IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

MISCELENEOUS LAND CASE APPEAL NO. 02 OF 2021

(From the decision of the District Land and Housing Tribunal of Mbinga at Mbinga in Land Appeal No. 12 of 2020 and Original Ward Tribunal of Kilosa Ward in Application No. 33 of 2019)

MARTIN LUTHERKING KAWONGA..... APPEALANT

Versus

REHEMA NGONGI ..... RESPONDENT

JUDGMENT

Date of Last Order: 05/10/2021.

Date of Judgment: 12/10/2021.

BEFORE: S.C. MOSHI, J.

Factual background of the matter; the respondent instituted a land case before Kilosa Ward Tribunal for ownership of the suit land, she claimed that the land was trespassed by the appellant. After hearing the case, the trial tribunal declared the appellant a lawful owner of the suit land. Aggrieved, the respondent appealed to the District Land and Housing Tribunal where the decision of the trial tribunal was eventually quashed, the reason being that the trial court didn't ascertain the value of land in dispute which could have helped it to ascertain its jurisdiction. Therefore, it held that, the trial tribunal proceeded with the matter without satisfying itself if it had jurisdiction. Also, it found that on some occasions when the matter was heard by the trial tribunal the coram did not disclose

assessors who were in attendance. The District Land and Housing Tribunal found that the conduct was contrary to law and it renders the proceedings a nullity. The other thing, it also found that the respondent sued an improper party. Therefore, it was ordered that the suit be tried again against a proper party and before a competent tribunal. Aggrieved by the first appellate tribunal the appellant has filed this appeal on the following grounds: -

1. That the first Appellate Tribunal Chairperson erred both in law and facts for deciding to order retrial of the matter after being satisfied among other anomalies that the appellant was wrongly sued by the appellant.

2. That, the first appellate Tribunal's Chairperson erred in law and facts for disregarding assessor's opinion as to whether the matter be tried afresh or not.

3. That, the first appellate Tribunal's chairperson erred in law and facts for failure to comprehend that all the anomalies that featured in the trial Tribunal were caused by the respondent and not the appellant.

4. That the first appellate Tribunal's Chairperson erred in law and facts for making contradictory orders which do not go together such that it was anomalous for the trial Tribunal's failure ton ascertain the valued of the Land in dispute but yet ordering retrial of the matter before the competent tribunal and further that if the appellant so wish to file a case against a proper party.

At the hearing of this appeal the appellant was represented by Mr. Tumaini Mfinanga, advocate whereas the respondent appeared in person. The appeal was disposed of by way of written submissions.

Mr. Mfinanga dropped the second ground of appeal, therefore he submitted on ground 1, 3, and 4 together. He stated that, before a person institutes a matter before court of law or tribunal must satisfy himself or herself a person to whom he/she intends to institute a matter against him or her. He must know exactly the subject matter in dispute and the value of the subject matter in dispute. The respondent intentionally mounted proceedings against the appellant at the trial tribunal indicating the piece of land which was allegedly unlawfully invaded by the appellant. She went on testifying on how she came into possession over the land in dispute. She also called witnesses to testify against the appellant. The trial tribunal made a visit to the land in dispute for the purpose of satisfying itself on the allegations by the respondent against the appellant. He said that all these steps indicate that the respondent mistakenly believed that she knew that what she did was right. However, mistakes, ignorance and negligence on part of the respondent cannot be used as basis to make orders in her favor and against the appellant, since ignorance of law is not an excuse.

He argued that, at the first appellate tribunal the respondent among other prayers, she prayed to be declared as a lawful owner of the land in dispute. However, the retrial order by the first appellate Tribunal based on the respondent's submission was contrary to what she prayed in her petition of appeal. He argued that, unless the prayer is specifically prayed, the court cannot grant a prayer which is not prayed for. To support his argument, he cited the case of **Zacharia Mlalo vs. Onesmo Mboma** [1983] TLR 240.

He submitted further that, the decision of the trial tribunal based on credibility of witnesses. In effect, the trial tribunal was better placed to assess their credibility. He cited the case of **Ali Abdallah Rajab vs. Saada Abdallah Rajab and Others** [1994] TLR 132, where it was held that: -

> *"Where a decision of a court is wholly based on the credibility of the witnesses, then it is a trial court which is better placed to assess, their credibility than an appellate court which merely reads the transcripts of the records.".*

It was his submission that apart from visiting the land in dispute, the trial court also received testimonies of all witnesses and assessed the same, therefore that he is very sure that the trial court satisfied itself as to the value of the suit land. Thus, since the judgement of the first

appellate tribunal was based on credibility of evidence, then the first appellate tribunal was fuctus officio to depart from trial tribunal's decision. He referred to the case of **Omari Hemed vs. Republic** [1983] TLR 52. Having read the judgement of the trial tribunal, he failed to find out circumstances under which the appellate tribunal relied on for departing from the findings, judgement and orders of the trial tribunal. Hence, he prayed the court to allow the appeal and uphold the judgement and orders of the trial tribunal.

In reply the respondent submitted on ground 1,3, and 4 among other things, that it is true that the party who intends to institute a case must know the subject matter which is under dispute and value of the subject matter before instituting the suit. However, that does not mean a wrong party has to be given rights over a disputed thing, the only remedy is for the court to order a retrial of the case by a competent court with jurisdiction.

On the second ground of appeal, she argued that the assessors are duty bound to advice the chairman who however is not bound with their opinion. She finally, prayed the court to order a retrial of the matter before the tribunal with competent jurisdiction with proper parties.

On the basis of the above arguments, the issue to be determined is whether this appeal has merits. I will discuss all grounds of appeal i.e 1,3

and 4 together. The best point to start would be to make an inquiry on the jurisdiction of the Ward tribunal in land matters. The jurisdiction of the Ward Tribunal in relation to land matters is set out under section 15 of the Land Courts Disputes Act, Cap. 216. The section reads thus: -

> *"Notwithstanding the provisions of section 10 of the Ward Tribunals Act, the jurisdiction of the Tribunal shall in all proceedings of a civil nature relating to land be limited to the disputed land or property valued at three million shillings."*

In view of the above section the ward tribunal may entertain land matters in which the value of the subject matter is not more than three million shillings. Where the value exceeds three million shillings that matter falls outside the purview of the ward tribunal. The gist for inquiring court's jurisdiction at the inception of the case is to determine the authority of a particular court or tribunal to entertain the matter, jurisdiction cannot be presumed, it must be ascertained by the court or tribunal to which the matter is placed before it. In order to do that, the law has placed an obligation to litigants to make sure that they provide relevant facts giving jurisdiction to the court or tribunal. In the case of **Fanuel Mantiri Ngúnda vs. Herman Mantiri Ng'unda and Two others** [1995] TLR 155, the Court of Appeal held thus: -

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. In our considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. This should be done from the pleadings. The reason for this is that it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."

Therefore, the jurisdiction of the court or tribunal must be apparent on the face of records before the tribunal, and it is not a matter of evidence to be gathered during the trial. I subscribe the position reached by the first appellate tribunal which held that since the trial tribunal presumed its jurisdiction its proceedings were a nullity. On the third ground the appellant is complaining that the anomalies featured were caused by the respondent and not the appellant. With due respect to appellant's counsel, the parties cannot confer jurisdiction to a court or tribunal. In the case of **Shyam and Others vs. New Palace Hotel** [1972]1EA 199, the defunct East Africa Court of Appeal held that: -

"All courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary

principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

The immediate issue is whether it was legally proper for the first appellate tribunal to order a retrial following its declaration that the trial tribunal's proceeding and judgment were a nullity due to lack of jurisdiction. There are a number authorities relating to this subject, see **William Stephen vs. Leah Julius**, Civil Appeal No. 65 of 2013, Court of Appeal sitting at Arusha (Unreported) and the case of **Fatehali Manji vs. Republic** (1966) EA 344, in this case it was held thus: -

"In general, a retrial may be ordered only when the original trial was illegal or defective ..... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require...."

Basing on the above discusion, I agree with the argument by the appellant on ground number one and four that the first appellate tribunal erred in law for ordering a retrial of the case that it had declared a nullity due to lack of jurisdiction. As such it was illogical to order a re trial for the matter whose proceedings were void due to lack of jurisdiction.

That said, I allow the appeal and set aside the first appellate tribunal's order of retrial. The parties are at liberty to institute a fresh suit

if they are so interested in a court or tribunal with requisite jurisdiction.

The appellant is to have his costs.

It is so ordered.

Right of Appeal is Explained.

S.C. MOSHI

JUDGE

12/10/2021