

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NDIKA, J.A., FIKIRINI, J.A., And ISSA, J.A.)

CIVIL APPEAL NO. 137 OF 2021

RAJABU YUSUFU KIRUMBI, the Administrator
of the Estate of the Late **MTAKUJA KONDO**..... **1ST APPELLANT**
MWANGAZA KONDO **2ND APPELLANT**
ABDU MUSTAFA KONDO, the Administrator
of the Estate of the Late **MUSTAFA KONDO**..... **3RD APPELLANT**
LWINDE KONDO **4TH APPELLANT**

VERSUS

WENDO MALIKI **1ST RESPONDENT**
ORLANDO COSMA BARRETO **2ND RESPONDENT**
CLAUDE RODRIGUES **3RD RESPONDENT**
(Appeal from the decision of the High Court of Tanzania (Land Division)
at Dar es Salaam)

(Mutungi, J.)

dated the 23rd day of October, 2014

in

Land Case No. 182 of 2013

JUDGMENT OF THE COURT

15th & 20th March, 2024

ISSA, J.A.:

The dispute giving rise to this appeal originated from the decision of the High Court (Land Division) at Dar es Salaam (Mutungi, J.) in Land Case No. 182 of 2013. The background facts of that case are ostensibly short. The appellants were claiming that four of them together with late Kibibi Kondo, the mother of the 1st respondent are the children of late

Asha Juma who died intestate and left a house no. 30 at plot no. 89 situated at Chunya/Arusha Street within Ilala Municipality at Dar es Salaam. Each of the five children owns 20% shares in the said house. The 1st respondent, who was the administrator of the estate, without the consent of the appellants allegedly sold the said house to the 2nd and 3rd respondents. The appellants got the knowledge of the sale transaction in April 2013 and they instituted Land Case No. 182 of 2013 at the High Court (Land Division) at Dar es Salaam.

The said land case met with a preliminary objection raised by respondents on the point of law that the suit was res judicata. The learned trial judge ordered the preliminary objection to be disposed of by way of written submissions. The respondents were ordered to file their submissions by 17.9.2014 whereas the appellants were to file their reply by 1.10.2014 and the rejoinder, if any, was to be filed by 8.10.2014. The ruling on the preliminary objection was scheduled to be delivered on 23.10.2014. The respondents did file their written submission, but not on the date fixed by the court. They filed their written submission on 9.10.2014. The appellants who were already late when they received the respondents' written submission did not file their reply at all. Hence, the learned trial judge proceeded to determine the preliminary objection raised by respondents based on the written

submission filed by the respondents. She sustained the objection that, the suit was res judicata. The suit was dismissed on 23.10.2014.

Aggrieved with that decision, the appellant lodged this appeal predicated on two grounds of appeal followed by a written submission.

The grounds of appeal are thus:

- 1. That the Honourable trial judge erred in law by denying the appellants right to be heard by considering only the submission filed by the respondents and which was filed out of time.*
- 2. That the Honourable trial judge erred in law in holding that the suit in Land Case number 182 of 2013 was barred by the doctrine of res judicata."*

At the hearing of the appeal, the 1st and 3rd appellants were present in person unrepresented while the 3rd and 4th appellants though were duly served did not enter appearance. Therefore, the appeal was heard in their absence. The respondents, on the other hand, were represented by Mr. Ambrose Malamsha, learned advocate who on 8.3.2024 lodged a notice of preliminary objection containing two preliminary points of objections. When the appeal was called on for hearing Mr. Malamsha at the outset abandoned the preliminary objections and the hearing of the appeal proceeded on merit.

Mr. Rajabu Yusufu Kirumbi, and Mr. Abdu Mustafa Kondo, the 1st and 3rd appellants respectively, in their address to the Court, adopted their written submission which was lodged earlier on by their former advocate. They had nothing of substance to add.

For the reason that will be apparent shortly, in the determination of this appeal the Court will only deal with the first ground of appeal. The appellants in their written submission faulted the learned judge for abrogating their right to be heard. They submitted that, the preliminary objections were scheduled to be argued through written submissions and the time for filing the written submissions was fixed by the trial court. The respondents were scheduled first to file their written submission on 17.9.2014, but they failed to comply with the order of the trial court. They filed their written submission on 9.10.2014 without seeking and obtaining extension of time to do so.

The appellants, on the other hand, were ordered to file their reply to respondent's written submission on 1.10.2014 which they did not file because of the failure of the respondents to file their submission on time. When they received the respondents' written submission their scheduled date of filing their written submission had already lapsed, hence, they did not file their reply at all.

They added that the learned trial judge did not call them, instead she proceeded with the determination of the preliminary objection without hearing the appellants. Therefore, the appellants were denied their right to be heard. They bolstered their argument by the Court's decision in **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251.

Mr. Malamsha responding to this ground of appeal admitted that, the respondents filed their written submission not on the date fixed by the trial court which was 17.9.2014. Instead they filed it on 9.10.2014, but he insisted that the trial judge was right in proceeding to determine the preliminary objection based on the submission filed by the respondents. He said the appellants were silent and did not make a follow up, hence, their silence could not be condoned. He urged the Court to dismiss the appeal.

We shall now proceed to determine the first ground of appeal and the issue for determination is whether the appellants were denied their right to be heard before the trial court disposed of the suit by sustaining the preliminary objection raised by the respondents. It was common ground that the trial court ordered the hearing of the preliminary objections to be through written submissions to be filed on the date fixed by the trial court. Unfortunately, the respondents who were the

first to file their submission did not comply with the order of the trial court. While they were ordered to file their written submission on 17.9.2014 they filed the same on 9.10.2014. The appellants, on the other hand, were scheduled to file their reply on 1.10.2014. Hence, when the respondents filed their submission, the appellants were already 8 days late. We are of the view that, the proper approach was for the respondents to seek extension of time and once granted both appellants and respondents would have filed their written submissions on the new dates fixed by the trial court. But, in the circumstances of the instant case where respondents filed their belated written submission without the leave of the trial court, prudence dictates that the learned trial judge should have called the parties and hear them before determining the preliminary objection before the court.

Leaping to the ground of appeal raised we answer it in the affirmative. The appellants were denied their right to be heard. The preliminary objections were determined without giving them an opportunity to express their side of the case. It is a cardinal principle of natural justice that a person should not be condemned unheard, fair procedure demands that both sides should be heard. Further, the decision reached in violation of the principle of natural justice is void and is of no effect. Our jurisdiction is blessed with authorities which

emphasised that, the courts should not decide matters affecting rights of parties without according them their right to be heard. Just to mention a few:

1. ***Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma*** [2003] T.L.R. 251,
2. ***Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy***, Civil Application No. 33 of 2002 (Unreported),
3. ***ECO-TECH (Zanzibar) Limited v. Government of Zanzibar***, ZNZ Civil Application No. 1 of 2007 (unreported),
4. ***Samson Ng'walida v. The Commissioner General of Tanzania Revenue Authority***, Civil Appeal No. 86 of 2008 (unreported),
5. ***Oysterbay Vilias Ltd v. Kinondoni Municipal Council and Another***, Civil Appeal No. 110 of 2019 [2021] TZCA 190 (7th May 2021, TANZLII),
6. ***R.S.A Limited v. Hanspaul Automechs Limited and Another***, Civil Appeal No. 179 of 2016 [2021] TZCA 96 (6th April 2021, TANZLII).

In **Mbeya-Rukwa** (supra) the Court expressed the position of the law with respect to the right to be heard. It is a fundamental constitutional right. The Court stated:

"In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among the attributes of equality before the law and declares in part:

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu..." [When the right and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing...].

Further, the Court in **Abbas Sherally** (supra) emphasised that even if the decision would be the same whether the party was accorded the right to be heard or not, still the court is duty bound to hear the parties before a decision is reached. The Court stated:

"The rights of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. The right is so basic that a decision which is arrived at in violation of it 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 natural justice”.

In **R.S.A Limited** (supra) the Court was faced with a situation where an objection on the jurisdiction of the trial court was raised in the final written submission. Therefore, the parties were not invited to argue the point of objection before it was dismissed by the trial court. The Court stated that it was incumbent on the part of the learned trial judge to re-summon and hear the parties. The Court added that:

“The Court in a plethora of decision has emphasised that courts should not decide matters affecting rights of parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned without being heard”.

In view of what we have discussed, we are satisfied that the adverse decision of the learned trial judge to proceed with the determination of the preliminary objection raised without according the appellants another opportunity to file their written submission is illegal and it was in violation of the fundamental right to be heard and the appellants were prejudiced. This renders the entire ruling a nullity.

Therefore, we invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 to nullify the ruling of the trial court. We direct the case file to be returned to the High Court to allow the parties to file their written submissions and to determine the point of objection raised. This should be expedited considering that the matter has been pending in court since 2013. We make no order as to costs.

DATED at DAR ES SALAAM this 19th day of March, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2024 in the presence of the 1st and 3rd Appellants appeared in person, in the absence of the 2nd and 4th Appellants and in the presence of Mr. Ambrose Malamsha, learned counsel for the Respondents is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL