

TANZANIA / JUDGMENT

REHEMA OMARY HAMIS AND ANOTH Vs

COURT
TANZLIIDECIDED
16 July 2024

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA LAND APPEAL NO. 109 OF 2023 (Originating from the decision of the District Land and Housing Tribunal for Dodoma at Dodoma in Land Application No. 24 of 2018 dated 07/09/2023) REHEMA OMARY HAMIS.....1ST APPELLANT ROZALIA YOHANA
MACHECHA.....2ND APPELLANT Versus DAUNSEN NICOLAUS
KIMARO.....RESPONDENT

JUDGEMENT

Date of last order: 16th July, 2024. Date of Judgment: 02nd August, 2024. E.E. KAKOLAKI, J. Before the District Land and Housing Tribunal the respondent herein in Land Application No. 24 of 2018, successfully sued the 1st and 2nd appellants together with one Maneno Gomba not subject of this appeal when was declared to be the lawful owner of Plot No. 50 B located at Zuzu area within the City of Dodoma, in the decision handed down by the tribunal on 07/09/2023. Subsequent to that, appellants were ordered to vacate from the suit land and not to interfere with the said land anymore while their counter claim against the respondent dismissed for want of merit with costs. Not amused the appellants have knocked this Court's doors challenging the said decision in six (6) grounds of appeal going thus:

1. That, the Trial Tribunal erred in law and fact in deciding in favour of the Respondent while there was a misjoinder of a necessary party. 1
2. That, the Trial Tribunal erred in law and fact by adjudicating and deciding the dispute in favour of the Respondent contrary to the law and procedures.
3. That, the Trial Tribunal erred in law and fact by adjudicating and deciding the dispute in favour of the Respondent without satisfying itself whether the survey procedures conducted on the disputed area was lawful.
4. That, the Trial Tribunal erred in law and fact by adjudicating and deciding the dispute in favour of the Respondent without according the appellant a right of fair hearing.
5. That, the Trial Tribunal erred in law and fact by adjudicating and deciding the dispute in favour of the Respondent without considering that the land in dispute is legally owned by the 1st appellant herein.

6. That, the Trial Tribunal erred in law and fact by adjudicating and deciding the dispute in favour of the Respondent basing on the weak and contradictory evidence adduced by the Respondent and his witnesses, unlike the evidence adduced by the appellants that was so clear. Briefly the respondent claimed to have acquired the disputed land in 1990 when the then Capital City Development Authority (CDA) issued him with an offer referenced CDA/ED/LA-15/18036 as Plot No. 50, before the said CDA constructed a road that crossed it hence dividing the same into two plots with 2 No. 50A and 50B. It was his further claim in respect of the disputed plot No. 50B, situated at Zuzu area within Dodoma City that, on 17/07/2015 the same CDA granted him with land offer letter referenced CDA/ED/LA-15/72864 and on 11/09/2015 acquired a Certificate of Title with No. 28588 from the Registrar of Title's office with a right of occupancy for 99 years, in which the appellants allegedly trespassed on. In their defence all appellants flatly denied respondent's claim contending that, the said certificate of occupancy was obtained fraudulently while raising a counter claim against the respondent that, they are owners of the disputed piece of land as in view of CDA letter to the respondent with reference No. CDA/DP/PRJ-11 dated 27/03/2013 occupants who are still in occupation of the disputed land are recognized by the authority. During the trial the respondent paraded two witnesses in a bid to prove his claims against the appellants while the appellants called in five witnesses including themselves. At the end of the trial the Tribunal was satisfied that, the evidence adduced by the respondent was heavier than that of appellants hence entered judgment in his favour the result of which this appeal is preferred. At the hearing of this appeal, appellants appeared represented by Ms. Joanitha Paul while the respondent enjoying the services of Simon Robert Ng'wigulu, both learned counsel as were heard by way of written submission, which submissions were filed in accordance with the scheduled orders save for the appellants who chose not to enter their rejoinder submission. 3 Having visited the records from the District Land and Housing Tribunal for Dodoma and dispassionately considered the contending submissions from both sides, for reasons to be apparent soon I wish to start addressing the 4th ground of appeal. It is appellants' contention that, their right to fair hearing was infringed as when the matter was scheduled for hearing on 24/03/2024 their advocate was indisposed but the one who was instructed by him to hold his brief was denied such right as a result appellants were denied of their right to cross-examine the witness. According to Ms. Paul, appellants' right to be heard as enshrined under Article 13(6)(a) of the Constitution of the URT, 1977 was denied the result of which the decision arrived at by the Tribunal is a nullity hence should be nullified. She relied on the decision in the case of Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy, Civil Application No. 33 of 2022, which she did not supply the copy to the Court as it seems to be unreported. Further to that, she contended even the exhibits admitted in court were not read nor appended with witnesses signatures. She relied on the case of Bulungu Nzungu Vs. R, Criminal Appeal No. 39 of 2018 [2022]TZCA 454 which held that, once the evidence is cleared and tendered in court against the person the same must be read over to that person. With those fatal irregularities Ms. Paul urged this Court to allow the appeal by quashing the tribunal's decision and set aside the orders thereto. 4 In response Mr. Ng'wigulu attacked appellant's submission terming it as misleading since the

Tribunal's proceedings speak louder. He said, on the 24/03/2024 appellants who appeared without their advocate chose to proceed on their own and in the absence of their advocate hence no proof that another advocate intended to hold brief of their advocate was denied such right. As to the second aspect on the failure of witnesses to read aloud the admitted exhibits and append their signature he retorted, the argument is too general as the cited authority of Bulungu Nzungu (supra) directs the court to expunge from the record any exhibit admitted in court without being read but there is no any legal requirement for the witnesses to append their signatures thereto. He therefore invited the Court to find the ground of appeal is wanting in merit and dismiss it. To start with the asserted requirements of reading the admitted exhibits and appending witnesses' signatures in civil cases, I find the same is not a legal requirement in civil procedures as Ms. Paul did not cite any provision of the law to back up his submission. The case of Bulungu Nzungu (supra) relied on by Ms. Paul though establishing the principle that reading exhibits after admission is applicable in both civil and criminal cases, in my humble view the principle applies to criminal matters only, the rationale being that, one, sometimes accused persons undergo trials without being availed with all documents intended to be relied on by the prosecution, more so in the subordinate courts where the accused person is supplied with complainant 5 statement only. Secondly, the law in criminal matters does not restrict the accused persons to tender documentary exhibits during his defence even if disclosure is not made by during preliminary hearing unlike in civil cases where the documents to be relied on by the opposite party are all disclosed before the hearing date. As to who has to append his signature in the admitted exhibit the law under Order XIII Rule 4(1)(e) of the Civil Procedure Code, [Cap. 33 R.E 2019] provides that, the admitted document shall be endorsed and signed or initialed by the trial magistrate or judge and not the witness as Ms. Paul would like this court to believe. I therefore find no merit in that complaint. Next for determination is the second complaint that, appellants were denied of their right to fair trial when refused to cross-examine the witness on the 24/03/2024. While I am in agreement with Mr. Ng'wigulu that, there is no evidence supporting their complaint that the request to have their advocate's brief held by another advocate was denied before they willingly chose to proceed on their own and without representation, the fact that they were denied of their right to cross-examine the witness (DW5) remain unchallenged. I so view as the typed Tribunal's proceedings of 24/03/2023 at pages 34 and 35 speak louder because it is not indicated in whose favour was the witness DW5 testifying for amongst the three unrepresented respondents at the Tribunal in which two of them are appellants now. To paint the true colour of what transpired during the Tribunal session on 24/03/2023, I find it imperative to reproduce partly the excerpt from the typed proceedings at pages 34 to 35. 24/03/2023 Hon. J.F. Kanyerinyeri – Chairman. Assessors: Kabohola & Magembe. Applicant – Mwigulu Advocate. 1st, 2nd and 3rd Respondents: Present in person. T/C: R. Jingu. Mwigulu Adv: The matter is for hearing and I am ready. Respondents: We are ready. Respondents: Our advocate have not appeared but we are ready to proceed in person. Sgd: J.F. Kanyerinyeri. 24/03/2023 DW5. Name: Ridhiwani Sultan Ndwata. Tribe: Hehe Rel: Moslem. Age: 59 years. I hereby affirm and state that: Per the record available in our office there was a farmNo. 50

that was allocated by the CDA. Was allocated to the applicant for various uses 7 such as agriculture. Later on the same was abandoned and new plan was done and the applicant was informed vide the letter that there was the native persons who were living there... Sgd: J.F. Kanyerinyeri. 24/03/2023 Cross – examination:

- I was called by my boss to give the evidence.
- I am working with city of Dodoma.
- The said farm was surveyed in 2015....
- The first respondent has been there since 1990. Sgd: J.F. Kanyerinyeri. 24/03/2023. Clarification questions: Kabohola:
 - The mistake was made to the extent that even Plot No. 50B was allocated to the applicant instead of 1st respondent. ... Sgd: J.F. Kanyerinyeri. 24/03/2023 J. Magembe: 8
 - After the authority surveyed the said land it is when the 1st respondent was found in the said land. ... Sgd: J.F. Kanyerinyeri. 24/03/2023 1st respondent: I pray to close our case. Order:
- i. Defence case is closed. ii. Assessors opinion is to be put in writing. iii. Assessors opinion is to be read on 14.04.2023. Sgd: J.F. Kanyerinyeri. 24/03/2023 What is discerned from the above excerpt is the true reflection of what is already found herein above that, the appellants were not denied of the right to have another advocate appear holding brief of their advocate as they willingly chose to proceed without representation on that day given the last adjournment order in the previous date. As to who summoned DW5 and in whose favour was his evidence to be rendered, the record is silent. It was expected of appellants to indicate to the Court that, they had summoned a witness to testify in their favour as from his testimony when cross-examined DW5 said, was summoned to testify before the Tribunal by his boss whom he 9 did not disclose his/her identity. The record is also dumb on who cross-examined the witness between the respondent's advocate and the appellants. Assuming DW5 was summoned by the appellants which fact is not disclosed and led by them to render his testimony before he was subjected to cross examination by the respondent's advocate, still there is no indication that appellants were availed with their right to re-examine him as provided under 147(3) of the Evidence Act, [Cap. 06 R.E 2022] hence violation of their right to be heard, leave alone the right to fair hearing. The right to be heard is one of principles of natural justice which if infringed this Court cannot close its eyes and bless such violation. It is so as being the fundamental Constitutional right as enshrined in Article 13(6)(a) of the Constitution of the URT, 1977, the cardinal principle of natural justice is that a person should not be condemned unheard but fair procedure demands that both sides should be heard, audi alterm partem. The right is so basic to the extent that a decision which is arrived at in its violation 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 the principles of natural justice. See the cases of Vs. Abdul Sultan Haji Mohamed Fazalboy, Civil Application No. 133 of 2002 (CAT- unreported), Mbeya-Rukwa Auto Parts and Transport General Medical

Council Vs. Spackman, [1943] A.C 627, Abbas Sherally and Another Vs. Jestina Mwakyoma [2003] TLR 251, I.P.T.L Vs. Standard Chartered Bank, Civil Revision No.1 of 2009 (CAT unreported) and M/S Flycather 10 Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG, Civil Appeal No. 142 of 2017 (CAT-unreported). It was held in the case of I.P.T.L Vs. Standard Chartered Bank (supra) on violation of the party's right to be heard 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." In this matter since there was no proof as to who summoned DW5 to testify in his/her favour amongst the three respondents so that others could be entitled to cross examine him and given the fact that, the record is silent as to cross- examination and further, whether appellants were accorded with their right to re-examine the witness if at all were the ones called in Court DW5, I find their right to be heard was violated by the tribunal, the defect which I hold vitiates the proceedings even if the decision reached by the Tribunal would be the same if were accorded with such right. I find refuge in the case of Abbas Sherally and Another (supra) when made reference to the case of General Medical Council (supra) where it was stated thus: "If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision." 11 With the above finding on the 4th grounds of appeal which disposes of the appeal, I see no any pressing issue calling for this Court's determination of the remaining grounds of appeal hence reserve the energy for other matters. In view of that glaring and fatal defect of denial of appellants' right to be heard by the Tribunal which I have found to be vitiating the proceedings, I invoke the revisionary powers conferred to this Court under section 43(1)(b) of the Land Disputes Courts Act, [Cap. 216 R.E 2019] and proceed to nullify and quash the proceedings of the District Land and Housing Tribunal for Dodoma in Land Application No. 24 of 2018 and set aside its decision dated 07/09/2023 and orders thereto. I order for retrial of the matter before another competent chairman. The appeal is therefore ordered allowed. I order each party to bear own costs. Order accordingly. Dated at Dodoma this 02nd of August, 2024. E. E. KAKOLAKI JUGDE 02/08/2024. Court: The Judgment has been delivered at Dodoma today on 02nd day of August, 2024, in the presence of Ms. Veradina Matikila, Court clerk and in the absence of both Appellants and Respondent. Right of appeal explained. 12 E. E. KAKOLAKI JUGDE 02/08/2024. 13

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