

TANZANIA / JUDGMENT

david mushi vs abdallah msham kitwanga 2022 tzca 535 2 august 2022

COURT
TZCADECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT p m ES SALAAM (CORAM: LILA, J.A., MWANDAMBO. 3.A.. And KAIRO. J.A./1 CIVIL APPEAL NO. 286 OF 2016 DAVID MUSHI.....APPELLANT VERSUS ABDALLAH MSHAM KITWANGA..... RESPONDENT (Appeal from the Judgment and decree of the High Court of Tanzania, Land Division at Dar es Salaam) (Wambura. 3.^ dated the 27th day of November, 2015 in Land Case No. 316 of 2010 JUDGMENT OF THE COURT 5thMay, & 2ndJuly, 2022 KAIRO. J.A.: The appellant in this appeal seeks to challenge the decision of the High Court of Tanzania, (Land Division) in Land Case No. 316 of 2010 dated the 27th November, 2015. In that case, the respondent prayed to be declared a lawful owner of the suit land and for a permanent injunction against the appellant, general damages and costs of the suit. It was the respondent's claim that he acquired the suit land during operation vijiji by clearing it. He went on stating that in 1982 he left the suit land in the care of her daughter who had been using it with her husband. Unfortunately, later, both of them passed away. While waiting for the season, the respondent was surprised to realize that the suit land had been invaded by the appellant who was cultivating and building therein. That upon enquiring from the appellant as to why he invaded his land, the appellant claimed that, the land was bought from one Musham Ngombo in 1994 by his wife; Ms. Jane Matowo and her relative one Ms. Aika Mongi and that a sale agreement was executed to that effect. As earlier intimated, after the hearing and analysing the evidence from both parties, the trial court found in favour of the respondent. The appellant was aggrieved and decided to come to Court armed with nine grounds to challenge the said decision as follows:-

1. That, the Honourable trial Judge erred both In law and fact by arbitrarily dose the defence case while the court and the opposite party had a prior knowledge o f appearance o f the appellant's counsel before the High Court Commercial Division as such, denying the appellant his fundamental right of being represented and fully heard prior to determination of his rights.
2. That, the Honourable trial Judge erred both in law and fact by her failure to give any consideration to the appellant's prayer for adjournment which prayer was orally made before the court on 5hMay, 2015.

3. That, even with the absence of the appellant's counsel in court on 5th May, 2015 at 11:30 a. m., the honourable court erred both in law and fact by denying the appellant of his right to lead his witnesses who were present in court to adduce evidence thereby depriving the appellant of his fundamental right to be heard.
4. That, the honourable trial judge erred both in law and fact by erroneously finding that it is the appellant who claims to have bought the suit land from a third-party contrary to the pleadings and evidence on record which finding lead her to reach an erroneous conclusion that the respondent is not bound to join a third party in the suit and by reaching such erroneous conclusion, she wrongly invoked the provisions of Order 1 Rule 14 (1) of the Civil Procedure Code Cap 33 R.E. 2002.
5. That, the honourable trial judge erred both in law and fact by condemning unheard and giving orders to persons who were not parties to the suit.
6. That, the honourable trial judge erred both in law and fact by finding that Ms. Mongi was aware of the suit without any proof to that effect.
7. That, the honourable trial judge erred both in law and fact by finding that it is on court record that the respondent's neighbours and ward leaders of Kunduchi know that he is the owner of the disputed land contrary to the evidence on record.
8. That, the honourable trial judge erred both in law and fact by finding that when PW2 was adducing evidence, exhibit DAZ was not yet tendered but pointed out that the signature on it is not his while the said exhibit was not even shown to PW2 in court or to the court itself for identification purposes.
9. That, the honourable trial judge erred both in law and fact by finding that the respondent is lawful owner of the disputed piece of land. At the hearing of the appeal, the appellant was represented by Mr. Wilson Edward Ogunde, learned counsel while Messrs. Mashaka Mfala, Alex Ngassa and Ganja Mboje, all learned counsel appeared for the respondent. Prior to the commencement of the hearing of the appeal on merit, Mr. Ogunde prayed under Rule 113 (1) read together with Rule 106 (2) (ii) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for the leave of the Court to add new grounds revolving on the issue of jurisdiction which were not included in the memorandum of appeal. He further informed the Court that the appellant's written submissions filed on 20th December, 2019 at page 14 has also included the arguments with regard to the new grounds intended to be added. Since the respondent had no objection to the prayer, the Court accordingly granted the same. Mr. Ogunde further prayed to adopt the written submission and the list of authorities filed on 20th December, 2019 to form part of the appellant's submissions in chief. In amplifying the grounds of appeal, Mr. Ogunde consolidated the 1st, 2nd and 3rd grounds of appeal and argued them jointly. We wish to state from the onset that the Court will address the grounds of appeal as they were argued by the parties. Mr. Ogunde submitted that, following the failure to amicably resolve the dispute, the hearing of the case was scheduled to commence on 17th April, 2015 before Hon. Wambura, J. which proceeded as scheduled. He further stated that

after the respondent's case (plaintiff therein) was closed, Mr. Ogunde who also represented the appellant at the trial prayed for adjournment of the hearing of defence case to another date. The learned counsel went on submitting that initially, the trial court proposed the defence case to start on 4th May, 2015 at 9:00 am, but Mr. Ogunde informed the Court that he had already scheduled to attend hearing of some cases at the High Court Commercial Division. After a dialogue, the Court and the parties agreed that the defence hearing be conducted in two consecutive days, that is 4th - 5th May, 2015 at 2:00 pm. He elaborated that the time was initially fixed to be 2:00 pm on both days as the appellant's counsel had already fixed the hearing of other matters before the Commercial Court during morning hours, believing that the two days would suffice to have all the respondent's witnesses testify. It was Mr. Ogunde's contention that the trial court did not record what has been agreed by the parties and the trial court on 17th April, 2015, instead, it only recorded that the defence case would proceed on 4th May, 2012 at 2:00 p.m. He referred the Court to page 52 of the record of appeal, for verification. Mr. Ogunde went on to submit that, on the scheduled date and time, he had two witnesses, the appellant and Ms. Matowo who testified as DW1 and DW2 respectively. That he prayed for adjournment to the next day as agreed so as to proceed leading other defence witnesses. However, the trial Judge informed the parties that she had an emergency and she would be available on 5th May, 2015 at 2:00 pm. According to Mr. Ogunde, the trial Judge proposed to proceed with the hearing on the same date but at 9:00 am. Mr. Ogunde further submitted that, he reminded the trial Judge on the consensus reached on 17th April, 2015 and urged the trial court to adjourn the said hearing to another convenient date and time to the parties and the court if it would not be possible to accommodate him on the next day at the agreed time. Mr. Ogunde lamented that his concern was again not recoded and the trial Judge directed him to start attending the case at Commercial Court at 9:00 am on 5th May, 2015 and thereafter attend the defence hearing before her at 11:00 am of the same day, and the hearing of the defence case was adjourned and fixed to proceed on 5th May, 2015 at 11:00 am. According to him, he was left with no choice but to abide with the trial court's order. Mr. Ogunde went on to submit that, on the scheduled date and time, only the appellant appeared in person and informed the trial court that his counsel was still proceeding with the scheduled matter at the Commercial Court which fact he contended to be well within the knowledge of the trial court and the respondent's counsel. He went on stating that in the said circumstances, the appellant who had a witness in court, prayed for adjournment of the case but the trial court did not consider his prayer. He also contended that, much as the respondent's counsel was unfair to pray that the appellant should proceed to lead his witness, the trial court neither considered it as well. Instead, the trial court arbitrarily closed the defence case for the reason that it had reached 11:30 am and the counsel for the appellant had not yet arrived; contended Mr. Ogunde. He submitted further that, by closing the defence case, the appellant was denied his right to summon his remaining witnesses to testify, which he argued to be against the principles of fair hearing thereby vitiating the entire proceedings. He referred the Court to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania Cap 2 R.E. 2002 (the Constitution) to substantiate his arguments. Mr. Ogunde argued that, the trial Court's order

was improper for the following reasons: one; the reason by the appellant to have the matter adjourned was sufficient and not objected to by the respondent counsel, yet it was not considered by the trial court, two; the court's discretion to reject the adjournment prayer was not exercised judiciously; and three; the court's order refusing or granting an adjournment and the reason thereof should have been reflected on record. He went on arguing that, if the trial court had good reason to refuse the prayer for adjournment, then the appellant who was present in court with a witness would have been given a chance to lead his witness and not close his case as it did. The learned counsel 8 insisted that the order of the trial judge was not only arbitrary but also unreasonable in the circumstances as it deprived the appellant's right to be represented by counsel and right to be fairly heard and it thus, contravened the cardinal principle of natural justice, as a result, vitiated the entire proceedings. He elaborated that, fair hearing entails the right of parties to call and lead their witnesses to adduce evidence as well as right to be represented. He argued that, the trial court's decision to close the appellant's case on 5th May, 2015 was made in violation of Article 13

- (6) (a) of the Constitution as well as the principles of natural justice. He asserted that it is now a settled principle of law that a decision which is arrived at in violation of the basic right to a fair hearing is a nullity even if the same decision would have been reached had the party been heard fairly. He cited the case of Highland Estate Ltd. vs. Kampuni ya Ilchukuzi Dodoma Ltd & Another, Civil Application No. 183 of 2004 (unreported) to back up his argument. Mr. Ogunde further submitted that, the trial court when composing the impugned judgment discovered that a fair and just decision would not be reached without calling Msham Ngombo and Ms. Mongi as court witnesses. Thus, on 21st July, 2017, the appellant was ordered to look for them and the matter was adjourned to 24th August, 2015. He went on submitting that, on the scheduled date, the trial court was informed that, Msham Ngombo had passed away and further that Ms. Mongi was outside the country on official duties and was expected to be back after a month. Mr. Ogunde argued that in the circumstances, the court was expected to wait for Ms. Mongi but it went on and closed the appellant's case arbitrarily for the second time. He also argued that, it was not proper to blame the appellant for failure to procure the said witnesses adding that even the findings that it was not known when would Ms. Mongi be back was incorrect. Mr. Ogunde concluded that, the conduct of the trial Judge as depicted in the proceedings of 5th May, 2015, 21st July, 2015 (pages 61 - 64 of the record of appeal) deprived the appellant his right to a fair hearing and thus has vitiated the proceedings rendering the decision of the court dated 27th November, 2015 a nullity. On that account he urged the court to find the 1st and 3rd grounds with merit and appeal be allowed. In his response, Mr. Mboje who submitted on behalf of the other counsel for the respondent prayed to adopt their written submission opposing the appeal filed on 27th January, 2020. He also informed the Court that he will as well address ground 1 - 3 of the appeal jointly as submitted by the appellant which centre on the right to be heard. In his brief submission, Mr. Mboje refuted the assertions by Mr. Ogunde that the appellant was denied the right to be heard. He elaborated that, during the Pre-Trial

Conference (PTC), Mr. Ogunde informed the trial court that he would call two witnesses and referred the Court to pages 41

- 42 of the record of appeal to substantiate his assertion. He further submitted that, the two witnesses testified and nowhere the appellant had prayed to add more witnesses. Mr. Mboje argued that Order VIIIA (4) of the CPC prohibits departure from the conference scheduling order unless leave of the court was sought and granted. The learned counsel argued that, in the absence of such leave the 1st, 2nd and 3rd grounds are wrongly premised as the appellant has failed to take into account what transpired and agreed upon at the PTC reflected at pages 53 - 60 of the record of appeal. Mr. Mboje further refuted Mr. Ogunde's contention that the parties had agreed to proceed with the hearing for two consecutive days on 4th and 5th May, 2015 arguing that, the same is not supported by the record of appeal. He asserted that, the record of appeal shows that, while at the trial, Mr. Ogunde undertook to come with his witnesses on 5th May, 2015, and the court scheduled the hearing to be at 11:00 am on 5th May, 2016, but he did not turn up. He argued that, his absence at the scheduled date and time showed negligence on his part and cannot now be heard to claim ii that the appellant was not heard. He urged the Court not to allow the appellant to benefit from his own mistake. As regards the contention that the appellant had witnesses at the trial court on 5th May, 2015, Mr. Mboje contended that, the record does not support the said assertion, rather it shows that the appellant was present in person and thus it was correct for the trial court to proceed with composing the judgment as per Order XVII Rule 3 of the CPC for the appellant's failure to cause the attendance of his witnesses. He further contended that, it was also within the trial court's discretion to close the appellant's case to which he argued to have been exercised judiciously. Mr. Mboje further rebutted the argument by Mr. Ogunde that there was sufficient cause to order the adjournment of the hearing of the defence case. He elaborated that, Mr. Ogunde neither brought his witnesses as per his commitment nor notified the trial court regarding his absence and thus the argument that the appellant's right to a fair hearing was infringed does not hold water. He further argued that even the information relayed to the trial court by the appellant that Ms. Mongi was to be back from the overseas official trip after a month was not sufficient to warrant the adjournment of the case. In conclusion, he prayed the 12 Court to find that the grounds are without merit and that the trial court acted in accordance with Order XVII Rule (1) of the CPC. In his rejoinder, Mr. Ogunde argued that the trial court's reason to close the defence case is centred on his failure to turn up in court to proceed with the hearing after the lapse of 30 minutes since the time scheduled to commence the hearing and not failure to pray to add the witnesses over and above the ones stated during the 1st PTC as argued by Mr. Mboje. He referred the Court to page 61 line 9 of the record of appeal to back up his argument. When asked by the Court as to whether the trial court had powers under Order XVII (3) of the CPC to close the defence case, Mr. Ogunde stated that, though the trial court had such discretionary powers, such powers were to be exercised judiciously which he argued the trial court did not, in the matter at hand. He reiterated his prayer to have the Court find the grounds meritorious. The parties' rival arguments in the 1st, 2nd, and 3rd grounds are centred on a right to be heard

whereby the appellant argued that he was not fairly heard while the respondent refuted the contention. The gist of the complaint by the appellant in all of the three grounds hinges on the action by the trial court to close the defence case after the failure by Mr. Ogunde to attend to court so as to proceed with the hearing 13 of the defence case on the date and time scheduled for hearing by the trial court. For easy of reference of the arguments to follow, we found it apposite to reproduce the relevant part that gave rise to this complaint found at pages 60-61 of the record of appeal: - "Mr. Ogunde: I pray to call in two more witness tomorrow. Court: Hearing adjourned to 5/5/2015 at 11.00 am. S. A. N. WAMBURA JUDGE 4/5/2015 5/5/2015" Coram: Hon. S. A. N. Wambura, J, Plaintiff: Mr. Kumwenda Advocate Defendant: Present in person C/cAnna Defendant: My advocate is still at the commercial division W. Kumwenda: as the witness is available then he should just proceed. Mr. Kumwenda: I pray for an adjournment Court: We agree to proceed today at 11.00 am and it is now 11.30. If the counsel has not yet showed then we close the defence case and parties to file their dosing submission by 15/5/2015. S. A. N. WAMBURA JUDGE 14 5/5/2015" It is plain from the above excerpt that on 4th May, 2015, Mr. Ogunde prayed to summon two more witnesses to testify on the 5th May 2015 and the trial court scheduled the hearing to commence at 11.00 am. The excerpt further shows that on the date and time scheduled, the appellant was present in court together with his witness. It also shows that the appellant informed the trial court that his advocate, Mr. Ogunde was still attending the hearing at the Commercial Court. The information made Mr. Kumwenda, the respondent's counsel to pray to proceed with the hearing as the appellant's witness was available. He later on a reflection, prayed for the adjournment of the hearing. It is worth to note that the trial court did not comment on the information regarding the absence of Mr. Ogunde, neither did it grant any of Mr. Kumwenda's prayers. Instead, it went ahead and closed the defence case and ordered the parties to file their final submissions. It is the contention of Mr. Ogunde, and rightly so in our conviction that the trial court's action was, with respect arbitrary. In our view, that was a clear indication of violation of a right to a fair hearing guaranteed under Article 13 (6) (a) (ii) of the Constitution. We say so for the following reasons; one; the appellant, though present, was not afforded the right to comment on anything including the prayers by Mr. Kumwenda before the last order to close the defence case was made. The Court in Abdallah Kondo vs. Republic, Criminal Appeal No. 322 of 2015 (unreported) held that a trial magistrate or judge has no power to close neither the prosecution nor defence case. It was further observed therein that the parties are at liberty to close their respective cases after being satisfied that what their witnesses have adduced as evidence is sufficient. Much as the cited decision involved a criminal case in nature, we are of the view that, the underlying principle is also applicable in the case at hand. Two; the appellant's right to legal representation was contravened as the trial court did not consider the reason for the absence of the appellant's counsel. In fact, the trial court did not state why it rejected the stated reason. Three, though the trial court under Order XVII Rule 1(1) (2) of the CPC has discretionary powers to refuse an adjournment where it is of the view that no sufficient reason is given, the reason advanced behind the absence of the appellant's counsel was in our view, sufficient to warrant the adjournment which was prayed by Mr. Kumwenda. As

such, the discretionary powers vested on the trial court was not exercised judiciously, more so, when there was no reason for the rejection of the prayer to adjourn the hearing. Four; since the appellant was present with his witness, justice demanded that the trial court would have received the witness's evidence even in the absence of Mr. Ogunde as 16 prayed by the respondent's counsel. In this regard, we agree with Mr. Ogunde that the appellant's right to a fair trial was contravened. The right to a fair trial is a fundamental right enshrined under Article 13 (6) (a) of the Constitution. The said Article states as follows:- "13 (6) (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 fair hearing and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned." [See also the cases of Samwel Gitau Saitoti @ Saimoo @ Jose and 2 Others vs. The Director of Public Prosecutions, Criminal Application No. 73/02/2020, Ausdirili Tanzania Ltd vs Mussa Joseph Kumili and Another, Civil Appeal No. 78 of 2014 (both unreported) and Mbeya-Rukwa Autoparts and Transport Ltd vs. Jestina George Mwakyoma [2003] T.L.R. 252. The respondent's arguments justifying the closure of the appellant's case by the trial court seem to hinge on two limbs; in the first limb through the oral submission by Mr. Mboje, the respondent argued that the appellant had committed himself to summon two witnesses who accordingly testified and did not pray to add more. As for the second limb 17 which can be picked from the written submission, the respondent contended that, Mr. Ogunde on 4th May, 2015 committed himself to summons two more witnesses to testify on 5th May 2015 and the trial court scheduled the hearing at 11.00 am but he neither brought the witnesses nor appeared on the said date. However, the record of appeal reflected at pages 60-61 as above quoted shows that Mr. Ogunde prayed to call two more witnesses after the first two witnesses completed their testimonies. It further shows that the respondent was present in court together with his witness. Besides, the appellant informed the trial court that, Mr. Ogunde was attending the case at the High Court Commercial Division. In the circumstances, we find the argument that Mr. Ogunde did not come with a witness to be incorrect. Consequently, both limbs of the respondent's arguments are without merit we dismiss them. We join hands with Mr. Ogunde that the appellant was denied right to a fair hearing in the said circumstances. It is a cardinal principle of law that where a judicial decision is reached in violation of the right to a fair hearing as is the case in this matter, such decision is rendered a nullity and cannot be left to stand. The Court has consistently taken that stance in various decisions including, Abbas Sherally and Another vs. Abdul S.H.M. Fazalboy, Civil Application No. 33 of 2002, Director of Public Prosecutions vs. 18 Yassin hassan @ Mrope, Criminal Appeal No. 202 of 2019 and Margwe Erro and Two Other vs. Moshi Bahalulu, Civil Appeal No. 11 of 2014 (all unreported). In Abbas Sherally and Another (Supra) the Court observed as follows:- "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 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." [Emphasis added]. [See also National Housing Corporation vs. Tanzania Shoe Company Limited and Others [1995] TLR 251. Based on what we have endeavoured to

discuss, we find merit in the 1st, 2nd and 3rd grounds of appeal. Since the grounds are sufficient to dispose of this appeal, we see no need to continue discussing the remaining grounds of appeal. We therefore proceed to quash and set aside the order closing the plaintiff's case, proceedings of the trial court from 5th May, 2015 to the end and set aside the judgment and decree emanating therefrom. We further order the case file to be remitted to the 19 High Court of Tanzania (Land Division) for an expedited hearing to proceed from the stage reached prior to 5th May 2015. In conclusion, the appeal is allowed on the grounds discussed above. Considering the nature of the infraction in the proceedings, we make no order as to costs. DATED at DAR ES SALAAM this 29th day of July, 2022. S. A. LILA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL L. G. KAIRO JUSTICE OF APPEAL JUSTICE OF APPEAL This Ruling delivered on 2nd day of August, 2022 in the presence of Mr. Ngasa Ganja holding brief for Mr. Deogratias Ogunde, learned counsel for the Appellant also for Ms. Yustina Odilo, learned counsel for the Respondent and in the absence of the Appellant, is hereby certified as a true copy of original. 20

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