

TANZANIA / JUDGMENT

salimin ali jaffar vs fatma tangawizi ngura another 2021 tzca 714 2 december 2021

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IN THE COURT OF APPEAL OF TANZANIA AT ZANZIBAR (CORAM: WAMBALI. J.A.. SEHEL. J.A. And GALEBA. J.A .) CIVIL APPEAL NO. 299 OF 2019 SALIMIN ALI JAFFAR..... APPELLANT VERSUS FATMA TANGAWIZI N GURA..... 1st RESPONDENT MASOUD OMAR M ASOUD..... 2nd RESPONDENT (Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga) (MahmoucLi) Dated the 8th day of March, 2018 in Civil Appeal No. 51 of 2017 JUDGMENT OF THE COURT 26th November, & 2nd December, 2021 WAMBALI, J.A,: Salimin Ali Jaffar, the appellant, successfully sued Fatma Tangawizi Ngura and Masoud Omar Masoud, the first and second respondents respectively, before the Land Tribunal of Zanzibar (the Tribunal) in Civil Case No. 114 of 2013 as he was declared a rightful owner of the disputed piece of land. Consequently, the second respondent was ordered to demolish and remove the house he had built in the disputed land and to pay TZS. 3,000,000.00 as compensation for trespassing into the appellant's property. He was also condemned to pay the costs of the suit. As it were, the respondents successfully appealed to the High Court of Zanzibar in Civil Appeal No. 51 of 2017. The decision seriously aggrieved the appellant hence, the instant appeal. It is noteworthy that hearing of Civil Appeal No. 51 of 2017 proceeded by way of written submissions which were duly filed by the parties as ordered by the first appellate judge. It is also not out of place to state that in his written submission the appellant who was the respondent, before he responded to the grounds of appeal, raised a preliminary objection on a point of law on the competence of the appeal on account that the decree of the Tribunal was defective. Thus, relying on sections 119, 129 and Order XXIII Rule 9 of the Civil Procedure Decree Cap 8 of the Laws of Zanzibar, he implored the first appellate court to strike out the appeal with costs. On their part, the respondents (then appellants) lodged a reply to the appellant's written submission and strongly contested the notice of preliminary objection. Based on their response, they urged the first appellate court to find the preliminary objection baseless and overrule it. As intimated above, after the first appellate judge considered the written submissions of the parties for and against the appeal, she decided in favour of the respondents. The decision prompted the instant appeal. Initially, the appellant presented before the Court a memorandum of appeal comprising

six grounds of appeal. However, at the hearing of the appeal, Mr. Salum Bushir Khamis learned advocate who appeared for the appellant prayed to abandon the first, second, third, fourth and sixth grounds of appeal. The prayer was accordingly granted as Mr. AbdulKhalik Mohamed Aley, learned advocate who appeared for the respondents had no objection. In the circumstances, the remaining fifth ground can be conveniently paraphrased as follows: - "That the Honourable High Court Judge erred in law by proceeding to determine the appeal without resolving the preliminary point of law on defective decree which was raised by the appellant" It is also not insignificant, we think, to point out that before the appeal was called on for hearing, on 23rd November, 2021, the respondents lodged a notice of preliminary objection on the competence of the appeal with regard to the incompleteness of the record of appeal. Nonetheless, before we commenced the hearing, Mr. Aley prayed to withdraw the notice of preliminary objection and we accordingly marked it withdrawn with no order as to costs. Submitting in support of the sole ground of appeal, Mr. Khamis argued that though the appellant raised a point of law on the competence of the appeal before the High Court of Zanzibar on account of defective decree, the first appellate judge did not decide on it before she proceeded to determine the merits of the appeal. He added that though it is settled law that once a preliminary point of law is raised by a party it must be determined first, in the instant case, in her considered judgment, the first appellate judge simply acknowledged its presence in passing and proceeded to determine the appeal based on the submissions of the parties in respect of the grounds of appeal. To this end, Mr. Khamis submitted that as the respective point of law concerned the issue whether the appeal was competent or not, the first appellate judge erred for not determining it and thus the appellant was prejudiced. In the circumstances, the learned advocate for the appellant prayed that the judgment of the High Court on appeal be nullified and quashed and the resultant decree be set aside followed by an order remitting the appeal before the High Court of Zanzibar for determination of the preliminary point of law as required by law. In the end, Mr. Khamis prayed that the appeal be allowed with no order as to costs as the error which necessitated the filing of the instant appeal was essentially caused by the failure of the High Court of Zanzibar to follow the procedure of determining the appeal which is confronted by a preliminary point of law. In reply, initially, Mr. Aley strongly defended the first appellate judge's decision. He contended firmly that though in her judgment she made a brief statement with regard to the preliminary point of law which was raised by the appellant, that statement sufficed to conclude that there was determination on the matter. Indeed, when he was prompted on whether the alleged statement at page 126 of the record of appeal was a determination or a summary of the written arguments of the appellant, he did not wish to retract his earlier stand. On the contrary, he presented an alternative argument in that, if the Court finds that the point of law was not determined, we should hold that the notice of preliminary objection was not formerly presented at the High Court of Zanzibar. In his view, the notice of preliminary objection was supposed to be lodged before the appellant lodged written submission in support of the appeal instead of including it in the same submission. He concluded his submission by urging the Court to dismiss the appeal with costs. We have carefully given thought to the contending arguments of the counsel for the parties in respect of the sole ground of appeal. In the first place, we entertain no doubt that in his written submission in support of the appeal, the appellant raised a preliminary point of law with

regard to the defective decree of the Tribunal. The said point was raised before submission in support of the grounds of appeal was made. Secondly, we equally have no hesitation to state that the respective point of law was contested by the respondents through their reply written submission in response to the appellant's written submission. This being the case, we hold, with respect, that the alternative submission by the learned counsel for the respondents that the notice of preliminary objection was not formerly raised, is regrettable and an afterthought. We say so because, the counsel's argument was not raised at the High Court of Zanzibar either orally or in the respondents' written submission before the first appellate judge determined the appeal on merits. What is important, in our view, according to the record of appeal, the respondents unreservedly and strongly resisted the preliminary point of law in their written submission. They can thus not be heard to complain at this stage that the preliminary point of law was not formally raised by the appellant before the High Court. Thirdly, we have closely scrutinized the judgment of the first appellate court and we entirely agree with the appellant's counsel that the preliminary point of law which was raised by the appellant was not determined. In the light of the record of appeal before us, we have no hesitation to find that though the learned first appellate judge acknowledged the presence of the preliminary point of law albeit in passing, she did not make any determination on it. For the sake of clarity, we better let the record bear testimony on what she stated with regard to the particular matter thus:- "Sababu zilizowasilishwa na pingamizi na kuona jambo la msingi litakalopelekea uamuzi wa rufaa hii ni nani hasa mwenye hakiya kinachobishartiwa" Clearly, as we have intimated above, the first appellate judge simply alluded to the existence of the grounds of appeal and the preliminary objection without determining it. Essentially, she concluded that the crucial issue for determination in the appeal was who had the right over the disputed property and proceeded to determine the merits of the appeal. On our part, we hold the firm view that in the circumstances of the appeal which was placed before the High Court of Zanzibar, since the preliminary point of law on the competence of the appeal with regard to the defective decree was raised, the first appellate judge was duty bound to determine it before she proceeded to determine the merits of the appeal. Certainly, as the point of law was not determined separately before consideration of the merits of the appeal was done, one would have expected to find the intended determination in the judgment of the first appellate court on whether the respective point of law was sustained or not. Indeed, as the parties were duly heard for and against the preliminary point of law through written submissions, the learned High Court judge had no alternative but to determine the competence of the appeal and come to the conclusion before she made findings on the merits. In *Shadida Abdul Hassan al Kassam v. Mahedi Mohamed Gulamali Kanji*, Civil Application No. 42 of 1999 (unreported), the Court emphasized that where a preliminary objection is raised, it should be heard first before the disposal of the matter on merits. Admittedly, in the matter at hand, as the first appellate judge had acquiesced to the style adopted by the parties of combining the written arguments on both the preliminary objection and the merits of the appeal, she was still bound to make her decision on the fate of the point of law which touched on the competence of the appeal known to the parties before she embarked on determining its merits. In the light of our deliberations and findings above, with respect, we hold that the first appellate judge made a fatal error in failing to make a specific determination and finding relating to the preliminary objection which was placed before her. In

the result, we allow the sole ground of appeal in its entirety. Ultimately, we nullify the judgment of the High Court and set aside the decree. Consequently, we order that the file concerning Civil Appeal No.51 of 2017 be remitted to the High Court of Zanzibar for it to proceed with the determination of the preliminary objection and the fate of the appeal in accordance with the law. In the end, given the circumstances which led to the instant appeal, we entirely agree with the appellant's counsel submission and order that parties shall bear their respective costs. DATED at ZANZIBAR this 1st day of December, 2021. F. L. K. WAMBALI JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL Judgment delivered this 2nd day of December, 2021, in the presence of Mr. Maulid Abdalla Juma, learned counsel for the appellant and Mr. Emmanuel Asama, learned counsel for the Respondent is hereby certified as the true copy of the original. DEPUTY REGISTRAR COURT OF APPEAL 10

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