THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF IRINGA

AT IRINGA

LAND APPEAL NO. 5 OF 2021

(Arising from the District Land and Housing Tribunal for Iringa, at Iringa in Application No. 151 of 2019).

ALEX LOID MGANI (Administrator of the estate of the late Patrick LoidMgani.....APPELLANT

VERSUS

JENIFA PAUL CHAMBALA.....RESPONDENT

JUDGEMENT

03th March & 19th April, 2022.

UTAMWA J,

In this first appeal, the appellant ALEX LOID MGANI (Administrator of the Estate of the Late PatricLoidMgani) challenges the judgement (impugned judgement) of the District Land and Housing Tribunal for Iringa, at Iringa (the DLHT) in Application No. 151 of 2019 (the original suit). Before the DLHT, the appellant, who sued as administrator of the estate of the late PatricLoidMgani (hereinafter called the deceased),sued the

respondent, JENIFA PAUL CHAMBALA for trespassing into the suit premises (the house) located on Plot No. 386, Block B, at KihesaKilolo B, within Iringa Municipality, in Iringa District, henceforth the house.

The suit was basically footed on the following brief facts:that, the house was part of the deceased estate for which the appellant had been appointed administrator.However, the respondent was unlawfully occupying it on the pretext that she was a legal wife to the deceased and she lived in the house with the deceased child, one Clara. Though the appellant did not dispute that Clara was in fact, among the deceased issues and born by the respondent, he maintained that the respondent was not a legal wife of the deceased, and efforts to make the respondent vacate the house proved futile. The appellant thus, claimed for the following reliefs before the DLHT:

i. A declaratory order that the respondent was a trespasser in the premises,
ii. Eviction order against the respondent from the suit premises,
iii. A permanent injunction restraining the respondent or his agents or servants from interfering with the premises,
iv. General damages to the tune of Tanzanian shillings (Tshs.) 20, 000, 000/= (Twenty million),
v. Payment of interest at the rate of 12% on the sum of the said Tshs. 20, 000, 000/= from the date of filing the suit until the judgment,
vi. Costs of the application, and
vii. Any other relief the DLHT would deem just to grant.

Having heard the parties to the suit, and through the impugned judgement, the DLHT dismissed the suit for want of proof of ownership of the house on the balance of probabilities. In so deciding, the DLHT also considered the fact that the appellant had not disclosed the time when the cause of action had arisen. It further ordered the status quo of the parties to be maintained in the sense that the respondent and the child Clara should go on residing into the house. It did not also make any order as to costs owing to the relationship of the parties.

The appellant was aggrieved by the impugned judgement, hence this appeal. The appeal is based on three grounds namely:

1. That, the DLHT erred in law and fact by procuring the judgment without considering the strong evidence adduced by the appellant's witnesses.
2. That, the DLHT erred in law and fact by procuring the judgment while misdirecting itself on the aspect of disclosure of the date when the cause of action arose.
3. That, the DLHT erred in law and fact by dealing with extraneous matters and deciding in favour of the respondent without considering the suit premise was the deceased's property.

Owing to the above grounds of appeal the appellant pressed this court to grant him the following reliefs:

a. To allow the appeal.
b. That, the proceedings, judgement and decree of the DLHT be nullified,

c. Costs to be born by the respondent,

d. Any other relief this court will deem just to grant.

The respondent resisted the appeal. The same was heard by written submissions owing to the consensus by the parties and court's order to that effect. In the appeal, the appellant was represented by Mr. Emmanuel KalikenyaChengula. The respondent was not legally represented.

In his submissions in-chief supporting the appeal, the appellant's counsel argued the first and third grounds of appeal together. He contended that, the trial DLHT left the issue on trespass and engaged *suomotu* in deciding the issue of ownership of the suit premises. It did not however, give chance for the parties to the address it on that issue, but it jumped to a conclusion that there was no evidence on the ownership. The learned counsel further argued that, the appellant gave evidence that proved his case on trespass in the balance of probabilities to the following effect: that, he was appointed administrator of the estate of the deceased and the house belonged to the said deceased. The deceased had married PW.2 (Evelina Jacob Fute) through a Christian marriage and left five issues including Clara, daughter of the respondent.

It was also the contention by the applicant's counsel that, the respondent could not get married to the respondent since a Christian marriage does not in law, accommodate polygamy as per section 11(5) of the Law of Marriage Act, Cap. 29 R.E. 2019 (the LMA).He added that, section 15(1) of the LMA also prohibits a man married by a monogamous marriage to contract another marriage. In fact, the respondent knew of the

marriage between the deceased and PW. 2, and she (respondent) did not produce any marriage certificate between her and the deceased. She was thus, not more than a concubine.

It was further the contention by the appellant's counsel that, the judgment of the primary court which was tendered as exhibit P. 2 before the DLHT appointed the appellant as administrator and held that the house belonged to the deceased. The objection by the respondent before the primary court and her alleged will of the deceased giving her right to stay in the house was declared invalid by the primary court. The respondent did not however, appeal against such judgment of the primary court which means that she was satisfied by it. There was also evidence that the PW.2 contributed to the construction of the house.

The learned counsel for the appellant also argued that, in law, the party who adduces stronger evidence than the other wins the case. He supported the legal position by the decision in **Mohamed Said v. Mohamed Mbilu [1984] TLR. 113.**However, the DLHT acted against this principle of law in making its decision.

Furthermore, the appellant's counsel submitted that, the issue on ownership of the suit house (between the appellant and the respondent) discussed by the DLHT was extraneous since there was no dispute between the parties that the house belonged to the deceased. The evidence adduced before the DLHT also demonstrated so. This included the exhibit P. 3 (the minutes of a meeting by deceased relatives). Furthermore, it was clear that before the DLHT the appellant was suing in

his capacity as administrator of the estate under the 5th Schedule, Part II, Item 6 of the Magistrate's Court Act, Cap. 11 R. E. 2019. These provisions, he submitted, entitles an administrator to bring or defend court proceedings on behalf of the estate of a deceased.

Regarding the second ground of appeal, the appellant's counsel basically contended that, the DLHT wrongly held that the appellant had not disclosed the date when his cause of action arose. This is because, the exhibit P.1 (the letter of admiration granted to the appellant) showed that the deceased had died on 11th April, 2019. The pleadings also disclosed this fact. The cause of action thus, arose on that date as per section 9(2) of the Law of Limitation Act, Cap. 89 RE. 2019 (LLA). The matter before the DLHT was also filed on 11th December, 2019, just five months after the death of the deceased. The matter was thus, filed timely.

In her replying submissions, the respondent argued regarding the first and third grounds of appeal that, the trial DLHT correctly held in her favour. This was because, it was not disputed that the deceased and the respondent lived in the suit house from 2016 as husband and wife respectively until when the respondent died. They were also blessed with the child Clara. It is thus, unfair to blame the respondent for living with the deceased because, she did not know that he had contracted a Christian marriage with PW.2 before. She also distinguished section 15(1) of the LMA (supra) since this is a land matter and not a matrimonial cause.

It was further the respondent's contention that, the law is against evicting a widow and her child from the house she lived with her deceased

husband and change their life style. She added that, her evidence at the trial was heavier than that of the appellant, hence the **Mohamed case** (supra) operates in her favour.

Regarding the second ground of appeal, the appellant argued that, the same has no merits. Though it is not disputed that the appellant was appointed administrator of the estate of the deceased, it is improper to argue that the cause of action arose when the deceased died as put by the appellant's counsel. Besides, the appellant's counsel did not mention as to which cause of action he was referring. It was thus, proper for the DLHT to hold that the appellant did not disclose the cause of action. It is more so because, the appellant, as administrator cannot evict the respondent from the suit house since the deceased himself did not do so. It is further so because, the respondent was innocent and she did not know the fact that the appellant had contracted a Christian marriage with PW.2 before he met and lived with her.

I have considered the arguments by the parties, the record and the law. I will now consider the merits of the grounds of appeal listed above.

I will consider the first and third grounds of appeal cumulatively since the parties also argued them together. Besides, they are interrelated, hence capable of being conversed collectively and smoothly. The partinent issues regarding these two grounds of appeal are two as follows:

a. Whether the trial DLHT erred in framing the issue on ownership of the suit house and deciding the case basing on the said issue.

b. In case the first issue will be answered affirmatives, then what is the legal consequences of that course?

As to the first issue, it is clear from the typed version of the proceedings of the DLHT (at page 4) that, before the hearing of the matter, the DLHT framed the following issues, which I reproduce verbatim for a readymade reference:

A. Who is the lawful owner of the disputed premises?
B. Whether the respondent has trespassed the suit premises.
C. *To what reliefs the parties entitled.*

I therefore, agree with the learned counsel for the appellant that, according to the pleadings before the DLHT and the reliefs sought by the appellant before it, no issue on ownershipof the house between the appellant and the respondent could be framed and decided by the DLHT. The entire matter was related to the claimed trespass by the respondent to the house. This was because, neither party had alleged to be the owner of the same. The appellant was absolutely clear in both his pleadings and evidence before the DLHT that he was suing as administrator of the estate of the deceased and the house was part of the estate. He went further to show that the respondent's alleged entitlement to stay into the house was her purported marriage with the deceases and that, there was a will giving her the entitlement. The will however, was declared invalid by the judgment of the primary court mentioned above.

On her part, the respondent did not also counter claim before the DLHT that the house belonged to her. She only based her entitlement into

the house on the same claim that she was a lawful wife of the deceased and there was a will giving her entitlement to stay into the house with the child Clara. She even purported to present the will before the DLHT, but the same was found inadmissible and rejected. In fact, in her evidence before the DLHT, especially during the cross examination, the respondent confessed that the deceased had informed her during his sickness that he had contracted Christian marriage and that she (respondent) found the deceased owning the house.She however, maintained that, she effected some innovations therein and she did not appeal against the judgment of the primary court mentioned above. She also agreed that, she would not object if the administrator could sale the house and distribute the proceeds to the heirs. The suit house is on a plot that was in the name of the deceased, but the will declared that the child Clara was the legal heir of the house.

Owing to the above narrated facts from the pleadings and the evidence adduced by the parties, the issue of ownership was irrelevant though the trial DLHT had framed and decided it. In fact, it is surprising that the DLHT essentially held that, neither the appellant nor the respondent proved the ownership (see at page 5 and 6 of the typed version of the impugned judgment). Yet, the DLHT dismissed the suit in favour of the respondent and made orders in her favour as shown previously. In a further surprise, the DLHD dismissed the suit without even considering the issue on trespass which it had framed as the second issue as indicated earlier. This was irrespective of the fact that, this particular issue (on trespass) was indeed, the actual and most pertinent issue

between the parties due to theirrespective pleadings and evidence adduced before the DLHT. I therefore, agree with the appellant's counsel that the DLHT left the important issue on trespass and the evidence adduce in its respect, but considered extraneous matters related to the issue on ownership of the house.

The view just highlighted above are based on the legal position that, in law, the tort of trespass to land is based on possession and not necessarily on ownership of the land at issue; see the holding by the Court of Appeal of Tanzania (the CAT) in the case of**JelaKalinga v. Omari Karumwana [1991] TLR 67**. The same position was underlined by the CAT in the case of **Geita Gold Mining Limited v. Twalib Ismail and three others, Civil Appeal No. 103 of 2019, CAT at Mwanza** (unreported) following its previous decisions in the **Jela case** (supra) and **AvitThadeusMassawe v.IsdoryAssenga, Civil Appeal No. 6 of 2017** (unreported). It was furtherobserved in the **Jela Case** (supra) that, although in law neither of the two parties had a better title than the other, the foundation of an action for trespass to land is possession, and it is not necessary that the plaintiff's possession should be lawful. The CAT in that precedent added that, one of the defences against an action for trespass is a claim by the defendant that he had a right to the possession of the land at the time of the alleged trespass or that he acted under the authority of some person having such a right.

Furthermore, in the **Geita Gold Miningcase** (cited bove) following the **Avit case** (supra), the CAT elaborated on the nature of the tort of trespass that,it is a tort of interference to possession that is why even a

tenant may sue his landlord for trespass if he encroaches upon his lawful possession. Again, in the same **Geita Gold Mining case** (cited earlier) the CAT defined the tort of trespass to land as an unjustifiable intrusion by one person upon the land in possession of another. In so doing the CAT considered with approval the decision of this court in the case of **Frank Safari Mchuma v.Shaibu Ally Shemndolwa [1998] TLR 278** at page 288.

In fact, if I can go a step further for the benefit of the DLHT and better future practice, ownership of land in relation to trespass is relevant only in criminal justice as one of the key ingredients of the offence of criminal trespass contrary to section 299 of the Penal Code, Cap. 16, RE. 2019. It was for example, held by this court in the case of **SyliveryNkangaa v. Raphael Albertho [1992] TLR 110**that, a charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined by a civil suit in a court of law. Again, in**Ismail Bushaija v. Republic [1991] TLR 100**, this court, following the case of **SaidiJuma v. R [1968] H.C.D n. 158** held that, it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused, under such circumstances, the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership.

In the case at hand therefore, the DLHT could not confuse between the relevance of ownership of land regarding the offence of criminal

trespass to land on one hand, and its irrelevance in relation to the tort of trespass to land on the other. These are two distinct wrongful acts. The former being a criminal offence while the latter is a mere civil wrong (a tort).

Having observed as above, I further agree with the learned counsel for the appellant that, in fact the DLHT erred in the manner complained under the first and third grounds of appeal. I consequently, answer the first issue under those two grounds of appeal affirmatively that, in fact, the trial DLHT erred in framing the issue on ownership of the suit house and deciding the case basing on the said issue leaving the pertinent issue of trespass and the evidence adduced in that respect. This finding calls for the examination of the second issue under the first and third grounds of appeal.

In relation to the second issue under those two grounds of appeal, I am of the opinion that, the course taken by the DLHT had a serious effect to the proceedings. This is because, the framing of the irrelevant issue on ownership together with the pertinent issue on trespass might have confused the parties and caused injustice to them, especially the appellant who emerged the looser before the DLHT. This is evident in the proceedings where the respondent was sometimes testifying that the house belonged to the deceased, sometimes she claimed that it belonged to the child Clara. In fact, in an instance she claimed to have renovated the house apparently in a mission to prove her ownership which was irrelevant. On the other hand, the appellant was also recorded to have claimed that

the house belonged to the deceased and sometimes he said it belonged to the family (of the deceased and the appellant himself).

The course taken by the DLHT in leaving the pertinent issue of trespass and deciding the matter at hand on the extraneous issue of ownership also amounted to an abdication of duty by it. It is also proper to conclude that, by deciding the issue of ownership which was neither pleaded nor covered by the evidence adduced by the parties, the DLHT did not do justice to them, especially to the appellant who lost the case. Indeed, that strange course to the process of adjudication resulted to the legally unexpected finding by the DLHT that neither partyhad proved ownership as observed above. This trend thus, amounted to judging the parties unheard since they were not given chance to give evidence on ownership of the house. The DLHT did not therefore, afford them any fair trial. it also violated the Principles of Natural Justice, especially their right to be heard.

The right to fair trial mentioned above is fundamental and protected under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2 RE. 2002). The CAT ranked this right as one of the corner stones of the process of adjudication in any just society like ours: see the decision in the **Kabula d/o Luhende case** (supra). **Kabula d/o Luhende v. Republic, CAT Criminal Appeall No. 281 of 2014, at Tabora**(unreported). No court can therefore, easily deny any party to court proceedings of his/her right to fair trial. It is also our trite principle of law that, a decision of court reached through violation of Principles of Natural Justice mentioned previously or the right to fair trial is a nullity; see

decisions in **Agro Industries Ltd v. Attorney General [1994] TLR 43**, **RazaSomji v. Amina Salum [1993] TLR 208** and the **Kabulacase**(supra).

Due to the above reasons, I conclude that, the above discussed course taken by the DLHT amounted to a serious and incurable irregularity. It thus, fatally affected the proceedings and the impugned judgment itself as rightly contended by the appellant's counsel. This finding constitutes an answer to the second issue in respect of the first and third grounds of appeal.

Having answered the first and second issues in the manner shown above, I uphold the first and third grounds of appeal.

Actually, I would have disposed of the entire appeal owing to the findings I have just made in relation to the first and third ground of appeal without testing the second ground. However, I opt to test it as well for the benefit of the DLHT and better future practice.

As to the second ground of appeal, the issues are two as it was in respect of the first and third grounds of appeal. These are the following:

I. Whether the trial DLHT erred in considering and deciding on the aspect of the appellant's non-disclosure of the time when the cause of action had arisen.
II. In case the first is issue will be answered positively, then what is the legal effect of that course?

As to the first issue regarding this second ground of appeal, I am of the opinion that, the learned counsel for the appellant had a genuine point. In fact, the learned chairman of the DLHT introduced the issue of non-

disclosure of the time when the cause of action had arisen when composing the judgement upon hearing the parties. That issue had neither been framed by it before the parties could adduce evidence nor addressed to by the parties during the trial. The legal purposes for introducing that issue at that stage was also not made clear by the chairman of the DLHT according to the impugned judgment itself.

Now, as correctly argued by the appellant, since the pleadings showed that he was suing as an administrator of the estate of the deceased, it sufficed for him to disclose in the pleadings only the date when the deceased succumbed to his demise and the date when he (appellant) was appointed administrator of his estate. The provisions of section 9(2) of the LLA in fact, are relevant to the the matter under consideration. It is more so when it is read together with sections 9(1) of the same Act. These lastly cited provisions provide thus, where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death.

In the instant matter, the appellant pleaded that the deceased died and he was appointed administrator of his estate. He attached to his pleadings the letter of administration which shows that the deceased died on the 28th March, 2019. The appellant also testified so before the DLHT and the letter was admitted in evidence as exhibit P.1 without any objection. In law, annexures to pleadings are part of the pleadings

themselves. The letter was thus, part of the pleadings before the DLHT. Now, since the appellant was suing as administrator, his cause of action against the respondent arose on 28th March, 2019 (when the deceased passed away) as per section 9(1) of the LLA. One could not therefore, expect the DLHT to claim that he did not disclose the date when his cause of action had arisen against the respondent.

Furthermore, since the issue of non-disclosure of the date of the appellant's cause of action had not been framed before the parties adduced evidence, and since the parties had not addressed that issue during the course of the trial, and since the DLHT raised the issue only when it was composing the impugned judgment, the DLHT was enjoined to re-open the proceedings and give an opportunity to the parties to address it before it could decide on that issue. It is the stance of law that, where in the course of composing its decision a court discovers an important issue that was not addressed by the parties at the time of hearing, it is duty bound to re-open the proceedings and invite the parties to address it on the issue discovered by the court *suomotu*. This is so for purposes of giving the parties the right to be heard; see the guidance by the CAT in the cases of **Zaid SozyMziba v. Director of Broadcasting, Radio Tanzania Dar es salaam and another, CAT Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Pan Construction Company and Another v. Chawe Transport Import and Export Co. Ltd, Civil Reference No. 20 of 2006, CAT at Dar es Salaam** (unreported).

Owing to the reasons shown above, I answer the first issue posed above regarding the second ground of appeal affirmatively that, the trial

DLHT indeed, erred in considering and deciding on the aspect of the appellant's non-disclosure of the time when the cause of action had arisen. This finding necessitates the examination of the second issue under this heading.

On the second issue, I am of the view that, since the DLHT raised the issue on non-disclosure of the date of the cause of action *suomotu* and decided it without giving any opportunity to the parties to address it on that issue, it is conclusive that it judged them unheard. That course, as I held when considering the first and third grounds of appeal, amounted to a clear violation of the Principles of Natural Justice and a denial of the fundamental right to fair trial. A court's decision of that nature cannot stand as I underscored earlier taking support from the **Agro Industries case** (supra), the**RazaSomji case** (supra)and the **Kabulacase**(supra).

Due to the above reasons, I find that, the course taken by the DLHT in considering the issue of the appellant's non-disclosure of the date of the cause of action was a fatal blow to the impugned judgment. It was thus, an incurable anomaly. The impugned judgment cannot thus, survive as rightly contended by the appellant's counsel. This finding forms an answer to the second issue in respect of the second grounds of appeal.

Now, by virtue of the above reasons, I uphold the second ground of appeal as I did for the first and third grounds.

All having been said, I hereby allow the appeal. As to other reliefs sought by the appellant in this appeal, I nullify and quash the proceedings of the DLHT from the date it framed the issues (i.e. on 30th September, 2020) to the date it delivered the impugned judgment. I consequently set

aside the impugned judgment and the decree extracted therefrom. I remit the record to the DLHT for a fresh trial before another chairman and another set of assessors. If parties still wish, they can pursue their rights before the DLHT. Parties shall bear their own costs since it was the DLHT which was instrumental in necessitating this appeal. It is so ordered.

JHK. UTAMWA

JUDGE

19/04/2022

19/04/2022.
CORAM; J. H. K. Utamwa, Judge.
For the Appellant: Mr.Cleophace Mheluka, advocate.
For Respondents: Present in person.
BC; Ms. Gloria. M.

Court: Judgment delivered in the presence of Mr. Cleophace Mheluka, learned advocate for the appellant, and the respondent, in court, this 19th April, 2022.

J. H. K. UTAMWA
JUDGE
19/04/2022.