IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 13 OF 2017

(From the Decision of the District Land and Housing Tribunal of Karatu District at Karatu In Land Case No. 20 of 2016)

PETRO GEWE.....APPELLANT

VERSUS

JOSEPH MANDOO.....RESPONDENT

JUDGEMENT

MWENEMPAZI, J.

The appellant is aggrieved by the decision of the District Land and Housing Tribunal of Karatu District at Karatu in Land Application No. 20 of 2016 delivered on the 17th March, 2017 by Hon. Viscent A. Ling'wetu, Chairperson. He has filed four grounds of appeal in a mission to challenge the whole decision and order of the tribunal as follows:

1. That the trial tribunal erred in law and in fact when it ordered that this matter (i.e. Application No. 20 of 2016) is *res judicata* to the application No. 19 of 2003 while the subject matter in this case is different from the subject matter in the application No. 19 of 2003.

2. That the trial tribunal erred in law and in fact when it failed to consider that a cause of action in this case(*understood as impugned decision)* is different to a cause of action in application No. 19 of 2003 whereby in this case the appellant complained over the act of the respondent to misuse th execution conducted in respect of Land Application No. 19 of 2003 and invaded the appellant's Land by 70 x 223 paces which is beyond the Land acquired to be executed.
3. It was wrong for the trial tribunal to believe that a claim has to be proved by many witnesses and avoid to consider the principle that number of witnesses does not matter; what matters is the requirement that the witness is able to prove and establish a claim.
4. That the Tribunal violated rules and principles in visiting *locus in quo.*

The appellant therefore prays for the judgement and decree of this court quashing the judgement and decree of the District Land and Housing Tribunal for Karatu in Land Application No. 20 of 2016 and this appeal be allowed.

Parties in this appeal represented themselves. They did not show to understand the procedure of conducting an appeal. On the 15th November, 2018 this court ordered them to present their case by way of written submission. A scheduling order was made and they duly complied to the order.

As I was composing a judgement, I noted that there was missing information or the information available was not clear in describing the dispute land. On

the 30th May, 2019 I made an opinion that it was necessary to have a sketch map of the dispute land drawn by the authority competent in mapping and surveying, preferably the land officer of the local area. Thus, an order was issued to remit the original file for additional evidence to be recorded. The nature of which should be such that a piece of land belonging to the respondent pursuant to the Execution Order in Land application No. 19 of 2003 should be identified and the area alleged to have been encroached be shown in the map. It was further ordered that the neighbours should also be allowed to confirm and testify so that it is confirmed that everyone with interest on the land around the area is satisfied that his or her interests are not interfered with. Once that is done, the original case file be brought back for final determination.

The Honourable Chairperson of District Land and Housing Tribunal, on the 29th November, 2019 brought back the original case file of the District Land and Housing Tribunal by letter dated 29th November, 2019 with (reference) Kumb. No. DLHT/KRT/APPL. NO. 20/2016/1 addressed to the Deputy Registrar of the High Court of Tanzania, Arusha District Registry with the following observations:

> *"Jalada hili mnamo tarehe 13/6/2019 lilirudishwa Baraza la Ardhi na Nyumba Wilaya ya Karatu kwa Maelekezo ya Kutembelea upya eneo lenye mgogoro pamoja na kuchukua Ushahidi, kuchora ramani ya eneo lenye mgogoro.*
>
> *Hata hivyo nasikitika kukujulisha kwamba Baraza la Ardhi na Nyumba Wilaya ya Karatu limeshindwa kutekeleza maagizo*

hayo kwa kukosa ushirikiano kutoka kwa Mdai Petro Gewe ambaye ameitelekeza kesi yake

Hivyo nalilejesha Jalada husika Na. 20 /2016 kwako ili liende kwa Jaji mhusika kwa ajili ya hatua zake muhimu..."

Before remitting the file back to the District Land and Housing Tribunal for taking additional evidence, parties had been ordered to present the appeal by way of written submission. They duly complied to the order of the court by filing their respective written submissions.

The appellant in his submission on the first ground of appeal stated that the trial tribunal improperly declared that application No. 20 of 2016 was *res judicata* due to the case filed in 2003 and registered as Application No. 19 of 2003. The appellant submitted that in essence, it was not *res judicata* as the subject matter in Application No. 20 of 2016 is based on the expropriated 70 x 223 paces by the Respondent while the one in Application No. 19 of 2003 is based on 68 x 223 paces awarded in favour of the Respondent. According to the appellant, this proves that the issues in application No. 20 of 2016 are different. The latter case was filed after the respondent misused the execution proceedings by invading into the appellant's land different from the one that was the subject to the execution order 70 x 223 paces as elaborated in the ground two of appeal below.

In the ground two of appeal the appellant argues that it further proves the existence of two different issues in the applications. He has submitted that while application No. 19 of 2003 the cause of action was on the alleged intrusion by the appellant into the respondent's property (68 x 223 paces)

the cause of action in application No. 20 of 2016 arose as a result of the misuse of the execution order by the Respondent who expropriated the appellant's land 70 x 223 paces.

The appellant has cited the case of **George Shambwe vs. Tanzania Italian Petroleum Co. Ltd [1995] T.L.R.20** where it was held that: -

> *"For res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court;"*

On the two grounds of the appeal as submitted by the appellant, the Respondent has submitted that the appellant re-claimed the area which was already decided in Land Case No. 19 of 2003 on the ground that the area of 70 x 223 paces of land was within the area which the Respondent was handed over in the execution of land Case No. 19 of 2003 before the Ward Tribunal of Karatu whereby the decree was executed accordingly. That all the legal measures had been taken, fulfilled and the land in dispute was handed over to the lawful owner, the Respondent.

The fact that the appellant was afforded the right to be heard by the District Land and Housing Tribunals, the District Commissioner of Karatu District, the Ward Executive officer, Village Executive office and the Village Council. Continuing with the same issues is going against the doctrine of *Res Judicata.*

It was based on the argument in respect of the two grounds of appeal I decided to order for additional evidence to be taken. However, the appellant

absconded and or was not cooperative. In the proceedings in the trial tribunal, it shows there was a visit to the *locus in quo* on the 10th February, 2017. It was found that the appellant had in fact claimed the area different from the area belonging to the respondent. And the appellant has even cultivated the land almost 50 meters.

As observed herein above, the appellant is instituting cases he cannot substantiate. When I gave an order for an additional evidence, I had the opinion the appellant just needs assistance to demarcate his area but the suit was not necessary at all. Relying on the finding of the District Land and Housing Tribunal, it is apparently clear that essentially the dispute was resolved earlier in Application No. 19 of 2003 and the appellant is just trying to reclaim the land. There was no need for him to file another application to claim the land.

In the judgement of the District Land and Housing Tribunal, the Honourable Chairman has observed at page 2 paragraph 5, that, I quote: -

> *"I have carefully read the evidence adduced by PW1(Petro Gewe) and tendered document A1., the applicant has failed to establish his claim over the invasion of(**by**) the respondent into area with 70 x 223 paces of land..."*

At paragraph 8 of the same page he observed again as follows:

> *"During the site visiting, the Applicant show that the area of 70 x 223 paces of land was within the area which the Respondent was handed over in the Land Case No. 19 of 2003. The difference of two (2)*

*footsteps may be caused by the steps (**understood as length of steps**) of the one who measured it."*(bold words are mine)

I have a firm view that the appellant failed to prove the allegations in the trial tribunal and now in the appeal he has again failed to help this court to verify the evidence which was collected by the trial Tribunal during hearing and when they visited the locus in quo and I was anticipating cooperation to make clear he boundaries of the appellant's farm differentiating it from other neighbours.

On the third ground of appeal, I agree there is no requirement to have more witnesses but the truth is necessary to prove the fact. The other fourth ground of appeal, the appellant has complained that the Tribunal chairman violated rules relating to the visit on *locus in quo*. He has cited the case of ***Nizar M. H. Ladak vs. Gulamali Fazar Janmohamed*** **[1980]T.L.R. 29** where the court of appeal held as follows:-

"when a visit to a locus in quo is necessary or appropriate and as we have said this should only be necessary in exceptional cases, the court should attend with parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter and for instance if the size of the room or width of a road is a matter in issue have the room or road measured in the presence of the parties, and a note be made thereof. When the court re-assembles in a court room. All such notes should be read out to the parties and their advocates, and comments, amendment, or objections called for and if necessary incorporated. Witnesses when to give evidence of all those facts, if

they are relevant, and the Court only refer to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust this procedure will be adopted by the courts in future."

It is very unfortunate the appellant himself absconded to assist this court in resolving the current dispute following the directives above. It will be an academic exercise to deal with it only on papers. I therefore leave it for knowledge sake and proceed to conclude that the abscondment by appellant is a clear sign he had no reasonable explanation to support his case.

For the reasons stated herein the judgement, I have a firm view that there was no need for the appellant to file Application No. 20 of 2016. The appeal is dismissed with cost and the decision of the District Land and Housing Tribunal is upheld. It is ordered accordingly.

T. M. MWENEMPAZI

JUDGE

3/11/2020