IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)
AT ARUSHA

MISC. LAND APPEAL NO. 11 OF 2019

(C/F from the District Land and Housing Tribunal for Manyara at Babati in Land Appeal No. 93 of 2018; Originating from Dongobesh Ward Tribunal Land Case No. 10 of 2017)

PETER Q. M. SULLE ..... APPELLANT

Versus

ROZALIA LEO MUSENYA ..... RESPONDENT

JUDGMENT

7th & 17th December, 2020

Masara, J.

The Respondent successfully sued the Appellant in Dongobesh Ward Tribunal (the trial Tribunal) in Land Case No. 10 of 2017 where she was claiming for a piece of land (the suit land) that the Appellant had trespassed into. In its judgment, the trial Tribunal made a finding that the Respondent is the lawful owner of the suit land measuring ⅛ of an acre. The Appellant was dissatisfied, he appealed to the District Land and Housing Tribunal for Manyara (the Appellate Tribunal) vide Appeal No. 93 of 2018. The Appellate Tribunal dismissed the appeal and upheld the decision of the trial Tribunal. The Appellant was still aggrieved, he has preferred the instant appeal on the following grounds:

a) *That, both the Ward Tribunal and the Appellate Tribunal grossly erred in law and fact for receiving and determining the matter without ordering the joining of necessary party who is Dongobesh Village Council;*

b) *That, both the Ward tribunal and the Appellate Tribunal erred in law and fact for receiving and determining the matter while it was above its pecuniary jurisdiction;*
c) *That, both the Ward Tribunal and the Appellate Tribunal erred in law and fact for failure to evaluate properly the evidence before it; and*
d) *That, both the Ward Tribunal and the Appellate Tribunal erred in law for failure to observe the law.*

At the hearing of the appeal, the Appellant was represented by Mr. Ombeni Kimaro, learned advocate, while the Respondent was represented by Mr. Gwakisa Sambo, learned advocate. It was the parties' prayer and the Court acceded that the appeal be argued through written submissions.

For a better appreciation of the issues in contention, I deem it necessary to recount facts giving rise to the appeal as they can be seen from the records of the lower tribunals. The Respondent claimed to have been allocated the suit land by her father, Leo Musenya, sometimes in 1990. The allocation was approved by her family members in a meeting convened on 5/7/2012. The Respondent contended to have been in undisturbed use of the suit land until 2017 when the Appellant trespassed therein and fenced it claiming to be his land. On his part, the Appellant claimed to have been allocated the suit land by the Village Assembly on 17/5/1986. The Appellant alleged that it was the Respondent who trespassed to his land in 2017.

Before preferring the dispute to the trial Tribunal, the Appellant was heard by the Dongobesh Village Land Tribunal for conciliation purposes, and the same found that it was the Respondent who was the owner of the suit land. After that finding, the Respondent instituted Land Case No. 10 of 2017

before the trial Tribunal. She was declared the lawful owner of the suit land and the Appellant was declared a trespasser. It is that decision that culminated to the filing of this Appeal.

Submitting in support of the first ground of appeal, Mr. Kimaro contended that the Appellant testified that he was allocated the suit land by Dongobesh Village Council and tendered the minutes of the allocation. Mr. Kimaro insisted that it was very important for the Village Council to be joined as a party in order to be heard regarding the alleged allocation. He made reference to the testimony of DW4 (Anthony Matay) who was the Village Secretary at the time the allocation was allegedly effected. Mr. Kimaro cited the case of ***Petrobert D. Ishengoma Vs. Kahama Mining Corporation Ltd and 2 Others***, Civil Application No. 172 of 2016 and ***Ngerengere Estate Company Ltd Vs. Edna William Sitta***, Civil Appeal No. 209 of 2016 (both unreported) which emphasize on the right to be heard on a party who is not joined while he is a necessary party.

On the second and the fourth grounds of appeal, Mr. Kimaro was of the view that the pecuniary jurisdiction of the Ward Tribunal is 3 million, as provided under section 15 of the Land Disputes Courts Act, Cap 216 [R.E 2019], and thus the trial Tribunal should not have entertained a dispute whose value was beyond its pecuniary mandate. He stated that his client had submitted a Valuation Report which showed that the suit land had a market value of the suit land was Tshs 3,500,000/=. This value was over and above the pecuniary jurisdiction of the trial Tribunal. The learned advocate contended

that the valuation report was prepared by Mbulu District Council but that both lower Tribunals disregarded the report. He added that the Appellate Tribunal raised the issue that the two valuation reports were not authorized by the Chief Valuer without calling the parties to address on that raised issue. To that effect he cited the decisions in ***Deo Shirima & Others Vs. Scandinavian Express Service Ltd*** (2009) 1 EA 127 and ***Mbeya-Rukwa Autoparts and Transport Ltd Vs. Jestina George Mwakyoma*** [2003] TLR 251. In Mr. Kimaro's view, the Appellate Tribunal was wrong in not giving opportunity to the parties to address on the issue raised by the tribunal *suo motu.*

According to Mr. Kimaro, jurisdiction of the Court is very crucial and it can be raised at any stage. He made reference to ***Tanzania China Friendship Textile Co. Ltd Vs. Our Lady of the Usambara Sisters*** [2006] TLR 70; ***Meiisho Sindiko Vs. Julius Kaaya*** [1997] LRT 108; and ***Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda & Others***, Civil Appeal No. 8 of 1995 (unreported). The learned advocate argued that before the Court engages itself in entertaining the matter before it, it must first investigate and satisfy itself whether it is vested with jurisdiction both pecuniary and territorial. He concluded that the trial Tribunal had no jurisdiction to entertain the suit since the value was over and above its pecuniary jurisdiction.

Elaborating on the third ground of appeal, Mr. Kimaro submitted that the trial as well as the Appellate Tribunal did not evaluate the evidence before them properly. He referred to the testimony of DW4 (Anthony Matay Sulle)

who was the Village Secretary and who knew the history of the suit land as he was present during the allocation of the suit land. The learned counsel fortified that had the trial Tribunal and the Appellate Tribunal evaluated properly the evidence of DW4, they would have come up with a different decision. For the above reasons, Mr. Kimaro implored the Court to allow the appeal.

Contesting the first ground of appeal, Mr. Sambo submitted that the first ground of appeal was raised in the Appellate Tribunal but at the hearing of the appeal in his written submission the counsel for the Appellant dropped it. Since it was not raised and determined in the Appellate Tribunal, Mr. Sambo implored this Court to dismiss it for being devoid of merits. Further, in the alternative, the learned counsel contended that Dongobesh Village Council was not a necessary party in the trial Tribunal because the case was about the ownership of the land whose decree could be executed without the Village council being impleaded. He added that even the Appellant himself did not seek to join the Village Council because he was aware that it was not a necessary party. To bolster his argument Mr. Sambo cited the case of ***Said Peter Katakula Vs. Norbert Mahigila Gwebe***, Land Revision No. 1 of 2020 H. C Mwanza (unreported).

It was Mr. Sambo's further contention that the issue whether the suit land was allocated by the Village Council was well addressed by the trial Tribunal when it held that the minutes purported to have allocated the suit land to the Appellant were forged and the evidence of DW3 was cooked as he stated

that there were cemeteries on the suit land while DW2, the wife of the Appellant, stated that there was none. He distinguished the cases cited by Mr. Kimaro stating that a person who was not party to the proceedings cannot claim not to have been afforded the right to be heard unless he is a necessary party to the case. He cited sections 16 of the Ward Tribunals Act and 45 of the Land Disputes Courts Act which enjoin the Tribunals not to deal with technicalities which do not go to the root of the matter.

Encountering the second and fourth grounds of appeal, Mr. Sambo contended that it was not possible for the same suit land to have two varying valuation reports. In his view, the valuation report tendered by the Respondent, who was also the applicant in the trial Tribunal, was more cogent considering the fact that the suit land is in a rural area. He added that the Respondent being the applicant in the trial Tribunal had a duty to value the suit land and not the Appellant. As the Appellant's valuation of Tshs 3,500,000/= was not authorized by the Chief Valuer, it was Mr. Sambo's view that it cannot affect the jurisdiction of the trial Tribunal. In the same vein, Mr. Sambo reiterated that the parties were afforded the right to be heard as they argued in their written submissions in the Appellate Tribunal. He distinguished the cases of ***Deo Shirima and Others*** and ***Tanzania China Friendship Textile Co. Ltd*** (supra) stating that the trial Tribunal was satisfied that it had jurisdiction prior to the determination of the case, since the value of the suit land was Tshs 900,000/= as testified by the Respondent.

On the last ground of appeal, Mr. Sambo submitted that both the trial and the Appellate Tribunal properly evaluated the evidence. He confirmed the holding in the case of ***Emmanuel Abraham Nanyoro Vs. Piniel Ole Saitabau*** [1987] TLR 47 which was cited by the Appellate Tribunal in its judgment. He argued that the Respondent was in occupation of the suit land for 27 years, therefore the Appellant was limited by the 12 years limitation time as provided by the Law of Limitation Act. Mr. Sambo fortified that the trial Tribunal visited the *locus in quo* and found a new structure which was built by the Appellant which implies that the Appellant's contention that he has been using the suit land since 1986 is unjustified as the new structure was built in 2017. Mr. Sambo contended that the Appellant relied only on the evidence of DW3 whose evidence was found contradictory and with full of inconsistencies to the other witnesses.

On a rejoinder submission, Mr. Kimaro maintained that whether the ground was dropped or not it is not an issue as the ground raised constitutes a point of law which can be raised at any stage. He averred that the trial Tribunal doubted the Village Assembly minutes which were tendered by DW3, it was for the interest of justice that the Village Council could have been joined as a necessary party so as to clear the doubts. He cited Order 1 Rule 10(2) of the Civil Procedure Code, Cap 33 [R.E 2019] stating that it was not possible for the Tribunal to adjudicate the dispute and reach effective decision without joining the Dongobesh Village as a necessary party. He cited two decisions of the Court of Appeal; ***21st Century Food and Packaging Ltd Vs. Tanzania Sugar Producers Association and 3 Others***, Civil Appeal

No. 91 of 2003 and ***Shaibu Salim Hoza Vs. Helena Mhacha (Deceased),*** Civil Appeal No. 7 of 2012 (both unreported) to support his argument.

Mr. Kimaro maintained that the inconsistencies stated by Mr. Sambo did not go to the root of the case. Mr. Kimaro stressed that the valuation report was prepared by an authority vested with powers to do so; therefore, the Court had no mandate of disregarding the same without giving the parties a right to be heard on the same. He invited the Court to expunge the issue regarding the occupation from Court record reasoning that it is a new ground which was not featured in the grounds of appeal.

I have thoroughly considered the grounds of appeal, the records of the lower Tribunals and the rival submissions by the learned advocates for the parties. The grounds of appeal constituted points of determination herein. I will determine the grounds of appeal in the course taken by the learned advocates in their submissions.

Before delving into the substance of the appeal, in the course of perusing the record of the lower Tribunals, I came across an irregularity which calls for the attention of this Court to address. In the entire record of the trial Tribunal, the description of the suit land is nowhere given. The Respondent, who was the applicant in the trial Tribunal testified that she claims her land which was trespassed by the Appellant on 1/6/2017. She averred that the suit land was allocated to her by her father in 1990, was confirmed by her

family members in 2012. After trespassing into her land, the Appellant fenced the same by a thorn fence, built a cowshed thereon and when he was summoned in the village office he ignored. When cross examined by the Appellant, she stated that the suit land is not one and the same with the plot where the Appellant built his living house.

The same applies to her witnesses, Joshua Magasi (AW2) who stated that he knows the suit land, he once leased it from the Respondent's father for agricultural purposes from 1982 to 1987. Sabas Jorojick (AW3) testified that he was the village chairman in 1985, they allocated a plot measuring one acre to the Appellant. He added that the suit land belonged to the Respondent's father who later allocated it to the Respondent. Edward Mayomba Melleyeck (AW4) and Petro Qwaray (AW5) testified that the suit land belongs to the Respondent. However, as I pointed out earlier, none of these witnesses gave the description of the suit land in terms of size and its boundaries.

The Appellant Peter Q. M. Sulle who testified as DW1 stated that he was allocated the suit land by the Village Council in 1986. The land was initially his ancestral land. The land allocated to him measured 76 paces from West to North, 133 paces from North to east, 122 paces from East to South and 52 paces from North to West. However, he did not state whether the above stated land or the one allocated to him is the disputed land. Flackian Mwanga (DW2) stated that she was married by the Appellant in 1989 and she gave the borders of the suit land but did not describe the size of the same. When

she was cross examined, she stated that she does not know the size of the land. Michael George (DW3) testified as the Appellant's neighbour. Anthony Matay Sulle stated to have participated in allocating the land to the Appellant in 1986, but he did not know the suit land. Kangile Abdallha (DW4) and Zakaria Waree (DW5) had nothing constructive on the description of the suit land.

The record of trial Tribunal visit to the locus in quo dated 24/7/2018 show that the size of the suit land had the following measurements: In the North 32 paces, in the South 35 paces, in the west 3 paces and in the east 18 paces. Again, in the valuation report tendered by the Respondent in the trial Tribunal, shows that the suit land is $607m^2$, which is the same as those found in the locus in quo. The valuation report tendered by the Appellant shows that the suit land is $583m^2$. What is unclear is the fact that the same suit land appear to have different sizes as indicated above. The Respondent being the applicant in the trial Tribunal was on the best position to describe her land which she alleged to have been trespassed by the Appellant but she abdicated the responsibility.

From the parties' testimonies, the description of the suit land in terms of its size, boundaries and its location was unclear. This is a very serious ailment which renders the judgment thereon nugatory as the same will not be executable since its size and boundaries are unknown. It is unfortunate that the Appellate Tribunal did not discover the anomaly, which renders the

proceedings of the two Tribunals a nullity as a decree emanating from such judgments will not be easily executed.

I borrow the wisdom of my learned brethren from the bench who encountered the same scenario in ***The Board of Trustees of the F.P.T.C Church Vs. The Board of Trustees Pentecostal Church***, Misc. Land Appeal No. 3 of 2016 (unreported) where Makani, J. had the following to say:

> *"The rationale for proper description is to make execution easy and to avoid any chaos by proper identification of the suit property. The judgment of the Ward Tribunal is therefore not executable for failure to have proper details/description of the suit land."*

Similarly, in ***Mohamed Salehe Vs. Fatuma Ally Mohamed***, Land Appeal No. 182 of 2018 (unreported) DSM H.C Land Division, Maige, J. observed the following:

> *"I would add however that, the cause of such inconsistencies is lack of clear and sufficient description of the suit property in the pleadings. The omission to clearly and sufficiently describe the suit property was violative of the mandatory requirement of order VII rule 3 of the Procedure Code, Cap. 33, R.E. 2019 ..."*

Further, in ***Agast Green Mwamanda (suing as the Administrator of the Estate of the late Abel Mwamanda) Vs. Jena Martin***, Misc. Land Appeal No. 4 of 2019 (unreported) H.C Mbeya Registry, Utamwa, J. held:

> *"Indeed, it is the law that, Court orders must be certain and executable. It follows thus that, where the description of the land in dispute is uncertain, it will not be possible for the Court to make any definite order and execute it...Owing to the above reasons, it cannot be argued that the Respondent in the matter at hand followed the law*

when she made the blanket description of the land in dispute by merely referring to it as her father's farm and house as shown earlier, without mentioning the title of the land or the boundaries surrounding it."

The above observations cover the situation in the Appeal under determination. Both the Respondent and the Appellant failed to properly give a description of the suit land. Without a thorough description of the suit land, it is equally not easy to determine the ownership of the suit land.

With the description of the suit land being vague, it brings me to the second and fourth grounds of appeal which touches the jurisdiction of the trial Tribunal. It was submitted by Mr. Kimaro that the value of the suit land is 3,500,000/= following the valuation which was tendered by the Appellant. Considering the pecuniary jurisdiction of the trial Tribunal to be Tshs 3,000,000/=, he therefore concluded that the trial Tribunal had no jurisdiction to determine the suit. Mr. Sambo reacted stating that the proper valuation report was the one tendered by the Respondent since she was the applicant in the trial Tribunal. The valuation report tendered by the Respondent showed that the market value of the suit land at that time was Tshs. 900,000/=.

Considering that the land subject to the valuations was the same, it was not disclosed as to why there was such a huge variation in terms of their market value. The Appellate Tribunal while determining this issue it dismissed the complaint reasoning that the valuation report tendered by the Appellant was not approved by the chief valuer. In my view, that decision was

misconceived. The proper procedure was for the trial Tribunal to call the valuers so that they would explain before the Tribunal the factors they considered in arriving at the market value of the suit land. It cannot be safe to disagree with the findings of the valuers considering that they are experts in valuation and the land subject of valuation was the same. This variation could be resolved at the visiting the locus in quo, as it was held in ***Avith Thadei Massawe Vs. Isidory Assenga***, Civil Appeal No. 6 of 2017 (unreported); but it is unfortunate that it was not resolved after the visiting the locus in quo.

Further, I desist from determining this ground in details due to the ailment I have raised above. The suit land was not properly described and the two valuation reports seem to have different sizes. Therefore, determining the jurisdiction of the suit land basing on the valuation reports will lead to injustice since the land valued in the two reports may not be one and the same.

I see no reasons to delve in the other grounds of appeal since they will not serve any useful purposes. The noted mishap, in my view, cannot be saved by the doctrine of *overriding objective*. Since the suit land was not properly described. I realise that counsels for the parties did not consider this aspect. Looking at the pleadings and the records, their comments on this aspect may not change anything substantially. The anomaly needs to be rectified at the trial Tribunal. For that reason I am of the view that the proper order for this

Court to make is to nullify the proceedings of both lower Tribunals and set aside their respective judgments.

Consequently, I invoke revisional powers conferred to me under section 43(1)(b) of the Courts Land Disputes Settlements Act, Cap 216 [R.E 2019] and do hereby quash and set aside judgments and proceedings of both lower Tribunals. If parties will be further interest to pursue their rights over the suit land, they are at liberty to approach any competent land Tribunal where proper description of the same will be made. Considering that the issue that has determined this suit was raised by the Court suo moto, I order that each party shall bear their own costs.

Order accordingly.

Y. B. Masara
JUDGE
17th December, 2020