

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 51 OF 2020
(Arising from District Land and Housing Tribunal for Mbeya
Land Application No. 10 of 2018)**

**MPASI MWAMBAMBE.....1ST APPELLANT
DANIEL SHIMALAUNGA.....2ND APPELLANT
PAULO MWAMBAMBE.....3RD APPELLANT
MASUMBUKO WATSON MOLAD.....4TH APPELLANT
MACHUNGWA MASASU.....5TH APPELLANT
NESO SELSON MACHANYA.....6TH APPELLANT
LUKASI MSANGAWALE.....7TH APPELLANT
CHAGU MASASU.....8TH APPELLANT
MOHAMED SHIMALAUNGA.....9TH APPELLANT**

VERSUS

EMMANUEL A. MACHA.....RESPONDENT

JUDGMENT

Dated: 18th May & 10th June, 2022

KARAYEMAHA, J

This suit touches on the ownership of farm No. 499 containing 27.36 hectares located at Mwatenga village within Mbarali District (henceforth, the suit land). The suit land is embroiled in an ownership tussle between the appellants, who allege that they are the lawful owners thereof, by virtual of inheritance from their parents, and the respondent who alleges that these appellants were mere trespassers

who derive no interest in the suit land. The contention by the respondent is that he is a lawful owner of the suit land with certificate of the Right of Occupancy No. 137414. He asserted that he acquired that farm in 1992 after applying to the Village Council in May and July, 1989. The applicant contended further that after being allocated and issued with the Certificate of Occupancy, he complied with conditions therein by paying land rent, demarcating and preserving the boundaries of the farm and using the land for agricultural purposes.

The dispute arose when the appellants on diverse dates and months in 2010 trespassed into the farm and constructed houses therein without the respondent's leave or any authorities' leave.

The appellants denied that they had encroached or trespassed into the suit land that belonged to them and have resided therein for 12 years. This tussle lasted for years until 28/05/2015 when intervention of the Rujewa District Council and team of experts from Land Department, was enlisted, culminating in a report which stated categorically that the suit land belonged to the respondent. All efforts to have vacant possession proved futile. This triggered the respondent's resentment, hence his decision to institute Land Application No. 10 of 2018 in the District Land and Housing Tribunal (henceforth, the Land Tribunal).

By an application instituted in the Land Tribunal on 18/01/2018 the respondent, in his application against the 1st to 9th respondents, moved it to grant the following reliefs:

- (a) A declaration order that the applicant is a lawful owner of the disputed property and entitled to possession of the same.*
- (b) An order for eviction of the respondents, their relatives, agents and invitees from the suit property.*
- (c) An order for injunction to restrain the respondents themselves, their agents and relatives from remaining in the disputed property and from any other interference with the applicant.*
- (d) An order for payment of TSH 10,000,000/= (ten million only) each being an outstanding amount for using the applicant's land (sic) without his consent from 2010 till the vacant possession of the suit property be delivered to the applicant (sic).*
- (e) An order for payment of general damages for disturbances caused to the applicant.*
- (f) Costs of this application.*
- (g) Any other or further reliefs this honourable tribunal deem fit to grant.*

At the zenith of the trial, the trial Chairman decided in favour of the respondent by declaring him the lawful owner of the suit land and the appellants as trespassers. Aggrieved, the appellants have found

recourse to this Court. They have filed the current appeal whose memorandum of appeal contains six (6) grounds. For reasons to be apparent in the due course, I am not going to reproduce them in this judgment.

When the appeal came up for hearing on 24/02/2022, by consensus parties agreed to canvas the same by way of written submissions. Happily parties complied with the court's order by filing their submissions timely. Appellants have the services of Mr. James Kyando, learned advocate from JBM & Associate Advocates and the respondent is represented by Mr. Jackson Ngonyani learned advocate from TSK Law Chamber.

Before I get to the thick of the appeal, let me, quickly, make findings on one problem. There are in record confusing situations and events. In the course of reading the Land Tribunal's record, I have discovered anomalies that go to the root of the trial and crumble it.

Indicatively, there is in the record an amended application which was filed on 03/07/2018 which joined Mohamed Shimilaunga and triggered him to file a Written Statement of defence to the amended application. Both hand written and typed proceedings as reflected from page 11 to 12 of 02/07/2018, 12/02/2018 and 03/07/2018 indicate that

there was Misc. Application. I have passed through the record and combed the documents. I have noted that the referred application is Misc. Land Application No... of 2018. The 10th appellant prayed therein to be joined as a respondent to Application No. 10 of 2018. The proceedings of 02/07/2018 indicate as follows:

"02/07/2018

Coram: T. Munzerere – Chairman

Members: 1. Kalongole

2. Kangele

Zamda

Applicant: Present.

Respondent: Present

Mary Gatuna advocate for applicant.

- There is a miscellaneous application.*
- One person needs to be joined.*
- I pray for adjournment.*

Applicant

I have served all respondent (sic).

Jackson Ngonyani for respondent

- It is true I have been served.*

Order:

- Hearing of Misc. on 03/07/2018.*

Sgn. T. Munzerere

Chairman

02/07/2018"

Also, proceedings recorded on 03/07/2018 indicate as follows:

"12/02/2018

Coram: T. Munzerere – Chairman

Members: 1. Kalongole

2.

C/c

Applicant: Present.

Respondent: 1st Present

2nd Both absent

Mary Gatuna advocate for respondent. *The matter is for proceed (sic).*

Order:

- *Mention on 24/07/2018*
- *The applicant is joined to the suit as the 1st respondent.*
- *Mention on 24/07/2018.*
- *Respondent be served.*

Sgn. T. Munzerere

Chairman

02/07/2018"

After three consecutive adjournments, the application was heard.

From the above quoted part of the proceedings, it is categorical that Misc. Land Application of 2018 which was not even given registration number, but presented for filing on 02/07/2018 and received on the same date, was not heard. It is not indicated how thereafter the

trial Chairman joined him to the application and why he joined him. Worse still, the proceedings do not indicate that the trial Chairman ordered the amendment of the application. What has confused me the most is the step taken by the 10th respondent to file a Written Statement of Defence (WSD) to the amended application without an order or being legally and formally joined to the suit. The 1st to the 9th respondents were neither ordered to file WSD to the amended application.

I have studied the Land Tribunal's judgment to the letter. It does not indicate whether it was predicated to the original application filed on 18/01/2018 or to the amended application filed on 03/07/2018 or both. It is similarly not indicated that in dealing with the WSD the trial Chairman dealt with the 1st to 9th respondents and the 10th respondent's WSD. This is a substantial irregularity because the original application recognizes the 1st to 9th respondents while the amended application recognizes the 1st to 10th respondent. In similar vein, the 1st to 9th joint WSD recognizes the 1st to 9th respondents while the 10th WSD recognizes the 1st to 10th respondents.

In law, the 10th appellant had no order of the Land Tribunal to defend himself in Application No. 10 of 2018. This is because there is no order for amendment of that application and no order to file a WSD. I

may hold that the Land Tribunal was correct to deal with the original Application but I am worried that it did act on the amended application because its judgment included the 10th appellant. If so, where did it get mandate to act upon it while there is no order for it to be filed. If I agree with the trial Chairman that he did not err, then the 1st to 9th respondents' rights are at stake. I say so because they did not defend themselves on the amended application even if it was substantially similar to the original application.

The immediate question that needs determination is what the effect of amending the pleading is. Happily this question is not left without answers. Once a pleading is amended that which stood before the amendment is disregarded. It is no longer material to the court. This principle was articulated by their Lordships Hodson and Ormered, LJ in the English case of **Warner vs. Sampson and another**, [1959] 1 QB 297 in which it was held inter alia that:

"...once pleadings are amended, that which stood before amendment is no longer material before the court.

The principle in **Warner** case was followed by the Court of Appeal of Tanzania in the case of **Tanga Hardware & Auto Parts Ltd and 6**

others vs. CRDB Bank, Civil Application No. 44 of 2005 (unreported). In this case the Court of Appeal speaking through Ramadhan, JA (as he then was) stated instructively that:

*I have no doubt in my mind that pleadings, which were the subject matter before their Lordships, cover notices of motions but in any case I am positive that that holding can be extended to cover all documents presented to courts. What their Lordship meant, I think, is that **once there is an amended document then the previous one before the amendment should be treated as if it never existed.***

[Emphasis is mine]

Back to this case, when the first application was amended obviously it was no longer material before Land Tribunal. It was to be treated as if it never existed. Therefore, it was wrong for the respondents not to file a WSD to an amended Application which of course could not because there was no order of amending the original application. This is the effect of the passive behavior of the trial Chairman in conducting the trial.

I have no doubt to state without any fear of contradiction that premising a judgment on controversial pleadings and proceedings, the Land Tribunal committed a serious error which is incurable under any law. The Land Tribunal had to give specific orders stemming from reasoned ruling that the 10th appellant was joined as the respondent to the application. It had similarly to give specific orders that the respondent was to amend the application and thereafter the respondents to file WSD to the amended application or give any other orders it deemed fit. In my considered observation, this has been the practice in this jurisdiction which has been rigorously followed in our courts.

For reasons canvassed above, I am satisfied that there was no judgment and decree. Anything subsequent, was a nullity. With this holding, there is no cause of going into the merits of the grounds of appeal because they draw their bond in a judgment which was null. I should however express my deep regrets that this has taken away from me an opportunity to consider the powerful and well reasoned submissions by both counsels on the grounds of appeal.

Having concluded that the trial court indulged in serious and incurable errors, the question that follows is what course I should take.

It is trite law that errors of this nature vitiate the proceedings and decree. If I dismiss the appeal, that will amount to blessing the proceedings, judgment, decree and subsequent orders thereto of the Land Tribunal. At the same time there is no appeal at all to allow. Given the anomalies that crowded the trial, it is my view that an order for trial *de novo* will serve the ends of justice. The matter is hereby remitted before the Land Tribunal to have the full trial conducted by another competent Chairperson. Given the time this matter has lived in judicial process, I order the application to be accorded a fast track. It should be completed within six months from the date of receiving this order.

Costs to be in the due course.

It is so ordered.

DATED at MBEYA this 10th day of June, 2022



A handwritten signature in black ink, appearing to read 'J. M. Karayemaha', is written over a horizontal line.

J. M. Karayemaha
JUDGE