

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

LAND APPEAL NO. 27 OF 2020

(Originates from the decision in Land Case No. 160 of 2013 by District Land
and Housing Tribunal for Mwanza)

PENDO YONA MAJIGILE APPELLANT

VERSUS

JOHN CHIMILE LUBAMBE RESPONDENT

JUDGMENT

Date of Last Order: 12.03.2021

Date of Judgment: 17.03.2021

A.Z.MGEYEKWA, J

At the first instance, the respondent had successfully lodged his complaints at the District Land and Housing Tribunal for Mwanza claiming for ownership over the suit land. The District Land and Housing tribunal decided in favour of the respondent.

To appreciate the issues of contention giving rise to the present appeal and on which the parties to this appeal have locked jaws, I find it

appropriate to revisit the background of the present matter; the parties to the present appeal were also parties in Land Application No. 160 of 2013 before the District Land and Housing Tribunal for Mwanza.

The record shows that the disputes between the parties was based on land ownership. Before the District Land and Hosuing Tribunal, the appellant claimed to be legitimate owner of a Plot No.1 Block S located at Rufiji street within Mwanza City with a Certificate of Title No. 033018/76 LO 205651. The appellant claimed that he acquired the suit land on 24th July, 2006 after purchasing it from the previous owner one Koroneli Soma. The appellant further claimed that the respondent resisted to vacate the suit premises on the account that the suit premises belongs to his late father.

The tribunal decided the matter in favour of the respondent and declared him a lawful owner of Plot No.1 Block S located at Rufiji street within Mwanza City and the respondent was ordered to vacate from the suit plot and handed the same to the appellant. The respondent was also permanently restrained from entering into or disturb the appellant's occupation in the said plot.

The appellant was not pleased with the decision of the District Land and Housing Tribunal hence this second appeal on the following grounds:-

- 1. That the Honourable appellate Chairperson grossly erred in law for misdirecting the available evidence that the suit had been wrongly instituted against the respondent.*
- 2. That the Honourable appellate Chairperson grossly erred in law for misdirecting the available evidence and as well for misapprehension of evidence that the seller of the land in dispute had to be joined.*

At the hearing, the appellant enjoyed the service of Mr. Mollan, learned counsel and the respondent enjoyed the service of Mr. Nasimire, learned counsel.

The learned counsel for the appellant opted to abandon all the grounds of appeal in substitution with one ground of appeal that the respondent sued a wrong person.

The appellant's Advocate contended that scrutinizing the District Land and Housing Tribunal proceedings is not featured if the appellant claimed for land ownership and she was the one who filed a suit at the District Land and Housing Tribunal. The learned counsel argued that the appellant stated that the land belonged to her mother; Mariam Hamisi and she gave it to her. To support his submission, Mr. Mollan referred this court to the

District Land and Housing Tribunal Judgment specifically on page 4 third paragraph the Chairman stated that Plot No. 1 Block S Rufiji Street at Mwanza belonged to the appellant's mother who passed away. He went on to state that on page 8 last paragraph, DW1 testified that the suit plot No.1 Block S belongs to his father, and DW2 also testified that the suit plot belonged to Mariam. Insisting, Mr. Mollan argued that there is nowhere stated that the appellant claimed for ownership. He cited Order 1 Rule 2 of the Civil Procedure Code Cap.33 [R.E 2019] and argued that the tribunal either *suo mottu* or by the parties application could have included the name of a person who claimed possession.

It was Mr. Mollan's further submission that the appellant has no title to defend or tender any document because she was not the administrator of the estate. He stressed that it was not correct for the District Land and Housing Tribunal to rule out that the appellant failed to prove her possession over the suit land. Mr. Mollan fortified his submission by referring this court to section 99 of the Probate and Administration Act, Cap. 52 [R.E 2019] that a deceased is required to be represented by an Administrator of the estate. Mr. Mollan valiantly argued that the judgment did not bring the matter to its finality since execution cannot be done against a wrong party. Mr. Mollan fortified his position by referring this

court to the case of **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman and Another**, Civil Revision No.55 of 2017.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to examine the records and struck out the District Land and Housing Tribunal proceedings and decision and allow the appeal with costs.

Resisting the appeal, Mr. Nasimire valiantly argued that the appellant's Advocate cited Order 1 Rule 2 of the Civil Procedure Code Cap. 33 but he did not state who was a proper party to be sued. Mr. Nasimire cited the case of **Abed Kipoto v Chief Arthur Mtoi**, Civil Appeal No. 73 of 2017, and the case of *Magdalen Daniel v Godwin Tabula*, land Appeal No.37 of 201. Mr. Nasimire argued that the plaintiff is the one who knows the person who was required to be sued. He added that the Plaintiff was required to follow the conditions stated in the two cited cases of **Abel Kipoto** (supra) and **Magdalena Daniel** (supra).

The learned counsel went on to argue that the instant case based on trespass in the land and the appellant is the one who trespassed the suit land since 2012 until when she was evicted by the respondent after he bought the suit land. . To support his submission he refereed this court to

Exh. PW1 and Exh. PE2 whereas the respondent acquired the disputed land on 26th July, 2006.

Mr. Nasimire continued to argue that the appellant argued that she was an administrator of the estate of the late Jona Majigile and that she was pointed on 27th November, 2013 after 7 years after the respondent acquired, possession of the disputed land. Mr. Nasimire went on to argue that the applicant's complained that the respondent acquired the land from one Koroneli Soma who was charged for forgery in Criminal Case No.226 of 2011at Nyamagana District Court and the appellant was PW2 and he was acquitted.

The learned counsel for the respondent went on to argue that this court dismissed the appeal in Criminal Appeal No.76 of 2013. Mr. Nasmire urged this court to take judicial notice t on the cited two criminal cases pursuant to section 68 of the Evidence Act. Cap. 6 [R.E 2019]. Mr. Nasimire went on to argue that the vendor might be a necessary party, but this will not affect the case of the appellant.

Mr. Nasimire did not end there, he argued that the appellant is the one who was on the disputed land and therefore was the right person to be sued. He strongly argued that there is no reason to quash the decision

of the District Land and Housing Tribunal because first, the evidence was properly analyzed. Secondly, going by section 45 of the Land Dispute Courts Act, Cap.216, and based on the case of **Jacobo Magoige Kichele v Penina Yusuf**, Civil Appeal No. 55 of 2017 (unreported) the decision of the tribunal cannot be quashed based on the errors, omission, improper or irregularity unless occasioned the failure of justice.

On the strength of the above, Mr. Nasimire beckoned upon this court to find that there was no error done by the District Land and Housing Tribunal. He urged this court to and sustain the District Land and Housing Tribunal decision and dismiss the appeal with costs.

In his brief rejoinder, Mr. Mollan reiterated his submission in chief and added that there was an issue of demolition done by Isanga Auction Mart. Insisting, Mr. Mollan argued that the tribunal was not correct to determine the issue of ownership because the appellant did not testify on that. He strongly argued that the respondent was supposed to sue a necessary party.

In conclusion, Mr. Mollan urged this court to find that the respondent sued a wrong party and the decision of the District Land and Housing Tribunal be quashed.

After a careful perusal of the submissions made by the learned advocates for both parties and after having gone through the records of the tribunals below, I have come to the following firm conclusions. The issue for determination is *whether this appeal is meritorious*.

The appellant has filed this appeal on the main ground that the respondent has sued the wrong person since the disputed land belonged to his late mother Mariam Hamisi. I have perused the court records and found that the appellant in her testimony testified that the suit land belonged to her late mother and she was appointed as an administrator of estate of her late mother.

It is trite law in civil litigations which guides a court to determine a matter that parties are bound by their pleadings in this sense it includes a Plaint, Written Statement of Defence, and Reply therein if any. I have read the Written Statement of Defence and found that the appellant was claiming over land ownership. She claimed that the respondent and Kolonile Somo are not lawful owners and have no interest in the suit land. She claimed that she is the one who had an interest in the suit land. For ease of reference, I find it important to reproduce hereunder paragraph 4 of the Written Statement of Defence which state as follows:-

*"That the contents of paragraph 6 are disputed. The Respondent further states that the Applicant is not the lawful owner of the said plot. The said **CORNEL SOMA** has never been a lawful owner of the said plot because he obtained the same by means of fraud and having done that the Respondent reported to Central Police Station and consequently **CORNEL SOMA** was charged for forgery vide **Criminal Case No. 626 of 2011** in the Nyamagana District Court. Currently, there is still a pending **Criminal Appeal No 76 of 2013** in the High Court of Mwanza before Hon. Sumari J. concerning the above said forgery case. Therefore it has never is proved that CORNEL SOMA and consequently the Applicant is the lawful owner of the suit plot at different times. Leave of the court is craved for a copy of judgment of Criminal case No 626 of 2011 to form part of this written Statement of Defence as Annexure PYM-2."*

Based on the above context, I have to say that I am wondering why the appellant raised an issue of administration of the estate in her evidence and submission contrary to what she pleaded in her Written Statement of Defence. She was required to confine herself to the pleadings which are in the court record. It is not correct for the appellant to come before this court claiming that she is a wrong party while she pleaded that she has interest in the suit land. The appellant's evidence

was supposed to confirm what she pleaded since she is bound by her pleadings. In the case of **Yara Tanzania Limited v Charles Aloyce Msemwa t/a Msemwa Junior Agrovat & 2 Others**, Commercial Case No. 5 of 2013, Mwambegele J (as he then was) held that:-

*" It is cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings... If I may be required to add another persuasive authority from Nigeria, I would add Adetoun Olediji (Nig) Ltd v Nigeria Breweries PLC (2007). In which it was also categorically stated that it is settled law that parties are bound by their pleadings. That is the position of the law in Nigeria as well as in this Jurisdiction. See **Peter Karanti and 48 others v Attorney General and 3 Others**, Civil Appeal No. 3 of 1988 at Arusha (unreported)."*

Additionally, saying that she was a wrong part to the original proceedings, means she had no interest over the suit land? I am forced to hold that if the appellant had no interests in the subject matter, then this appeal before this court is with no merit.

I have also perused the records of the trial tribunal and realized that the respondent sued the appellant for trespass. In my view, the act of the appellant to encroach into the respondent's piece of land raised a cause

of action against the present appellant. That is why the respondent chooses to sue the trespasser, not anyone else. As rightly pointed out by Mr. Nasimire the choice of who to sue, lies on the plaintiff. She/ he has the duty to show the cause of action against the person who she/he sues.

In the matter at hand, the respondent in Land Application No. 19 of 2013 chose to sue the appellant as the proper person since the trespass was committed by the appellant in a personal capacity. The records of the tribunal show clearly that the respondent successfully proved the alleged trespass by tendering a title deed to prove his lawful ownership.

In the upshot, I find no merit in the appeal. I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Mwanza this date 17th March, 2021.


A.Z.MGEYEKWA

JUDGE

17.03.2021

Judgment delivered on 17th March, 2021 via audio teleconference whereby Mr. Nasimire, learned counsel for the respondent also holding brief of Mr. Mollan, learned counsel for the appellant was remotely present.




A.Z.MGEYEKWA

JUDGE

17.03.2021

Right to Appeal explained.