IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: JUMA, CJ, KWARIKO, J.A. And SEHEL, J.A.)

CIVIL APPEAL NO. 71 OF 2022

MWAJUMA BAKARI (Administratix of the Estate of the Late Bakari Mohamed) ..... APPELLANT

VERSUS

1. **JULITA SEMGENI**
2. **JOSEPHINE MWALIMU** ..... **RESPONDENTS**

(Appeal from the Judgment and Decree of the High Court of Tanzania, Tanga District Registry at Tanga)

(Mkasimongwa, J.)

dated the 20th day of August, 2019

in

Land Appeal No. 15 of 2017

.....

JUDGMENT OF THE COURT

9th & 12th May, 2022

KWARIKO, J.A.:

Formerly, the appellant, Mwajuma Bakari in her capacity as administratix of the estate of her late father Bakari Mohamed sued the respondents herein, Julita Semgeni and Josephine Mwalimu in the District Land and Housing Tribunal of Muheza (the DLHT) over a piece of land situated at Jibandeni Village, Magila Ward within Muheza District as part of the estate of her late father (the suit land).

The appellant lost the suit before the DLHT and unsuccessfully appealed in the High Court of Tanzania at Tanga (the High Court). Undaunted, she has knocked the door of this Court on appeal.

Briefly stated, the facts of the case which led to this appeal are as follows. The appellant claimed that the suit land is part of three acres owned by her late father since 1954 and had been living in it with his family until he died on 16th August, 2002. That, in the suit land there are graves of her relatives. The appellant averred further that the respondents owned land adjacent to the suit land. However, she sued them because they exceeded the boundaries and cultivated in the suit land.

For their part, the respondents averred that, they inherited the suit land from their mother who died in 1998 following which the first respondent was appointed administratix of her estate. That, in the suit land, they have cultivated banana plants, maize and cassava. The respondents also claimed that, formerly, the appellant had successfully instituted a claim against them under her own capacity at Magila Ward Tribunal in Application No. 13 of 2014 before it was reversed by the DLHT in Land Appeal No. 80 of 2014.

One of the issues for consideration before the DLHT was whether the suit was *res judicata*. In its decision, the DLHT answered that issue in

the negative for the reason that in the suit before the Ward Tribunal and ultimate Land Appeal No. 80 of 2014 of the DLHT, the appellant sued under her own capacity whereas currently she is claiming as administratix of the estate of her late father. However, the DLHT found that the suit land was not part of the estate of the appellant's late father, hence dismissed her appeal.

On being aggrieved by that decision, the appellant preferred an appeal before the High Court on the following three grounds:

1. *That, as there was abundant evidence that for many years the suit land was in possession of the deceased Bakari Mohamed and his beneficiaries after his death, and as there was no evidence at all that the respondents possessed the same at all except invading it in January 2013, the Tribunal grossly misdirected itself in holding that the appellant had not proved her case.*
2. *That, as neither the respondents nor their mother had taken any action against Bakari Mohamed or his beneficiaries for use of the land in dispute for many years, the District Land and Housing Tribunal misdirected itself in holding that the appellant had not proved her case.*
3. *That, as the respondents were sued in their personal capacities and not as administratix of the estate of their late mother, the District*

Land and Housing Tribunal misdirected itself in believing the evidence that the suit land belonged to the respondents' deceased mother and not part of the estate of Bakari Mohamed.

In dismissing the appellant's appeal, the High Court, observed that the case was *res judicata* for the reason that, at first the appellant sued the respondents in her personal capacity she is thus estopped from claiming the suit land as part of the estate of her late father.

Before this Court, the appellant raised the following five grounds of appeal:

1. *That, the Honourable High Court Judge erred in law and fact by disregarding the evidence adduced to the effect that the appellant and her late father have been using the disputed property for burying and cultivation for more than twelve years without interference from either the respondents or from their late mother.*
2. *That, the Honourable High Court Judge erred in law and fact for entertaining the respondents as proper parties to the case and declaring them owners of the disputed plot while they had no locus standi as their claim of ownership was based on a plot alleged to have been owned by their late mother.*

3. *That, the Honourable High Court Judge erred in law and fact by holding that no proof of letters of administration is required in cases involving unregistered land.*
4. *That, the Honourable High Court Judge erred in law and fact by holding that the matter was res judicata.*
5. *That, the Honourable High Court Judge erred in law and fact by relying and entertaining matters which were not adduced during the trial tribunal.*

In terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 the appellant also filed written submissions to amplify her grounds of appeal. On the day the appeal was called on for hearing, Messrs. Egbert Mujungu and Obediodom Chanjarika, learned advocates, represented the appellant and respondent, respectively.

We propose to begin with the fourth ground of appeal which has raised a point of law. In his submission in that respect, Mr. Mujungu argued that the issue of *res judicata* was dismissed by the DLHT and it was not one of the grounds of appeal filed by the appellant before the High Court. He thus contended that, the Judge erred to decide it after being raised in the course of the reply submissions by the respondent's counsel without giving the parties sufficient opportunity to be heard, more so because the appellant's advocate had opposed to it. He argued further

that, the High Court did not decide the grounds of appeal on record but decided the appeal basing on extraneous matters. To fortify his contention, Mr. Mujungu cited the Court's decision in **Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Services,** Civil Appeal No. 257 of 2018 (unreported).

Responding, Mr. Chanjarika argued that the High Court did not err to hold that the case was *res judicata* because it is not disputed that there was Land Appeal No. 80 of 2014 at the DLHT in respect of the same subject matter which the appellant lost and did not appeal against it. He argued therefore that, it was not legally correct for the appellant to file a fresh suit on the same subject matter. He added that the issue of *res judicata* was raised at the DLHT before it was raised by the respondents' counsel in the High Court.

We have dispassionately considered the parties' submissions and find the issue for determination is whether the High Court erred to decide the appeal basing on the issue of *res judicata*. It is not disputed that that issue was dismissed by the DLHT and it was not one of the grounds of appeal which was filed by the appellant. This issue was raised in the course of the reply submissions by the respondents' counsel which was however opposed by the appellant's counsel.

It is our considered view that, even though the issue of *res judicata* is a point of law which can be raised at any time during the pendency of the case, in the instant case, the parties were not given sufficient opportunity to be heard on the same. Unfortunately, the High Court Judge decided the appeal basing on that issue only and left the grounds of appeal raised before it, unattended. It is trite law that the court is enjoined to consider the grounds of appeal presented to it either generally or one after another, and failure to consider the grounds is fatal to the decision. In the Court's decision in the case of **Malmo Montagekonsult AB Tanzania Branch v. Margret Gama,** Civil Appeal No. 86 of 2001 (unreported), where the High Court determined the appeal after consolidating several grounds of appeal into one, the Court observed thus:

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately".*

Other decisions which dealt with similar scenario include; **Simon Edson @ Makundi v. R,** Criminal Appeal No. 19 of 2017 and **Nyakwama s/o Ondare @ Okware v. R,** Criminal Appeal No. 507 of 2019 (both unreported).

The rationale of the cited decisions is that, the appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal but it is bound to address and resolve the complaints of the appellant either separately or jointly depending on the circumstance of each appeal. Contrary to that principle, in the instant case, the High Court did not at all decide the grounds of appeal presented before it, and instead it decided the appeal on the basis of the point of law which was not sufficiently canvassed by the parties.

Giving a party sufficient opportunity to be heard is consistent with the principles of fair hearing as envisaged under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, as amended from time to time. The said article directs that, when rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to among others, a fair and full hearing. This principle has been discussed by the Court in its various decisions including **Mbeya-**

Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma [2003] T.L.R. 251, where it was held *inter alia* that:

> *"(i) The right of hearing is a fundamental constitutional right in Tanzania by virtue of Article 13 (6) (a) of the Constitution;*
>
> *(ii) The judge's decision to revoke the rights of M/s Kagera and the appellant, without giving them opportunity to be heard, was a violation of the Rules of natural justice, but also a contravention of the Constitution, hence void and of no effect."*

See also **Severo Mutegeki & Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019 (unreported).

Relying on the cited authorities, we find that the High Court erred to deny the parties sufficient opportunity of being heard on the issue of *res judicata* occasioning injustice to them. It follows therefore that the omission vitiated the proceedings before the High Court and its resultant judgment which we hereby quash and set aside.

As to the way forward, since the grounds of appeal were not determined, for the interest of justice, we remit the case to the High Court for it to hear the parties on the basis of those grounds, before another

judge. Should the High Court find it necessary to determine the issue of *res judicata*, it shall accord the parties sufficient opportunity to be heard on the same. Now, since the fourth ground has disposed of the appeal, we find no need to deliberate on the remaining grounds.

In the event, we find the appeal meritorious and it is hereby allowed. In the circumstance of the case, each party shall bear its own costs.

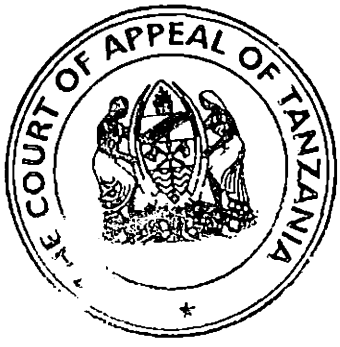
DATED at **TANGA** this 11th day of May, 2022.

I. H. JUMA
CHIEF JUSTICE

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 12th day of May, 2022 in the presence of Mr. Obediodom Chanjarika who holding brief for Mr. Gilbert Mujungo, the learned counsel for the Appellant and Mr. Mr. Obediodom Chanjarika learned counsel for the Respondents, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL