IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT KIGOMA

LAND APPEAL CASE NO. 16 OF 2019

(From the decision of District Land and Housing Tribunal for Kigoma in Land Case Application No. 42 of 2011)

DISTRICT EXECUTIVE DIRECTOR

KASULU DISTRICT COUNCIL..... APPELLANT

VERSUS

YOHANA S/O KIBHOLE.....RESPONDENT

RULING

Date of last Order: 21/7/2020

Date of Ruling: 21/7/2020

Before: Hon. A. Matuma, J

The appellant and two others namely **Bakari Maulidi** and **Perpetua Kimondo** stood sued as respondents in the District Land and Housing Tribunal for Kigoma. Bakari Maulidi was the 1st respondent and Perpetua Kimondo was the 2nd Respondent. The applicant thereat was **Yohana Kibhole** now the Respondent.

The dispute between the parties at the trial tribunal was over the ownership of **plots no. 637 and 639 Block "R" at Mwilavya - Kasulu** in Kigoma Region.

The respondent alleged that he owned and possessed the disputes plots but the appellant without any justifiable cause sold and subsequently re-

allocated them to the said Bakari Maulidi and Perpetua Kimondo respectively.

The trial tribunal was satisfied that indeed the respondent was the original owner of the dispute plots and those plots were unfairly allocated by the appellant to those two; Bakari and Perpetua without any compensation to the applicant now respondent.

The tribunal however observed that since the said Bakari Maulidi and Perpetua Kimondo had already developed the plots and lived in, they should continue to possess the plots respectively and be regarded as lawful owners but since it was the appellant who unfairly dispossessed the respondent those plots, she was liable to pay the respondent general damages to the tune of **Tshs. 15,000,000/=** and give the respondent **alternative plots** which resemble to the dispute plots in lieu of compensation thereof.

Before the appeal could be heard on merit the respondent rose to argue a preliminary objection to the effect that this appeal is bad in law for contravening section 25 (3) of the Magistrate Court Act, Cap. 11 R.E 2019. After some discussions instigated by the court itself on the propriety of the preliminary point of objection, Mr. Abdulkheir Ahmad learned advocate for the respondent prayed to withdraw the objection and he was accordingly granted.

The preliminary objection having been withdrawn, this court ***suo motto*** raised a legal issue; *whether in the circumstances of this case, this appeal can legally be entertained in the absence of Bakari Maulidi and Perpetua Kimondo as necessary parties who may be affected by the decision of this court if the judgment of the trial tribunal will be nullified and or quashed.*

Mr. Emmanuel Ladislaus learned solicitor advocated for the appellant while Mr. Abdulkheir Ahmad learned advocate represented the respondent.

Mr. Emmanuel Ladislaus the learned Solicitor started to address the court on the issue and argued that the one who was aggrieved by the impugned judgment was the appellant because it is her who was held liable to pay the general damages and issue alternative plots to the respondent. He argued that Bakari Maulidi and Perpetua Kimondo were not held liable and thus not necessary in this appeal.

Even though the learned solicitor at the end he materially conceded that in the circumstances of this appeal Bakari Maulidi and Perpetua Kimondo are necessary parties, he should therefore be allowed to make some amendments.

Mr. Abdulkheir Ahmad learned advocate for the respondent submitted that the two persons herein above named were necessary Parties to be joined in this appeal and it would be improper to determine this appeal with the view of challenging the judgment of the trial tribunal without their knowledge.

On my party, I should state at the right beginning that this appeal was wrongly drafted against the respondent alone, leaving behind the two other parties who stood as parties during trial and are directly benefiting from the judgment sought to be quashed in this appeal.

Up to this juncture those Bakari Maulidi and Perpetua Kimondo have in possession of the impugned judgment and decree as among their lawful instruments in relation to ownership of the plots in dispute. It will be illegal to determine the propriety and merits or otherwise of such judgment and decree without their knowledge. The appellant seeks to quash such

judgment and set aside the decree thereof. Quashing someone's judgment and decree without according him an opportunity to be heard is illegal as it amounts to violation of the fundamental principle of the right to be heard. It has been held in various authorities that nobody should be condemned unheard. Such authorities are many without numbers including but not limited to that of ***Mbeya – Rukwad Auto Parts and Transport Limited versus Jestina George Mwakyoma [2003] TLR 251.***

In the instant appeal the right of the parties herein cannot be determined in the absence of **Bakari Maulidi** and **Perpetua Kimondo** because the respondent alleged that they wrongly purchased and were unlawfully allocated his plots by the appellant herein. The trial tribunal after hearing the parties including the two was satisfied that indeed the plots in question were unfairly dispossessed from the respondent and allocated to the two without any compensation to the respondent. They were however declared owners of those plots as they have already developed them and it was the fault of the appellant who allocated them. In lieu thereof the appellant was condemned to allocate the respondent alternative plots of the same nature.

In the circumstances, the titles over the dispute plots to Bakari Maulidi and Perpetua as declared by the trial tribunal cannot be left to stand if this Court entertains and allows this appeal. This is because those titles are subject to payment of general damages and allocation of alternative plots by the appellant to the respondent. Therefore, it is imperative that the two are accordingly heard before the impugned judgment is altered or quashed so that they can defend their interests in the suit.

In fact, the appellant's grounds of appeal purports to challenge that the trial tribunal's judgment was erroneously reached. If we have to

determine this appeal and perhaps allow it, the effect thereof would be to restore the parties to their original status which existed before the institution of the suit at the trial tribunal. If that is done, it means the respondent would be entitled to commence the suit afresh regarding them said Bakari Maulidi and Perpetua Kimondo as trespassers thereof. By doing so it will be a surprise to the two persons herein above named to be retried on the same subject matter without having been heard on this appeal, as by now they are peaceful enjoying occupations of the dispute plots believing that the ownership thereof was conclusively determined by a competent tribunal and no appeal against them was ever preferred.

On the other hand, if this court is again satisfied that indeed the plots in question were lawfully owned by the respondent and unfairly reallocated to the two without compensation, it might order vacant possession against them to the respondent. We cannot do so without according them opportunity to defend their decree. It is my firm view that any attempt to determine this appeal on merit and whatever decision that might be reached would result into condemning Bakari Maulidi and Perpetua Kimondo unheard. I am not prepared to make such mistake.

The appellant is also complaining of illegalities in the trial tribunals proceedings. It is my settled view that the alleged illegalities cannot be determined without hearing the said Bakari Maulidi and Perpetua Kimondo because they were parties to the said proceedings, they benefited from such proceedings through which they satisfied the trial tribunal that they were not the one to blame and were lawfully allocated the dispute plots. They must therefore, be accorded opportunity to defend their decree and interest in the dispute plots. They have also a legal right to state whether they also do observe the alleged illegalities or not.

Being co-defendants during trial does not preclude them from being joined in this appeal as respondents against the trial tribunal's judgment if they by themselves became satisfied with the impugned judgment and did not co-appeal so long as the results in the appeal might in one way or another affect their interest in the dispute land. I once held so in the case of ***Frank Miharugwa versus Jumanne Rusaba, Land Appeal no. 22 of 2019*** (High Court at Kigoma)

A party to the suit cannot be forced to appeal against the decision of the lower Court but he must be joined in an appeal as a respondent if the decision of the lower Court is challenged, and the relief sought in an appeal are likely to affect his rights dully determined and declared at the trial Court. The appeal should be brought against any, who was a party to the original suit, and against whom some reliefs are sought on appeal, and or against whom the decision on appeal might affect and in whose absence an effective decree cannot be issued.

In the instant appeal, the trial Court determined and adjudged for the respondent and safeguarded the rights of ownership over the dispute plots to the said Bakari Maulidi and Perpetua Kimondo. The appellant was however condemned to make re-allocation of alternative plots to the respondent and pay him general damages for the sufferings. Therefore, despite the fact that those two were co-respondents with the appellant in the suit at the trial, technically they were winners along with the Applicant thereat now the respondent and therefore the only loser was the current appellant. The aggrieved loser if decides to appeal must bring the appeal against all who were parties to the suit and against whom the impugned decree and judgment are sought to be nullified and or quashed

The appellant cannot therefore challenge the trial tribunal's judgment which had declared the rights of other parties along with the respondent

without joining them all for them to defend their titles as it was dully decreed.

I therefore, conclude the issue that this appeal cannot be legally determined in the absence of Bakari Maulidi and Perpetua Kimondo who are likely to be affected by whatever outcome of this appeal and I accordingly struck out this appeal for being incompetent for none joinder of a necessary parties.

The appellant prayed that in the circumstances that Bakari Maulidi and Perpetua Kimondo are necessary parties, she be allowed to make some amendments to include them.

I am far to agree with the prayer for amendments. In the case of ***Yunus Seif Kaduguda versus Razak Seif Kaduguda & Another, Misc. Land Application no. 7 of 2020*** (High Court – Kigoma), I had time to rule out that;

"It is not always however, that every error or omission is condonable. While some errors can be corrected by amendments with leave of the court, some others would call a direct struck out of the matter. ***When the matter before the court is held to be incompetent, the same cannot be corrected or amended since it is regarded as if it is not there".***

I reiterarte the same holding in this appeal.

In **Hassan Mohamed** *(administrator of the Estate of the late Mohamed Kikondo)* **Versus Spelansa Zakaria, Misc. Land Application no. 22 of 2016** my learned brother **Utamwa, Judge** held that an ***incompetent matter can neither be withdrawn nor amended but struck out.***

Not only that but also there is a question of time limitation. As an appeal must be brought within the statutory prescribed time and the fact that this appeal was brought after the grant of extension of time in which the said Bakari Maulidi and Perpetua Kimondo were not parties, I hold that it is quite unfair to allow them being dragged on appeal without extension being sought against them. They are entitled in law to believe that no further action has ever been taken against their decree since then. Those parties cannot be dragged in an appeal unless heard on an application for the extension of time. This is because they have statutory right to hear the grounds upon which an appeal could have not been brought against them within the prescribed period. But also, for them to state whether circumstances have already changed to the extent that any extension of time would prejudice the interest of justice on the so changed circumstances.

In this case, the appellant delayed to appeal and therefore she successfully applied for the extension of time hence this appeal. Even though Bakari Maulidi and Perpetua Kimondo as I have said were not made parties to the said application and they are therefore not aware on the ongoing litigation on the matter which was concluded in their favour way back on the 16/02/2015 almost five years ago.

The appellant is thus at liberty to start afresh his appeal against all necessary parties subject to the law governing time limitations, i.e she must first obtain extension of time against all the intended respondents. Since this appeal ends with the issue raised by the court itself, no orders for costs to either party. Right of appeal fully explained.

A. Matuma

Judge

21/7/2020