THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 9 OF 2019.

(From the District Land and Housing Tribunal for Kyela, at Kyela, in Land Application No. 15 of 2017).

EMMANUEL MWAKIBINGA.....APPELLANT

VERSUS

1. KELVIN MWAMPASI.....RESPONDENT

2. ATUSWEGE KASEKELE.....RESPONDENT

JUDGMENT

14/4 & 12/07/2021.

UTAMWA, J:

The appellant in this appeal, EMMANUEL MWAKIBINGA challenged the judgment (henceforth the impugned Judgement) made by the District Land and Housing Tribunal for Kyela, at Kyela (the DLHT) in Land Application No. 15 of 2017. In that application, the appellant sued KELVIN MWAMPASI and ATUSWEGE KASEKELE (hereinafter called the first and second respondent respectively, or the respondents cumulatively) for a piece of land (the suit land).

The undisputed background of this matter, according to the record, goes thus: back in 2009, the appellant bought the suit land from the

second respondent (mother of the first respondent) for Tanzanian shillings (Tshs.) 800, 000/=. Later on, the first respondent, interfered the land and uprooted some crops therefrom. The appellant then sued the two respondents before the DLHT for some reliefs including a declaration that the sale between him and the second respondent was lawful and a declaratory order that, the suit land belongs to him. The respondents denied any liability in their joint written statement of defence.

During the trial before the DLHT, the sale was not disputed and the written agreement to that effect was tendered in evidence without any objection. The respondents however, claimed that, the land belonged to the late father of the first respondent who was husband of the second respondent (henceforth the deceased). It was thus, a clan land of the two respondents' clan. The second respondent, as the wife of the deceased therefore, had no right to sale the land to the appellant.

Ultimately, the DLHT decided against the appellant through the impugned judgment. It held that, the land be redeemed (to the two respondents' clan) within a year from the date of the impugned judgment (on 24th December, 2018), the appellant be refunded the purchase price of Tshs. 800, 000/= and compensation of Tshs. 2, 000, 000/=. The DLHT also directed that, the respondents had to pay costs of the suit.

Aggrieved by the impugned judgment the appellant preferred this appeal. It was based on the following five grounds of appeal:

1. That, the trial District land and Housing Tribunal erred in law and fact in ignoring the point of law that upon the death of the 2nd

respondent's husband on 14/9/1999 matrimonial property that included the disputed 2.5 acres of land devolved upon the 2nd respondent who in law, could deal with it as she wanted, including selling it to the appellant, which she rightfully did.

2. That, the trial District Land and Housing Tribunal erred in law and fact in declaring that the dispute 2.5 acres of land legally belongs to the 1st respondent when there is no iota of evidence on record to that effect.
3. That, the trial District land and Housing Tribunal erred in law and fact in ignoring the fact that the two respondents and all their witnesses i.e. DW1, DW2, DW3, DW4 and DW5 openly lied in court by testifying that they did not witness the sale of the disputed 2.5 acres of land when their respective signatures are very evident on the sale agreement i.e. Exhibit P.1, and which signatures the said defence witnesses did not disown at the trial.
4. That, the trial District land and Housing Tribunal erred in law and fact in ordering that the disputed 2.5 acres of land be "redeemed" within a year when the respondents have no legal title to the said land.
5. That, the trial District land and Housing Tribunal erred in law and fact in ordering that the appellant be compensated by being paid the very small amount of Sh. 2,000,000/= in the absence of any evidence on record as to what improvements the appellant had made on the said 2.5 acres.

Owing to these grounds of appeal, the appellant urged this court to grant him the following reliefs: to allow the appeal, to quash the judgment and

decree of the DLHT, to declare that the suit land is his lawful property, costs of the appeal and any other relief the court will deem fit to grant. The two respondents resisted the appeal.

The appeal was argued by way of written submissions. The appellant was represented by Mr. Victor Mkumbe, learned counsel while the two respondents were advocated for by Mr. Emilly Mwamboneke advocate.

In deciding this appeal, I consider the second and fourth grounds of appeal listed herein above as being basically similar to each other. For the sake of convenience, I also opt to consider and determine them firstly. If need will arise, I will also consider the rest of the grounds.

The major issue regarding the two grounds of appeal is thus, whether or not the DLHT erred in ordering that the suit land be redeemed to the two respondents' clan. In his written submissions, the learned counsel for the appellant wanted this court to answer the issue affirmatively. He based his stance on the fact that, the evidence on record was in favour of the appellant. On the other side, the learned counsel for the respondents advocated for the impugned judgment as being correctly made due to the evidence on record, hence he preferred a negative answer to the major issue.

In my view, the circumstances of the case attract an affirmative answer to the major issue posed above though on different reasons from those adduced by the learned counsel for the appellant. This view is based on the following grounds: in the first place, it is clear from the record that upon the appellant lodging his application/suit before the DLHT, the two

respondents filed their joint written statement of defence (the WSD). In their WSD they sought the following reliefs: dismissal of the suit, an order to vacate the appellant from the suit land, a declaration that the suit land is the respondents' clan land and that, the respondents are the lawful owners of the same.

The holding by the DLHT in its impugned judgment highlighted previously essentially granted the respondents' reliefs just listed above. In fact, the reliefs sought by the respondents in their WSD had a nature of a claim against the appellant since they wanted the court to grant them some substantive rights in relation to the suit land. Nonetheless, the respondents had not set any counter claim and gave no any particulars thereof in their WSD. The record does not also show that they paid any appropriate filing fees for their claims or reliefs they had sought against the appellant. In my settled opinion, these omissions amounted to impropriety in law for the reasons shown below.

The procedure before the DLHT in original proceedings is governed by the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003 (hereinafter called the GN). The GN guides that, upon the defendant being served with an application (equated with the plaint in normal suits) before the DLHT, and if he/she disputes the applicant's (plaintiff's) claim and has a claim against the applicant (plaintiff) related to the suit, he/she has to file a WSD, set a counter claim and give the particulars thereof in it. The law further guides that, upon being served with the WSD with a counter claim, the applicant (plaintiff) has also to file a WSD being replying to the counter claim within

21 days of the service. This procedure is envisaged under regulation 7(1) and (2) of the GN. Owing to these provisions, it is clear that, the law considers a counter claim as a pleading, especially a plaint. A counter claim is thus, a cross-suit against the defendant before a DLHT.

Certainly, the GN does not provide much on the procedure for setting a counter claim before a DLHT. One must thus, resort to the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). According to Order VIII rule 9(1) of the CPC, a defendant who intends to claim against the plaintiff in a fit case, may state particulars of the claim made or relief or remedy sought by him in his written statement of defence. These provisions were underscored by this court in the case of **Chibinza Kulwa v. Amosi Kibushi and others [1990] TLR 36.** The law further provides that, where a counterclaim is set-up in a WSD, it shall be treated as a cross-suit and the WSD shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply *mutatis mutandis* to such written statement as if it were a plaint.

In underlining the sequence of filing pleadings and the status of a counter claim just highlighted above, the Court of Appeal of Tanzania (the CAT) observed in the case of **The National Insurance Corporation and Another v. Sekulu Construction Company [1986] TLR 157,** at page 159, thus, and I quote it for the sake of a readymade reference;

> "As English common law developed, in civil pleadings, briefly speaking, an action begins with a statement of claim, or what we call a plaint, then a written defence is filed, to which a reply is made. In the written defence, a counterclaim can be included, which can be rebutted in the defence filed with the reply. Thereafter, until the court gives permission, no other pleading can be filed...In any event there can only be one counterclaim,

which in fact is a cross suit, in an action filed." (Bold emphasis is mine).

Now, since a counter claim is a cross-suit, a defendant in a suit cannot obtain any substantive right without setting a counter claim and give particulars thereof in his/her WSD. Otherwise, a defendant is usually entitled to only reliefs like a dismissal of the plaintiff's suit and costs.

Again, where there is a counter claim, the procedure for filing an application (suit) before a DLHT has to be followed. This includes the payment of appropriate filing fees, unless the defendant is legally exempted from paying such fees. This view is based on regulation 3(1) of the GN which requires appropriate fees to be paid by an applicant/plaintiff when he/she files an application/suit before a DLHT. In the matter at hand however, though the respondents were awarded by the DLHT substantive rights mentioned above, they had neither set a counter claim in their WSD nor provided the particulars thereof nor paid the filing fees for their purported claims against the appellant as hinted earlier. It is thus, conclusive that, the respondents obtained such rights improperly and through a serious violation of the laws cited above.

In fact, the irregularities demonstrated above had the effect of denying the appellant the opportunity for filing his defence against the respondents' claims before the DLHT. The impugned judgment thus, judged him unheard by granting the substantive rights to respondents without them firstly filing a counter claim, provide for the particulars thereof and paying the appropriate fees for their claims. He was thus, denied a fair trial. The DLHT also violated the Principles of Natural Justice

by committing such irregularities. The right to fair trial is a fundamental right well enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R.E. 2002. The CAT also once described that right as one of the cornerstones in the process of adjudication for any just society and an important aspect of the right which enables effective functioning of the administration of justice; see in the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported). It follows thus, that no court can easily violate a party's right to fair trial.

Furthermore, it is trite law that, a decision of a court reached through violation of the Principles of Natural Justice or the right to fair trial is a nullity; see decisions in **Agro Industries Ltd v. Attorney General [1994] TLR 43, Raza Somji v. Amina Salum [1993] TLR 208** and the **Kabula case** (supra). The law further guides that, it is immaterial whether the same decision would have been arrived at in the absence of the violation; see **General Medical Council v. Spackman [1943] AC 627** followed in **De Souza v. Tanga Town Council [1961] EA. 377** (at p. 388) and **Abbas Sherally and another v. Abdul Sultan Haji Mohamed Fazalboy, CAT Civil Application No. 133 of 2002, at Dar es Salaam** (unreported). See further the case of **Alex Maganga v. Awadhi Mohamed Gessan and another, HCT Civil Appeal No. 13 of 2009, at Dar es Salaam** (unreported).

Owing to the reasons shown above, the abnormalities committed by the DLHT in the present case cannot be saved by the provisions of section 45 of the Land Disputes Courts Act, Cap. 216 R.E. 2019. These provisions

essentially guide that, irregularities committed by a ward tribunal or a DLHT cannot vitiate their respective decisions, unless the same occasion injustice to parties. However, as I have shown above, the irregularities in the matter at hand offended the Principles of Natural Justice and deprived the appellant of his fundamental right to fair trial, hence not fit for the protection under such provisions of the law.

Furthermore, the irregularities discussed above cannot be saved by the principle of overriding objective. This principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice. The principle was underlined by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) in construing the provisions of section 45 of Cap.216 just mentioned earlier. Nonetheless, the principle of overriding objective was not meant to absolve each and every blunder committed by adjudicating bodies or by parties to court proceedings. Had it been so, all the rules of procedure would be rendered nugatory. The principle does not thus, create a shelter for each and every breach of procedural laws. This is the envisaging that was recently underlined by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of overriding objective amid a breach of an important rule of procedure.

There is yet another serious irregularity which justifies answering the major issue posed above affirmatively. This one is exemplified by the failure by the parties to specify the location or description of the suit land

sufficiently. The appellant just stated in his application (plaint) at paragraph 3 that the suit land is located at Talatala Kati hamlet, in Talatala Ward of Kyela District. In his testimony he described the suit land in the same manner. He only added that, the same was measuring 2. 5 acres (see at page 4 of the typed proceedings of the DLHT). On his part, the first respondent testified before the DLHT that, the suit land is located at Talatala Kati and is 3 acres in size (see at page 19 of the typed proceedings). The second respondent also testified that the land is at Talatala Kati, but she did not know its size (see page 24 of the typed proceedings).

The law mandatorily guides that, parties involved in land disputes should properly identify the land at issue sufficiently enough to differentiate it from other pieces of land adjacent to it. Examples of provisions of law underlining this requirement are regulation 3 (2) (b) of GN and Order VII rule 3 of the CPC. I underscored the importance of the requirement just mentioned above in various cases including the case of **Daniel Dagala Kanunda (as Administrator of the estate of the late Mbalu Kushaba Buluda) v. Masaka Ibeho and 4 others, Land Appeal No. 26 of 2015, High Court of Tanzania (HCT), at Tabora** (unreported).

I also made some remarks relating to this aspect in another case of **Masincha Nyamhanga v. Magige Ghati Gesabo and two others, HCT Land Appeal No. 20 of 2008, at Mwanza** (unreported), and I will reproduce the pertinent passage for purposes of a swift reference:

> "...land is in fact, a natural immovable solid part of the earth or its surface (and some of its contents) extending globally with some various manmade divisions, sub-divisions, sub-sub divisions etc. such as Continents, States, Countries, Regions, Districts, Villages etc. For purposes of ownership or possession of land, it is the specific demarcations and the location (geographical, political or otherwise) of a piece of land that differentiates it from another piece of the same earth or its surface. Admittedly this may not be the very professional way of describing land, but at least these are the practical and common attributes exemplifying land, and I am entitled to presume them as true under S. 122 of the Evidence Act (Cap. 6 R. E. 2002). It is for this truth I believe, my brother (**Moshi, J.** as he then was) remarked to the effect that land can only be allocated when distinct and determinable; see the case of **Asumwike Kamwela v. Semu Mwazyunga, High Court, Civil Appeal No; 13 of 1997, at Mbeya...**"

In my view, the written laws just cited above did not make these obligatory provisions for cosmetic purposes. Their objective was to ensure that, the court determines the controversy between the two sides of a land dispute effectively by dealing with a specific and definite piece of land. In other words, the law wanted to ensure an authentic identification of the land in dispute so that when the court passes a decree, the same becomes certain and executable. This follows the fact that, the law guides 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.

It follows further that, parties in court proceedings related to land disputes are duty bound to describe a disputed land by providing its references like the title numbers, plot numbers etc if the land is surveyed and registered. In case of an un-surveyed /un-registered land, description of its permanent boundaries is mandatory and sufficient.

In the matter at hand however, the parties disclosed neither the title number nor plot number nor the permanent boundaries of the suit land. Their descriptions that the land was in Talatala village did not thus, suffice the legal requirement highlighted above. It is more so since it is not stated anywhere in the record that the suit land was the only land at situated in the said Talatala village. It is further more so because, even the description of the size of the suit land given by the parties differed. The appellant maintained that, it was 2.5 acres while the first respondent claimed that it was 3 acres. This discrepancy enhanced the uncertainty of the land at issue.

It follows thus, that, the DLHT was not entitled to grant the land to any party since the same was uncertain. Otherwise, its order could not be executed for want of an authentic identification of the land.

Owing to the reasons shown above, I am convinced that, the major issue regarding the second and fourth grounds of appeal can be determined without considering the evidence on record and the arguments by the parties. I therefore, answer it negatively that, the DLHT erred in ordering that the suit land be redeemed to the two respondents' clan. I accordingly uphold the second and fourth grounds of appeal though on different reasons from those adduced by the learned counsel for the appellant.

Furthermore, due to the same reasons adduced herein above, I am convinced that this appeal can be disposed of without considering the rest of the grounds of appeal. I will not thus, consider them. Instead, I exercise

my revisional powers and make the following orders: that, the proceedings of the DLHT are nullified and quashed. The impugned judgment of the DLHT is set aside for being based on null proceedings. Each party shall bear his/her own costs since the DLHT was instrumental in permitting the irregularities pointed out earlier. In case any party still wishes, he/she can seek justice before any competent court by observing the provisions of law discussed above. It is so ordered.

JHK. UTAMWA

JUDGE

08/07/2021.

Date: 12.07.2021

Coram: Hon. P.R. Kahyoza – DR.

Appellant: Present

For the Appellant:

1st Respondent: Absent

2nd Respondent: Absent

For the Respondents: Ms. Febby Cheyo/Mr. Emily Mwamboneka, Advocate.

B/C: Patrick Nundwe.

Ms. Febby, Advocate: The matter is coming for judgment.

Court: Judgement delivered.

P.R. Kahyoza

Deputy Registrar

12/07/2021