IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC LAND CASE APPLICATION NO. 113 OF 2018

(C/F from District Land and housing Tribunal of Arusha at Arusha Application No. 204 of 2016)

CHRISTINA THOMAS KOONGE

(Suing as Administratrix of the Estate of

THOMAS KOONGE) ..... APPLICANT

Versus

RAPHAEL LENGITENG .....1ST RESPONDENT

SIMON MOLLEL.....2ND RESPONDENT

MATHAYO SAMWEL SIARA..... 3RD RESPONDENT

TROPICAL TOURS & SAFARIS..... 4TH RESPONDENT

NAKAJI VAYANI..... 5TH RESPONDENT

WILLIAM SARUNI..... 6TH RESPONDENT

LILIAN LUMBISA..... 7TH RESPONDENT

ZAKARIA GADI KIVUYO..... 8TH RESPONDENT

MARK RAJABU..... 9TH RESPONDENT

RULING

23th August & 24th September, 2021

MZUNA, J.:

The applicant is seeking for this court to review the ruling of the District Land and Housing Tribunal for Arusha (herein referred to as DLHT) after striking out her application allegedly that the application which was filed in the DLHT never disclosed the exact figure of the land which each of the respondents, above mentioned, did trespass. This court is therefore called

upon "*to satisfy itself as to the correctness, legality and propriety of the ruling and order and revise the said proceedings.*"

During hearing of this application which proceeded by way of written submissions, Mr. Duncan Joel Oola learned advocate, appeared on behalf of the applicant whereas Lilian Joely learned counsel represented the 1st, 2nd, 3rd and 8th respondents. The 4th respondent enjoyed the service of advocate Josephat Z. Msuya. On the other hand, Ms. Jenipher John learned counsel, represented the 5th respondent.

Briefly, the applicant filed Land Application No. 204 of 2016 against all respondents claiming for ownership of land located at Naserian in Arusha District measuring 350 paces in the Northern side and bordering Loiboni Melita. Measuring 310 in the southern part bordering with Jackson Lengiteng. In the West with 155 paces bordering Sonyo family and in the Southern part with 175 bordering the Koonge family.

The facts revealed that the 1st respondent divided the land in dispute into portions and then sold to the 2nd -9th respondents. It is therefore correct to say, except the 1st respondent, the remaining respondents their interest to the suit land is through purchase.

The Chairman of the of DLHT in his ruling on the preliminary point, said that the applicant was expected to give description of the suit land to every

parcel of land purchased by 2nd to 9th respondents from the 1st respondent in order to smoothen the execution process.

I propose to start with some preliminary points which I have to resolve first: -One; Issue of legality for the applicant to file this application. Mr. Josephat Msuya, the learned counsel at the beginning of his submission, pointed out that Mr. Duncan did not present any evidence that Thomas Koonge is dead and or that indeed Christina Thomas Koonge was appointed as an administratrix of the estate. He insisted there was need to prove death first in the circumstances of this case where the interest of the deceased person is in question. Again he says, there ought to have been produced letters of appointment as well.

On his part, Mr. Oola the learned counsel says, Mr. Josephat Msuya misdirected himself for arguing on the matter which was raised during preliminary objection and adjudicated upon by this court.

I should not labour much on this. As correctly submitted by Mr. Duncan, the ruling of this court issued on 09th April, 2021 allowed the applicant to implead the administrator of the deceased's estate. It cannot resurface now. I agree that this point is misplaced and therefore it is bound to fail. I dismiss it.

Another point which was raised by Ms. Jenifer John is that the submission of the applicant does not reflect what has been stated in the affidavit. Ms. Jenifer argued that, the applicant did not state any reason in the

affidavit to support his prayers in the chamber summons. She says that, the applicant's counsel adduced the reason that the DLHT misapplied the law when deciding the case which is the subject of this application while the affidavit did not state such reason. To bolster her submission, she cited the case of **The Registered Trustees of the Archdiocese of Dar es salaam vs The Chairman Bunju Village Government and 4 Others,** Civil Appeal No. 147 of 2006 CAT (unreported) which among other things the court held that submission is generally meant to reflect the general features of his case. They are elaborations of explanations on evidence already tendered in court. She insisted it is wrong to state new evidence in the submission which was not sworn in the affidavit.

In response, Mr. Oola faulted the submission by Ms. Jenipher and insisted that what he submitted about was prayed in the amended chamber summons and supported by an affidavit. Special attention was made to paragraph 4 of the affidavit. The learned counsel cited a number of cases like **Yakobo Magoiga vs. Penina Yusuph,** Civil Appeal No. 55 of 2017 CAT at Mwanza (unreported), among others.

Reading the affidavit, specifically paragraph 4 of the amended application supports what has been submitted in the written submissions. It says the Tribunal was in error to struck out the application ignoring the "description of the suit land made by the applicant on his suit land claimed." The submission has all along been on this aspect not more. It fails as well.

Another point is that the ruling of the DLHT was premised on points of law and therefore the remedy was to appeal instead of filing a revision application. That, revisionary powers are provided for under Section 79(1) of The Civil Procedure Code, [Cap. 33 R.E 2002]. To her, the circumstances mentioned under such provision does not feature into this one under scrutiny. That the applicant has established nothing to warrant revision. The learned counsel referred this court to the case of **Blass Michael vs Said Seleman** [2000] TLR 260, where the court said that revision can be invoked only where the issue is one of the jurisdictions that is, the irregular or non-exercise of jurisdiction or the illegal assumption of it. That the provision has nothing to do with conclusion of law or facts. And also, that this court will not exercise its revisional powers merely because the DLHT misapplied the law. Ms. Jenifer John contended further that the applicant was required to seek other remedies like appeal than revision.

Responding to that argument, Mr. Oola has said that he believes the Chairman reached to an illegal and erroneous decision wanting revision. The cases of **Principal Secretary, Ministry of Defence & National Service vs Devram Valambhia** [1992] TLR 387 and **Hitila vs Uganda** (1969) 1 EA 219 were referred to this court showing that, this Court should take appropriate measures to put the matter and the record right by way of revision.

The point which calls for determination is whether this application is fit for revision. Ms. Jenipher referred me to Section 79(1) of The Civil Procedure Code, [Cap. 33 R.E 2002]. However, there is specific provision governing the matter at hand. This application has been preferred under Section 43 of the Land Disputes Courts Act [Cap. 216 RE 2019] which reads;

> *43. Supervisory and revisional powers:*
>
> *(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court –*
>
> *(a) shall exercise general powers of supervision over all District Land and Housing Tribunals and may, at any time, call for and inspect the records of such tribunal and give directions as it considers necessary in the interests of justice, and all such tribunals shall comply with such direction without undue delay;*
>
> *(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or* ***revisional jurisdiction,*** *on application being made in that behalf by any party or of its own motion,* ***if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.***

According to this section, this Court has jurisdiction if it appears that there is an error material to the merits of the case involving injustice to revise the proceedings of the District Land and Housing Tribunal. The issue complained of is all about the pleadings in the DLHT not prescribing demarcations and size of each respondents' portion of land (2nd to 9th). In my

view, this anomaly falls within the ambit of matters which calls for intervention of this Court through revisionary powers. In the case of **Principal Secretary, Ministry of Defence & National Service vs Devram Valambhia** (supra), reaffirmed the position that right to be heard cannot be done away where the point of law at issue is the illegality or otherwise of the decision being challenged. It is a point of law of sufficient importance to constitute a sufficient reason. Again in the case of **Transport Equipment Ltd v. D.P. Valambhia** [1993] TLR 91 (CA) the court held that:-

"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

As well submitted by Mr. Oola, there is a point which calls for this court to revise the record. This case is fit for revision.

There is also another point. Paragraph 6(a)(iii) of the amended application when giving description of the suit land, the applicant did not mention the boundaries on the eastern part of it, instead talks about southern part being recorded twice as correctly argued by Ms. Jenifer. But in my opinion, this is just a mere slip of the pen which can be rectified by amendment rather than striking out the application. It does not prejudice any part as the matter should not be decided on such simple technicalities rather on merits. The case of **Chang Quang International Investment Limited**

vs TOL GAS Limited (supra) cited by Mr. Duncan is quite relevant in the circumstances of this case. In the case of **Gapoil (Tanzania) Limited vs the Tanzania Revenue Authority and Two Others,** Civil Appeal no. 9 of 2000, CAT at DSM (unreported) the Court of Appeal cited with approval the case of **Vallabhidas Karsandas Raniga versus Mansukhlal Jivraji and Others** (1965) E.A. 700. The then Court of Appeal of Eastern Africa considered the applicability of the Slip Rule and held:

> *'Slip Orders' may be made to rectify omissions resulting from the failure of counsel to make some particular application'*

The Court went on holding that;

> *'We are also satisfied that the said misdescription of the parties is a minor and curable defect under the Slip Rule.'*

Standing on that authority therefore, reasonably the applicant omitting to write Eastern part of the land in dispute instead write Southern twice the defect is curable under the slip of the pen rule.

Lastly, on the main issue, whether the law requires the applicant to state in the pleadings the description of the property of the applicant/plaintiff or that of the respondent (s) /defendants? The nagging question which calls for determination is whether the DLHT was correct to find and uphold the point of preliminary objection raised by the 5th respondent that the applicant ought to have described the size and boundaries of land which the 1st respondent sold to the 2nd to the 9th respondents?

The view expressed by Mr. Oola, the learned counsel is that the applicant claims the land as a whole and not into pieces as it was purchased by the 2nd to 9th respondents. He argues further that the description outlined by the applicant in the application was enough to institute the case as they described the whole land in dispute. The issue of boundaries and size of the pierces of land bought by respondents might have been known during hearing and sometimes when visiting the *locus in quo*, he added.

That, the issue is not about the extent in which the respondents trespassed into the suit premises, but it is all about identification of the land as a whole. To fortify his argument, he referred this Court to the case of Said **Fereji vs Jaluma General Supplies Ltd and Another** [Land case No. 86 of 2002] TZ HC Land division 167 which to his understanding elaborates the reasons for describing the suit property which is to assist the Court in issuing executable orders. He goes on substantiating that the description of the suit land may include the location, title number for surveyed plots, neighbours or boundaries for un surveyed plots or form of description that would sufficiently identify and distinguish the suit property from other properties.

Mr Duncan furthermore argued that, the suit property being unsurveyed one the applicant was only required to describe or identify the land in dispute. He faulted the chairman for basing the decision on the case of **Naiskie Lelemor vs. Barnabas Kisiri,** Civil Appeal No. 20/1993 at Arusha (unreported) and **Mlangarini Village Council v. Samwel Meshilieki & 6**

Others, Application No. 87 of 2015 (unreported) as it is distinguishable from the circumstances of this case.

Opposing the application, Ms. Lilian Joely, learned advocate submitted that, this application has no merit because the applicant has thrown the burden of finding the illegality to the court. She says, the advocate for applicant has failed to show what he is seeking from this Court to be revised. Moreover, the learned advocate argued that the applicant had not even stated which part of suit land had been encroached by each of the respondents. She says, such omission might bring hardships during execution process in case the applicant wins the case against some of the respondents. To bolster her position Ms. Lilian referred this Court to the case of **Naisikie Lelemori vs Barnabas Kisiri,** (supra)**.** She further submitted that failure by the applicant to identify the property of each respondent is equal to not having cause of action against them. Also, she cited the case of **Husseinali Dharamsi Hasman vs The National bank of India LTD** (1937) EACA 55. At the end, Ms. Lilian cited Regulation 3(2) of the Land Disputes Courts (The District and Housing Tribunal) Regulations, 2003.

Ms. Jenipher, just like other counsels for the respondents, supported the decision of the DLHT for striking out the application on the reason that the applicant failed to state in his application clear demarcations and size of each respondent the omission which could make execution of the decree impossible in case the application succeeds for one or some of the

respondents. She referred this court to the cases of **Naiskie Lelemor vs Barnabas Kisiri** (supra), **Rwanganilo Village Council and 21 Others** vs. **Joseph Rwakashenyi,** Land Case Appeal No. 74 of 2018 High court Bukoba Registry, and **Peter Q. M. Sule vs Rozalia Lea Musenya,** Misc. Land Appeal No. 11 of 2019, High court Arusha Registry (all unreported). Order VII rule 3 of the Civil Procedure Code, [Cap. 33 RE 2019] and regulation 3(2)(b) of the Second Schedule of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN No. 174 were also cited to augment her submission on the need to clearly describe the suit land.

Mr. Josephat Z. Msuya, the learned counsel, also premised his submission on the argument that the applicant ought to have stated the size and specific boundaries of the land sold to the 2nd to 9th respondents. This would at least make each of the respondent fend his own specific interest which would ease this court in its judgment.

To strengthen his submission Mr. Josephat referred this court to the cases of **James Funke Ngwagilo vs Attorney General** [2004] TLR 161 and **Pasinetti Adriano vs Giro Limited and Another** [2001] TLR 89. He pointed out from these cases the principle that the Court always decides on the issues which were specifically pleaded in the pleadings and not otherwise. To him, he considers the omission not to mention the size and borders of each parcel of land owned by 2nd to 9th respondents in the pleading being fatal. The remedy was to file a fresh application with sufficient description of

the land in dispute claimed to be trespassed by each of the respondents. Both respondents urged this court to dismiss the application with costs.

In his rejoinder submission, Mr. Duncan reiterated his earlier submission in chief and some points involving legality of the application, which he says has no basis.

It is clear that both counsels are not at issue that the pleadings described the size and boundaries of the whole suit land. What they depart from is that the applicant was supposed to describe the size and boundaries of each portion of land purchased by respondents No. 2-9 from the 1st respondent. All the authorities cited by them agree in principle that the size and boundaries of the land in dispute has to be described, as per the requirement of the law. This will assist at the time when the decree will be executable. What remains wanting is on interpretation of the law specially so where the suit land involves different respondents with different interests.

Regulation 3(2) of the Land Disputes Courts (The District and Housing Tribunal) Regulations, 2003 provides;

3(2). An application to the Tribunal shall be made in the form prescribed in the second schedule o these regulations and shall contain

(a)the names and address of parties involved

(b)the address of the suit premises or ***location of the land involved in the dispute to which the application relates.***

(c)nature and disputes of action

(d)estimate value of the subject matter of the dispute

(e)relief sought;

(f) amount of Rent if the dispute involves payment of rent

(Underscoring mine).

Mr. Duncan is contending that, so long as the size and boundaries of the whole land is prescribed there is no need of prescribing for each and every respondent's land he purchased. That the matter will be taken care during hearing, it will be described by the evidence.

Order VII rule 3 of the CPC as well as Regulation 3 (2) (above cited) talks about "location of the land involved in the dispute to which the application relates". It has nothing to do with exact figure of the trespass by each respondent so long as the applicant has shown the land alleged to have been encroached by marked location.

The cited case of **Naiskie Lelemor vs Barnabas Kisiri** (supra) the description was verge because the decree said "the plaintiff is the rightful owner...parcel of land in dispute in Lundikinya/..Vilage in Monduli District." The Court of Appeal found that it was irregular for the failure to give the size of land allegedly trespassed into.

In our case, the land has the size 350 paces in the Northern side as well as the bordering people. Similarly, 310 paces in the southern as well as 155 paces in the West, to mention but few. It is therefore correct to say that the

case of **Naiskie Lelemor vs Barnabas Kisiri** (supra) is distinguishable in that respect.

It is therefore correct to say, the gist of regulation 3(2) of the Land Disputes Courts (The District and Housing Tribunal) Regulations (supra) has not been violated. Presence of number of respondent does not in my view shift the plaint to show what each respondent had trespassed so long as the disputed land is clearly marked.

For that reason, revision application is allowed. The DLHT application No. 204 of 2016 should proceed before another Chairperson. Costs shall abide to the final results of that case. Application allowed. Order accordingly.

M. G. MZUNA,
JUDGE.
24th September, 2021.