IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J. A., MASHAKA, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 291 OF 2020

ROSE ROEZER ..... 1ST APPELLANT
ANNE MOHAMED ..... 2ND APPELLANT
EVANS BUHIRE ..... 3RD APPELLANT
ROBERT C. SHAURI ..... 4TH APPELLANT

VERSUS

NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED ..... 1ST RESPONDENT
BARAZA LA KISWAHILI LA TAIFA (BAKITA) ..... 2ND RESPONDENT

(Appeal from the Ruling and Draw order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Maghimbi, J.)

dated the 6th day of May, 2020

in

Land Case No. 126 of 2019

RULING OF THE COURT

31st May, 2023 & 11th March, 2024

MASHAKA, J.A.:

This is an appeal from the ruling of the High Court which struck out the appellants' suit on a point of preliminary objection that the plaint disclosed no cause of action against the first respondent.

The appellants in their plaint alleged that, they were employees of the National Insurance Corporation Tanzania Limited, the first respondent, between 1973 and 2012 in different capacities and were assigned housing facilities at Plot No. 75-78 Block "B" NIC Staff Flats at Kijitonyama, Kinondoni District in Dar es Salaam.

During the reformation of the Parastatal sector in Tanzania, the first respondent was placed under the Parastatal Sector Reform Commission (the PSRC) and the defunct Consolidated Holding Corporation (the CHC) was appointed as the receiver of the first respondent. All the assets owned by the first respondent were placed under the CHC. Sometimes on 13th July, 2009 the appellants were served with the notice to vacate the flats as they were about to be sold by the CHC, the receiver manager. Consequently, on 16th October, 2009 the Government confirmed its decision of purchasing all the buildings of the first respondent through Tanzania Building Agency (the TBA). Being distressed by the eviction, the appellants instituted a Land Case No. 126 of 2019 claiming among other things, the right of pre-emption and denial of the right of first refusal to buy houses which were owned by the first respondent.

In the written statement of defence, the respondents raised a notice of preliminary objection on the point that, one; the plaintiffs/*the appellants* had no locus standi to sue the first defendant, two; the plaintiffs had no cause of action against the first defendant and three; the plaint does not disclose any cause of action against the first defendant.

The trial court determined the second and third ground of objection and held that, the plaintiffs cannot have a cause of action on the first defendant who was de-specified in 2018 for acts which were done in 2009 when she was a specified corporation and the purported sale was done under the supervision of the PSRC. It further held that, at the time the first defendant was a specified corporation, then the plaintiffs had no cause of action against the first defendant to sue her in isolation of the Treasury Registrar. Consequently, the trial court struck out the suit. The appellants were aggrieved with the said order. They filed their present appeal predicating it on four (4) grounds of appeal which for reasons that will become apparent shortly, we will not reproduce them in this ruling.

In terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the appellants filed written submissions in support of the appeal likewise the respondents filed the reply to the appellant's submissions in terms of rule 106 (7) of the Rules.

At the hearing of the appeal, the appellants were represented by Mr. Melkior Saul Sanga, learned counsel and Ms. Pauline Mdendemi assisted by Mr. Kitia Turoke both learned State Attorneys, represented the respondents.

Prior to the commencement, Ms. Mndemeni raised a point of preliminary objection on a point of law that the appeal is not properly before the Court as it is against an interlocutory order. She expounds that, the impugned ruling of the High Court struck out the Land Case No. 126 of 2010 for failure to disclose a cause of action against the first respondent. She thus, submitted that the order appealed against was not appealable under section 5(2) (d) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA). She bolstered her argument referring the case of **Tanzania Posts Corporation v. Jeremiah Mwandi,** Civil Appeal No. 474 of 2020 (unreported) where the Court applied the nature of order test, in which the

remedies sought before the High Court were not granted hence an interlocutory order.

She further argued that, the right of the parties has to be conclusively determined but in the impugned decision the rights were not determined and the appellants has the right to reinstitute their suit upon amendment of the plaint. She cemented that the appeal is improperly before the Court as the High Court did not conclusively determine the rights of the parties' hence an interlocutory order. She referred us to the case of **Masolwa D. Msalu v. Attorney General and Another,** Civil Appeal No. 21 of 2017 (unreported).

In the alternative, Ms. Mndemeni submitted that, if it will be taken that the order of the High Court conclusively determined the suit, then the appellants failed to adhere to the mandatory requirement of section 5(1) (c) of the AJA, which they were required to obtain leave to appeal to the Court.

When probed by the Court on propriety of the order of the High Court in relevance to Order VII rule 11 of the Civil Procedure Code [Cap 33

R.E 2019] (the CPC), Ms. Mndemeni argued that the order of the High Court was not proper as the provision of the law directs the trial court that where a plaint does not disclose a cause of action to order amendment and the proper order the High Court ought to *grant was to* reject the plaint and order the amendment of the plaint. The learned counsel invited the Court to invoke its revisionary powers vested under the provisions of rule 4 of the Rules and order the High Court to consider Order VII rule 11 of the CPC and issue proper orders.

In response, Mr. Sanga strongly resisted the contention of the learned State Attorney that the order of the High Court is an interlocutory order. He submitted that the impugned order had finally determined the rights of the parties by striking out the suit. He further argued that all the authorities referred by the learned State Attorney are distinguishable.

On the second issue concerning leave to appeal to the Court, it is Mr. Sanga's contention that leave is no longer a requirement as there are amendments on land matters. The third issue concerning the applicability of Order VII rule 11 of the CPC, it was his argument that the High Court

was not correct to struck out the suit where the plaint did not disclose the cause of action. The High Court ought to have ordered amendment of the plaint and in terms of Order VII rule 12 of the CPC ought to have rejected and not strike out the suit. He implored the Court to set aside and quash the order of the High Court and allow the appellants to amend their plaint.

Ms. Mndemeni had nothing to rejoin.

On our part, having heard the submissions of both parties and critically revisit the order of the impugned decision, we think, the first issue before us for determination is on the propriety of the High Court order striking out the suit. We shall reproduce a part of the impugned decision which reads:

> *"Having made those findings, it is settled that the plaintiffs cannot have a cause of action on the 1st defendant who was de-specified in 2018 for acts which were done in 2009 when (she) was a specified corporation and the purported sale was done under the supervision of the PSRC. The blame would have gone to the 1st defendant if the PSRC had ceased to exist without any succession plan,*

but that (in) not the case at hand as I have elaborated above. Therefore, suing the 1st defendant for acts done when she was specified is not proper. As the plaintiffs in their pleadings throw the blame on the way the PSRC handled the sale and given the undisputed fact that at the time the 1st defendant was a specified corporation, then the plaintiffs have no cause of action against the 1st defendant to sue her in isolation of the Treasury Registrar. Section 40 of the Written Laws (Misc. Amendments Act) (No. 3) of 2016 has given the right to the Attorney General to intervene in any suit against the Treasury Registrar, with the word "shall" used in the section, and since the same section further provides for the applicability of the Government Proceedings Act, Cap 5 R.E 2019, this suit cannot be left to stand. The same is hereby struck out."

Both learned counsels do not dispute that the said order is against the dictates of Order VII rule 11 of the CPC. The trial judge was required to order amendment of the plaint or reject the plaint. We shall reproduce Order VII rule 11(a) of the CPC which reads:

"(11) The plaint shall be rejected in the following cases:

(a) Where it does not disclose a cause of action;

(b) Where the relief claimed in undervalue and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) Where the suit appears from the statement in the plaint to be barred by any law:

Provided that, where the plaint does not disclose a cause of action or where the suit appears from the statement in plaint to be barred by any law and the Court is satisfied that if the plaintiff is permitted to amend the plaint, the plaint will disclose the cause of action, or as the case may be , the suit will cease to appear from the plaint to be barred by any law, ***the court may allow the plaintiff to amend the plaint subject to such conditions as to costs or otherwise as the court may deem fit to impose.***"(Emphasis made)

In the light of the above legal position, our focus will be on Order VII rule 11(a) and its proviso. The provision is self-explanatory that once the Court is satisfied that the plaint did not disclose the cause of action it may reject the plaint or order the plaintiff to amend the same. The discretionary powers embrace the overriding objective principle for the purposes of timely adjudication of disputes. In the instant appeal, the High Court after being satisfied that the plaint did not disclose the cause of action, it struck out the suit. We subscribe to the submission of all learned counsels that the trial judge strayed into the error to strike out the suit instead of allowing the plaintiffs to amend the plaint. See: **Sunlog General Building Contractors Ltd and 2 Others v. KCB Bank Ltd,** Civil Appeal No. 253 of 2017 and **Sarbjit Singh Bharya and Another v. NIC Bank Tanzania Ltd and Another,** Civil Appeal No. 94 of 2017 (both unreported). We are of the firm view that the order of striking out the suit was not in tandem with the overriding objective principle which in the circumstances envisaged a right for the plaintiff to amend the plaint.

In the circumstances, the appeal succeeds. We invoke our revisionary powers under section 4(2) of the AJA, and set aside the

decision of the High Court and the resultant orders. The case is remitted back to the High Court for continuation of adjudication after the amendment of the plaint by the appellants.

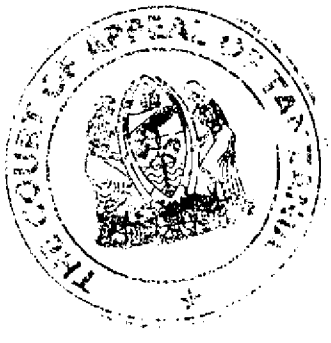
DATED at **DAR ES SALAAM** this 7th day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Ruling delivered this 11th day of March, 2024 in the presence of Mr. Melchior Sanga, learned counsel for the Appellants and Ms. Pauline Mdendemi, learned State Attorney for the Respondents, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL