IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

LAND APPEAL NO. 06 OF 2022

(Originating from the Land Application No.4/2014 before Chato District Land and Housing Tribunal)

EDWARD BUBAMU ..... APPELLANT

VERSUS

PAGI KILAURI ..... 1ST RESPONDENT

JUMA KILAULI ..... 2ND RESPONDENT

NYAMULANGI KILAULI..... 3ND RESPONDENT

RULING

25th May & 23rd June, 2022

Kahyoza, J.

Edward Bubamu filed an application in the District Land and Housing Tribunal (the DLHT) praying for declaration that he is the owner of the suit land. The DLHT, vide an *ex parte* judgment declared him owner of the suit land. Later, **Pagi Kilauri** and **Juma Kilauli** applied successfully to set aside *ex-parte* judgment. After *interpartes* hearing, the DLHT decided in favour of **Pagi Kilauri** and **Juma Kilauli.**

Aggrieved, **Edward Bubamu** appealed to this Court raising four grounds of appeal, which raised the following issues: -

1. Whether the application for setting aside an *ex parte* judgment was defective because as it was an *omnibus* application.
2. Whether the DLHT fatally erred to deliver a judgment 3 months from the date it reserved it.
3. Whether the DLHT erred to vacate its *ex-parte* judgment out of time.
4. Whether the DLHT was justified to hold that the appellant did not prove his claim for failure to call author of the sale agreement.

I will commence with the first issue whether the application for setting aside an *ex parte* judgment was bad in law for being *omnibus*. The appellant and the respondents had nothing to add to their grounds of appeal. I will not dwell much on this issue. I know no any provision of the law which bars *omnibus* application. There are several the Court of Appeal decisions and the High Court which bar *omnibus* application. Some of those decisions are **Mohamed Salimin v. Jumanne Omary Mapesa** Civil Appl. No. 103/2014 CAT (unreported), **Bibie Hamad Khalid v Mohamed Enterprises (T) Ltd; Kangonda and Hamis Khalid Othman** and **Ali Chaman v. Karagwe District Council & Columbus Paul**. There are also **Rutagatina C.L Vs the Advocate Committee & Clavery Mtindo Ngalapa,** Civil Application No. 98 of 2010, and **Jovin Mtagwaba &**

85Others Vs Geita Gold Mining Limited, Civil Appeal No. 23 of 2014, where the Court took a position that the *omnibus* application are incompetent and must be struck out.

There is no dispute that the application for setting aside *an ex parte* judgment combined two reliefs, **one** for seeking extension of time to file an application for setting aside a default judgement and **two**, seeking to set aside a default judgment. There is no law that bars combination of distinct reliefs or application in one application. There is also no hard and first rule of practice developed by Courts to discourage combination of two or more distinct reliefs in one application. There are authorities both of this Court and the Court of Appeal discouraging and others appreciating combination two or more distinct reliefs in one application.

The Courts discourage combination of several reliefs in one application, (*omnibus* application) and find such application incompetent for combining two or more distinct reliefs governed by **different laws with different yardstick or timelines.** Whereas Courts encourage combination of one or more reliefs in one application to avoid multiplicity of applications, provided reliefs are not **diametrically opposed to each other.** This is a position in **MIC Tanzania Ltd Versus Minister of**

Labour and Youth Development and Attorney General Civil Appeal No 103 of 2004 (Unreported). The decision in **MIC Tanzania Limited** (supra) supports consolidation or combining several application or reliefs into one application (chamber summons). It also sets a test to be applied to determine whether omnibus application is competent or not. The test is that the Court must make a determination whether reliefs sought in the chamber summons are not dramatically opposed to each other. The Court of Appeal stated **"We wish to emphasis, all the same that, each case must be found that prayers made were not diametrically opposed to each other."**

I wish to associate myself with decisions supporting *omnibus* application provided that reliefs sought are not diametrically opposed to each other. An *omnibus* application saves court's time and litigants' costs. In ***MIC Tanzania Limited Vs Minister for Labour and Youth Development,*** (supra) which quoted with approval the decision of the High Court in ***Tanzania Knitwear,*** the Court of Appeal stated:-

> *"In the TANZANIA KNITWEAR LTD case (Supra), the application had united* ***two distinct applications,*** *namely one for setting aside a temporary injunction and another for issuance of a temporary injunction. Objection was taken against such a*

combination on the ground that it was bad in law. Mapigano, J. (as he then was) held:

1. ***In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings.***
2. *Courts of law encourage the opposite. Indeed, we are not bound by it and there is no direct decision of this Court on the issue. However, that cannot be a hindrance to us in our endeavours to ensure that substantive justice always prevails. After all, judicial process is not a discovery process but a creation process.* ***Having so observed, we hold that the ruling of Mapigano, J. on the issue cannot be faulted, and we are respectfully in agreement with him."***

The decision of the Court of Appeal in ***MIC Tanzania Limited*** was different from the decision in the case of **Rutagatina C.L (supra)**. In the latter case, the Court of Appeal the Court Appeal revisited Rules 44, to 66 of the Court of Appeal Rules, 2009 and found the cited Rules have common feature in the sense that, they make a reference to an application. Then the Court stated that, it was never envisaged in the cited Rules that, an intended applicant would file several applications. The Court of Appeal therefore stated that, there was no room in its Rules for a party to file two applications in one.

I am of the view that the decision of the Court of Appeal in the case of **Rutagatina C.L** (supra) is distinguishable as the Court was construing

the Tanzania Court of Appeal Rules, 2009. The Tanzania Court of Appeal Rules, 2009 do not apply to matters in the High Court.

I, therefore find the first ground of appeal baseless and dismiss it.

I will now consider the issue whether DLHT erred to deliver a judgment after expiry of three (3) months from the date of conclusion of proceedings. It is true that the *proviso* to regulation 19(1) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174/2003 provides that the chairman shall not reserve a judgment for a period more than 3 months from the date of conclusion of proceedings. However, the law does not state that the judgement delivered after that period is a nullity. I do not subscribe to appellant's view that I should find the judgment illegal simply because it was reserved for more than 3 months. Regulation 19(1) was enacted to curb delays in delivering judgment. If the chairman delivers a judgment after 3 months, that will be a ground to take disciplinary action against that chairman but not a ground to declare the judgment a nullity. I asked myself what would happen if I declare the judgment a nullity? Will I order the same chairperson to write and deliver another judgment within the period prescribed by law or order trial *de novo*? Any of the above options is ridiculous and a mockery to justice. It would not serve anyone's interest. If I declare a judgment

delivered after 3 months from the date of conclusion of proceedings a nullity and order re-trial, re-trial will cause more delays. I agree with the appellant that the chairman reserved the judgement from 15/10/2021 and delivered it on 18/02/2022, hence, he delivered it after expiry of 3 months from the date of conclusion of proceedings. The chairperson violated the law. All in all, I do not find that chairman's violation of the law occasioned any injustice, which this court must address. Acting under section 45 of **Land Disputes Act**, [Cap. 216 R.E. 2019] (the **LDA**) and Section 3A of the Civil Procedure Code Act, [Cap. 33 R.E. 2019] (the CPC), I find no injustice caused to attract my intervention. Section 45 of the **LDA** states that:-

> *45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence* ***unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.*** *(Emphasis added)*

I find no merit in the second ground of appeal. I dismiss it.

The third ground of Appeal raised an issue whether the DLHT erred to vacate its *ex-parte* judgment without the respondents obtaining leave to apply to the DLHT to set aside *ex-parte* judgment out of time. I will not dwell on this issue for long time. The record speaks loud that the respondents applied vide Miscellaneous Application No.24/2020 for leave to apply to set aside the *ex-parte* judgment out of time. The DLHT granted the application on the 01/10/2020. It permitted the respondents to file an application to set aside an *ex-parte* judgment out of time. The respondents applied to set aside an *ex-parte* judgment vide Miscellaneous Land Application no. 42/2020, which the DLHT granted. I therefore, find no merit in the complaint that the DLHT set aside the *ex-parte* judgment without the respondents first obtaining leave to apply out of time to the DLHT to set the judgment aside. I dismiss the third ground of appeal.

The last issue is whether the DLHT was justified to hold that the appellant did not prove his claim for failure to call author of the sale agreement. This is a first appeal which is in the form of a re- hearing. For that reason, I will review the evidence on record and consider the last ground of appeal. The appellant contention was that he bought the suit land from the 1st and 2nd respondent's father, Kilauli Kiula. The sale

agreement was executed on the 28/12/2005. The only evidence on record in the appellant's favour is a sale agreement, Exh. PE1. The sale agreement was between Edward Bubamu and Kilauri Kiula executed in the presence of hamlet chairman of Muhororo hamlet. There was no any other witness.

I doubted whether the sale agreement is genuine and enforceable. It is a position of the law that once a village is registered management of the land vested in the village council. This position is found in the determination of the Court of Appeal in the case **Metthuselah Paul Nyagwaswa vs Christopher Mbote Nyirabu** [1985] TLR 103. The Court found that there was no transferred because the village council did not approve it. It stated-

> *"rights to land held in a registered village could only be transferred with the approval of the Village Council... the sale to the appellant, for lack of approval, was void and of no effect."*

The appellant tendered a sale agreement showing that the agreement was signed by seller and buyer and witnessed by the hamlet chairman. The village council was not involved. The position before and after the Village Land Act [Cap. 114 R.E. 2019] came into operation is similar, that no person would legally occupy or acquire land without the

involvement of the village council. I find therefore that there was no proper transfer of land.

Furthermore, the sale agreement shows that the hamlet chairman witnessed the sale. It was very important to summon the hamlet chairman who was the appellant's key witness. The law requires that whoever asserts in a civil litigation must be capable to prove the assertion on the reasonable acceptance of evidence, cum on the reasonable balance of probability. The appellant had duty to prove that he procured the suit land. Failure to call a key witness, the hamlet chairman, entitled the DLHT and this Court to draw adverse inference that if the hamlet chairman was summoned, he would have testified against the appellant.

In addition, I do not find convincing evidence to prove that the appellant procured land in the absence of a neighbor or the deceased's relative. There is no legal requirement that the neighbours should be presented when a person buys a piece of land but it is vital. Neighbours give assurance to a buyer that the land belongs to the seller and confirms boundaries specified in a sale agreement. Considering a fact that the appellant failed to call the hamlet chairman and a fact that no neighbor or

deceased' relative took part, I find that there was sale agreement executed between the appellant and the deceased.

Apart from the sale agreement, another evidence which supported the appellant assertion, was Philbert Kagoma Gwandiho(**PW2**)'s evidence. Philbert Kagoma Gwandiho (**PW2**) deposed that the appellant once licenced him to cultivate part of the disputed land. That evidence is to far to prove ownership. The appellant did not contend that he once occupied the disputed land. Thus, there is no evidence to prove that the appellant took actual possession of this suit land to be able to licence another person to use the suit land.

Respondents, especially Juma Kilauri (**DW2**) explained how their father obtained the suit land. He contended that their father stayed at the suit land until he was murdered. After their father was murder they buried him at the suit land. The contention that the respondent's father was buried to the suit land was supported by Pagi Kilauri (**DW1**), Lutobeka (DW3) who was neighbouring the disputed land, Mashelo Kahabu DW4 a neighbor, who witnesses the appellant being interrogated, John Malula Misalaba (**DW5**) and Ernest Simon Chai (DW6).

John Malula Misalaba (**DW5)** deposed after the first and second respondents' father died, the respondents went to the village office and reported that they were leaving the disputed land under the supervision of village leaders. John Malula Misalaba (**DW5)** was the village chairman in 2007. He contended that the respondents were not staying in that village at that time. Later, the first respondent's mother went to the disputed land and occupied it with the first respondent.

All the defence witness deposed the police suspected and arrested the appellant murdering the first and second respondents' father. Lutobela (DW3) aged 100 years, deposed that the appellant worked as a casual labourer for the first and second respondents' father. There evidence from that the appellant was present when the deceased was murdered and he did not inform any one that he bought the suit premises.

There is yet another piece of evidence which support the contention that after the first and second respondents' father died, they left the disputed land under the supervision of the village office. This proves that the disputed land belonged and was occupied by the first and second respondents' father until his demise. It negates the contention that the deceased sold the disputed land. Had the first and second respondents'

father sold the disputed land in 2006, the buyer would have been in occupation at the time the deceased was burried.

I find the first and second respondents' evidence plausible and probable and worth to believe. The appellant did not discharge his obligation to prove that he procured the disputed land from the deceased, the first and second respondents' father. The appellant's evidence to prove that he bought the suit land was too weak and shaky. As stated above the document to prove that he bought the suit land had no any value when weighed against the defence evidence. No deceased's relative or neighbor witnessed the alleged sale agreement. Also, the village council did not authorize it, save the hamlet chairman who could not be summoned to testify. Furthermore, the appellant alleged that he bought the suit land in 2006 until the alleged seller met his demise in 2007, the appellant had not taken possession of the disputed land. The allegedly sold hand remained in the possession of the seller until his demise. This is unprecedented, unless the sale agreement specified that the seller will occupy the sold land until his demise. In **Hemed Said V. Mohamed Mbiu** [1989] TLR 113, this Court held that;

"According to law both parties to a suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win".

I find that the respondents adduced heavier evidence than the appellant, they must win.

Before I pen off I wish to condemn the appellant for joining **Nyamulangi Kilauli** as party to the appeal. She was not a party to the application before the DLHT it was unprocedural to make her a party at appeal stage. If the appellant wanted **Nyamulangi Kilauli,** the first respondent's mother to be a party, he had to follow legal procedures.

In the end, like the DLHT, I find that the appellant failed to prove his claim. Consequently, I uphold the judgment of the DLHT and dismiss the appeal with costs.

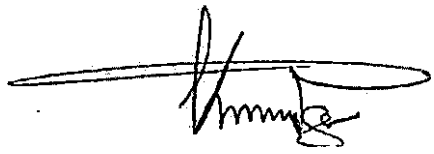
I order accordingly.

Dated at **Mwanza** this 23rd day of **June**, 2022

THE HIGH COURT OF TANZANIA

J. R. Kahyoza
Judge

Court: Judgment delivered in the presence of Mr. Juma Kilauri, the second respondent and the absence of the appellant and the first respondent. Ms. Jackline (RMA) present.



J. R. Kahyoza
Judge
23/06/2022