And ordinarily* ***the Court would exercise its appellate and revisional powers only after the lower courts have handled down their decisions."*** [Emphasis added].

Therefore, in the instant appeal, since the issue of time limitation is yet to be decided upon by the High Court, this Court cannot exercise its appellate jurisdiction on that matter.

We are increasingly of the view that, what was done by the learned High Court Judge to introduce the said new 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 desired 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. Commenting on the foregoing legal position, **Mulla,** in his book titled, **The Code of Civil Procedure** Vol. II 15th Edition at page 11432 cited in the case of **Scan-Tan Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu,** Civil Appeal No. 78 of 2012 (unreported) observes:

> *"If the court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue..."*

In addition, 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. Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 provides that: -

> *"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 fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

Furthermore, in **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported) the Court observed that:

> "*The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it wiii 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." [Emphasis added].*

In the instant case, it is evident that parties were not accorded the right to be heard and address the court on the new issues on the locus standi of the appellant to institute the suit against the respondent and non-joinder of M/S Concern Worldwide Ltd as a party to the suit which were

raised by the learned High Court Judge when composing the judgment. Such omission amounted to a fundamental procedural error which occasioned a miscarriage of justice to the parties. Consistent with the settled law, the resultant effect is that, such finding cannot be allowed to stand, it was a nullity. In the circumstances, since we have held that finding a nullity, we hereby quash the judgment of the High Court and set aside the subsequent orders arising therefrom.

In the premises, and as we are satisfied that the omissions done by the learned High Court Judge are fatally defective, as the same have prejudiced the rights of the parties, we hereby invoke the revisional powers under section 4 (2) of the AJA to revise, nullify and quash the purported decision of the High Court delivered on 5th February, 2016 in Land Case No. 67 of 2010. Having quashed the High Court's decision from which the appeal arose, the appeal lacks legs on which to stand and in consequence we strike it out.

In the circumstances, we remit the case file to the High Court for it to hear the parties on the issues regarding the time limitation and *locus standi* of the appellant to institute the suit against the respondent together with a non-joinder of M/S Concern Worldwide Ltd to the suit as a necessary party

and, depending on the outcome of any of the said issues, determine the case according to law. Since the issue resulting into the disposal of the appeal was raised *suo motu* by the Court, we order that each party shall bear its own costs.

DATED at **DAR ES SALAAM** this 23rd day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 24th day of June, 2022 in the presence of Mr. Yahaya Njama holding brief for Mr. Samson Mbamba, counsel for the appellant and Mr. Yahaya Njama also holding brief for Mr. Daimu Halfan, counsel for the respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL