

TANZANIA / JUDGMENT

joseph utenga vs patrick utenga

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IRINGA DISTRICT REGISTRY)
AT IRINGA LAND APPEAL NO.06 OF 2020 JOSEPH UTENGA APPELLANT VERSUS

1. PATRICK UTENGA 1
2. AURELIA KINDOLE J RESPONDENTS (Being appeal from the decision of the District Housing and Land Tribunal for Iringa District at Iringa) (Hon. C. Hatson (CP)) dated the 17th day of December, 2019 in Application No. 66 of 2017

JUDGMENT

Date of Last Order; 21/06/2022 & Date of Judgment: 24/06/2022 S.M, KALUNDE, J.: This is an appeal against the decision of the District Housing and Land Tribunal for Iringa District sitting at Iringa (the trial Tribunal) in Application No. 66 of 2017 (the suit). The suit at the trial Tribunal terminated in favour of the respondents hence the present appeal. The facts giving rise to this appeal are founded on a piece of land located at Kigamboni Street within Iringa Municipality (the suit property). The appellant and 1st respondent are siblings having shared a father but from different mothers. It was alleged in 2002 their father, Tokyo Galawesa Utenga (PW2), the owner of the suit property decided to distribute his properties to his five children. As pointed out earlier, the appellant and respondent were part of his children. In the said distribution the appellant was allocated a house situated on the suit property. It was alleged that the respondent and the remaining siblings were, each, allocated farms. Upon distribution of the said property the father departed to Sumbawanga his new duty station, leaving the family in the hands of her sister, Fatuma Utenga (PW3). In the same year, the appellant left for Mbeya. On his return he gathered that the respondent had sold the suit property to the 2nd respondent. He instituted an application before the trial Tribunal. Before the trial Tribunal the appellant alleged that the 2nd respondent has trespassed into his land and erected a structure without his consent or approval. He invited the trial Tribunal to issue orders that the acts of the 2nd respondent were illegal. In addition to that he sought for an order prohibiting the respondents from building a house on the disputed land. On his part, the respondent contended that he was the lawful owner of the suit property having been allocated by his aunt, PW3. Having heard the testimony and considered evidence from both parties, the learned Chairperson was content that the appellant failed to

establish his claim of ownership over the suit property. In the end the trial tribunal ruled in favour of the respondent thereby dismissing the suit. The decision of the trial Tribunal did not resonate well with the appellant. He has preferred now the present an appeal before this Court. The appeal is predicated on three grounds of appeal which may be summarized as follows:

1. That the learned trial Chairperson erred In failing to consider the strength and weight of evidence presented by the appellants witnesses;
 2. That the learned trial Chairperson misdirected himselfby falling to determine all Issues framed for determination; and
 3. That the learned trial Chairperson misdirected himself when It failed to consider that PW2 and PW4 were original owners of the suit property. By consent of the parties, the appeal was disposed by way of written submissions. Both parties filed their submissions in accordance with the orders issued by the Court. However, it would appear that the appellant waived his right to file a rejoinder. Either way, I appreciate the efforts made by both parties in preparing their submissions which in the end assisted in the composition of the present judgment. The appellant combined the first and third grounds and argued them together. He contended that the learned Chairperson of the trial Tribunal failed to properly evaluate and analyze the strong evidence presented by the appellant thereby arriving at an erroneous conclusion. The appellant contended that through the testimony of PW2 and PW3 he established that the suit property was the property of PW2 who subsequently gave it the appellant. He contended that the above evidence is supported by PW4 who stated she participated In the construction the house over the suit property together with PW2. Relying on the above evidence the appellant contended that he was able to establish that the suit property was allocated to him. In the second ground of appeal the appellant submitted that the learned trial Chairperson failed to resolve the and 2" ^ issues framed for determination. Submitting further on the point, the appellant argued that throughout the judgment of the trial Tribunal the learned Chairperson failed to pronounce who was the lawful owner of the suit property. There was also no resolution of the question whether the sale of the suit property by the respondent to the 2" ^ respondent was valid. In the end the appellant argued that the trial Tribunal failed to resolve the dispute between the parties. Relying on the above arguments the appellant Invited the Court to interfere by quashing the decision of the trial Tribunal replacing it with a decision in his favour. The respondents were rather brief in their reply. In their three
- (3) paragraph response the respondents submitted that the trial Chairperson properly evaluated and analyzed evidence and arrived at a fair and just decision in view of the evidence presented by both parties. They prayed that the argument presented by the appellant, that the trial Chairperson failed to properly evaluate and analyze evidence, be disregarded for lacking merits. In response to the second ground of appeal the respondents submitted that since by the time the suit was instituted the 2" ^ respondent was in possession of the suit property, then the decision of the trial Tribunal meant that the 2"" ^ respondent remained the lawful and true owner of the suit property. It was the respondent's argument

that the trial Tribunal justly decided that the appellant had not justified his claim of right over the suit property. In conclusion, the respondent prayed that the appeal be dismissed for lack of merits. Having considered the rival arguments by the parties, the ball is now on this Court to confront the complaints advanced by the appellant through his grounds of appeal. In my considered view, I propose to first address the complaint by the appellant that the learned trial Chairperson failed to resolve the issues framed for determination. I am taking this view because in terms of section 41 read together with section 46 both of the Land Disputes Courts Act, Cap. 216 R.E. 2019 the appellate powers of this Court on matters emanating from the District Land and Housing Tribunal are limited to considering and examining matters that have been considered and decided by the tribunal in its decision. The respective sections read: "41.-(1) Subject to the provisions of any law for the time being in force, all appeals, revisions and similar proceedings from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.

- (2) An appeal under subsection (1) may be lodged within forty five days after the date of the decision or order: Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days. [Emphasis mine] Similarly, section 46 of Cap. 216 highlights the powers of this Court on appeal, the section reads: "The High Court shall in the exercise of its appellate jurisdiction have power to take or to order the District Land and Housing Tribunal to take and certify additional evidence and whether additional evidence is taken or not, to confirm, reverse, amend or vary in any manner the decision or order appealed against." [Emphasis mine] From the wording of the above sections, for an appeal to lie before this Court, there must be a decision handed down by the tribunal. In absence of a decision this Court cannot exercise its appellate jurisdiction. It is an elementary principle of pleadings that each issue framed for determination should be resolved. In *Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others* (Civil Appeal No.239 of 2017)[2020] TZCA 1889;(11 December 2020) the Court of Appeal stated that: "... a trial court is required and expected to decide on each and every issue framed before it, hence failure to do so renders the judgment defective. We are supported in that position by the cases of *Alnoor Shariff Jama!*(supra) cited to us by Mr. Chamani and *Sosthenes Bruno and Another v. Flora Shaun*, Civil Appeal No.81 of 2016(unreported). It is also well settled that when an issue which is relevant in resolving the dispute between the parties is not substantively resolved, an appellate court cannot step into the shoes of the lower court and assume that duty. This view was adopted by the Court of Appeal in the case of *Mantra Tanzania Limited v. Joaquim Bona Venture*, Civil Appeal No. 145 of 2018 (unreported) where the Court observed that: - "On the way forward it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter." Similarly, in the case of *Truck Freight(T) Ltd v. CRDB Ltd*, Civil Application No. 157 of 2007 (unreported) where the High Court failed to determine a framed issue and as a

result, the parties* controversy was left unresolved. Having considered that situation, the Court of Appeal made the following observation: - "If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We cannot step into its shoes. We therefore allow the appeal and quash the decision..." Mindful of the above position of the law I will revert to the resolution of the controversy in the present case. The appellant contends that the trial Tribunal failed to resolve the 2nd issue. It is on record that on the 01st day of March 2018 the trial tribunal framed three issues for determination as follows:

1. Who was the lawful owner of the suit property as between the applicant and Respondent;
2. Whether the sale of the suit property by the Respondent to the 2nd Respondent was valid; and
3. To what relief(s) are the parties entitled. I have gleaned through the typed judgment and noted that, in an attempt to resolve the issues framed for determination the trial Tribunal, at page 3 of the typed judgment, is recorded to have made the following remarks: "The problem of this case seems to have been caused by the PW3 Fatuma Utenga, who seems to believe on the taboos she says the 2nd Respondent cannot build a house on the place where the house of his brother was located, the PW2 Tokyo Utenga, The dispute is also attributed by the fact that in 2002 when the plot and farms were distributed to the children by the PW3 on the direction of the PW2 there was no writing." Influenced by the above observation the learned trial Chairperson made the following conclusion: "The Applicant has failed to prove on the required standard that the piece he is claiming belongs to him alone. Having made the above statement, the trial Tribunal proceeded to quote the opinion of the wise assessor present at the conclusion of the trial and by way of conclusion the tribunal made the following remarks: "The other assessor died on the 23/06/2018 on the course. The Applicant has said should take the plot which is said to be there and stop disturbing the 2nd Respondent on the suit premise. I thus proceed to dismiss the suit. To maintain the relationship of the parties who are relatives each to bear own costs. C HATSON CHAIRMAN 17/12/2019" The above excerpts were the learned trial Chairperson's entire assessment and analysis of evidence presented by both parties as well as resolution of the issues framed for determination. The question now is whether what the trial Tribunal did was enough for the resolution of the issues framed for determination. At this juncture I agree with the appellant, and I am convinced that the answer to that is no and I will illustrate hereunder. In the first issue the learned trial Chairperson was required to resolve a question, as between the appellant and respondent, who was the lawful owner of the suit property. Unfortunately, that question was not resolved. In fact, the trial tribunal opened up the question even further when it stated that the appellant "has failed to prove on the required standard that the piece he is claiming belongs to him alone" That meant that the applicant had managed to establish, somehow, that he owns the suit property, perhaps not alone, but presumably together with another person. But that was not, in case, a statement that the respondent was also the lawful owner of the suit property. In view of the issue framed for determination, the

trial Tribunal should have categorically made a finding on whether the applicant of respondent was the lawful owner of the suit property. Since the 1st and 2nd issue appear to be interdependent, it seems to me that if the trial Tribunal had resolved the issue it would have been, albeit, easy for it to resolve the question whether the sale of the suit property to the 2nd Respondent by the Respondent was valid. However, since the issue remained unresolved the trial Tribunal could not attend the 2nd issue, which by necessary implication, depended on the answer to the issue. On top of that, considering the reliefs sought by the appellant, it is also apparent from the records that having failed to resolve the 2nd issue, the trial Tribunal failed to address its mind on the reliefs due to be accorded to the parties. Having said that, I am of a decided view that, failure to conclusively resolve the issues framed for determination was a fundamental error on the part of the trial Tribunal. The error vitiated the impugned decision as it left crucial issues and the dispute unresolved. The position of the law is that omitting to consider the framed issues is an error which renders a judgment defective. I am supported in this view by the decision of the Court of Appeal in the case of *Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others* (Supra December 2020 TANZLII). In the said case having observed that a trial court is required and expected to decide on each and every issue framed before it, hence failure to do so renders the judgment defective. The Court (Kerefu, 3.A) noted that: "Being guided by the authorities cited above, it is our considered view that, by omitting to consider the framed issues, the learned High Court Judge strayed into an error which has rendered the judgment defective. The Court then stated: "Therefore, this Court is required to exercise its appellate jurisdiction after the lower courts have handed down their decisions in respective matters." In final the Court stated: "Therefore, the High Court having omitted to determine the framed issues, there is no decision of the High Court on the unresolved framed issues to be re-appraised, re-evaluated or re-considered by this Court. In view of the above authority and considering the powers of this Court in terms of section 41 and 46 of Cap. 216, I am convinced that the failure to resolve the issues framed for determination left this Court without decision from which it could exercise its appellate jurisdiction. As for the way forward, I would have exercised my if there was no guidance. However, I find guidance in the case of *Mantra Tanzania Ltd vs Joaquim Bonaventure* (supra) and where the Court of Appeal observed that: - "On the way forward it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter." Similarly, in *Truck Freight(T) Ltd v. CRDB Ltd* (supra) the Court of Appeal stated: "We therefore, allow the appeal and quash the decision.... We order that he (the trial Judge) either decides the issues which were framed and agreed upon by the parties..." All said and done, I am convinced that the omission by the learned trial Chairperson rendered the decision of the trial Tribunal fatally defective, I thus proceed to quash the judgment of the Trial Tribunal in Application No. 66 of 2017 and set aside the decree and orders thereto. This alone is sufficient to dispose of the appeal, I will therefore not consider the remaining grounds of appeal. As a way forward, I remit the case file to the trial Tribunal for it to render a decision after having considered and determined all the 12 issues framed for

determination. Considered the age of the dispute I order that, the decision of the tribunal be delivered within 60 days of receipt of the case file. In fine, the appeal succeeds as explained above. Given the relationship of the parties, I make no order for costs. Order accordingly.
DATED at IRINGA this 24th day of JUNE, 2022. oURT o ^.M. KALUNDE JUDGE 13

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