THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 59 OF 2021
(Originating from ruling and order of the District Land and Housing Tribunal of Mbeya at Mbeya in Miscellaneous Land Application No. 182 of 2021)

SPRIAN MAGURU.....APPELLANT

VERSUS

EMMANUEL MWAMAHONJE.....1ST RESPONDENT
MUMBA VILLAGE COUNCIL.....2ND RESPONDENT

JUDGMENT

18th January & 24th February, 2022

KARAYEMAHA, J

This appeal emanates from the ruling of the District Land and Housing Tribunal for Mbeya at Mbeya (henceforth the Tribunal), which refused to grant the appellant an extension of time within which to file an application to set aside ex-parte judgment in Application No. 182 of 2017.

The facts of this case can briefly be told as follows. The 1st respondent sued the appellant and second respondent in the Tribunal for a declaration that he is the lawful owner of the suit land situated in Munda village. Upon inception of the application, the Tribunal issued several the summons to the appellant. The first summons to the

appellant through Nashoni Yisega, Hamlet Chairman, proved futile as the appellant was said to be unknown in the village. On 27/11/2017 order for substituted summons was issued and on 6th December, 2017 it was advertised via Mtanzania Newspaper. However, the appellant neither filed written statement of defence nor appeared, hence the application proceeded ex-parte and the tribunal declared the 1st respondent the lawful owner of the suit land.

Apparently, the decision of the Tribunal came into the knowledge of the appellant. On 19/04/2021 file an application for extension of time to enable him file an application to set aside an ex – parte judgment. The appellant averred in the affidavit supporting an application that he was informed of existence of the case against him by village leaders in March, 2021 and that he was neither served with notice or summons from the tribunal nor ever travelled or left home at any time since 2013 to the extent of missing the summons of the Court.

The tribunal upon hearing both parties, declined to grant extension of time for failure to account for three years of delay and that reasons advanced were for setting ex-parte judgment.

Aggrieved with that decision the appellant filed memorandum of appeal containing three grounds of appeal namely;

1. *That trial tribunal erred both in law and fact by not considering the applicant's/appellant's affidavit which was adopted by his advocate in reaching at the ruling*
2. *That the trial tribunal erred both in law and fact when he ruled that reason for extension of time were not provided by the appellant.*
3. *That the trial tribunal erred both in point of law and facts when he ruled that reasons provided in the affidavit and submission were for setting aside ex-parte judgment and not for extension of time.*

When the appeal was called on for hearing, the appellant was represented by Mr. Sambwee Shitambala, learned advocate, the first respondent had service of Martha Gwarema also learned advocate while the second respondent appeared Msafiri Shamsi Idd, a solicitor. Both parties agreed to dispose the appeal by way of written submission and complied with the schedule.

In disposing of this matter, I feel constrained not to consider the neither the grounds of appeal nor submissions by parties. The apparent reason is that in the process of composing the judgment, I spotted one serious irregularity in the proceedings touching the jurisdiction of the tribunal. I think, it will be superfluous to decide the appeal on merits.

Consequently, I shall exercise my revisional powers to deal with this irregularity.

I will take this course though parties did not address themselves to the anomaly for the following reasons:

In the first place, it is a firm and trite legal stance of the law that courts are enjoined to decide matters before them in accordance with the law and Constitution irrespective of the attitude taken by parties to court proceedings. This is the very spirit stressed under Article 107B of the Constitution of the United republic of Tanzania, 1977 as amended, which emphasizes very well the stance highlighted above and not otherwise. This stance was also underscored by my brother Hon. Utamwa, J in the case of ***Rajabu Juma Mwasegera v Marriam Hassan***, HC (PC) Civil Appeal No. 13 of 2015, at Tabora (unreported).

Secondly, it is a trite principle of law that a point of law, especially the one touching the jurisdiction of the Court or which goes to the root of the case, can be raised at any stage of the proceedings before judgment. It is as well trite law that it can be raised by the Court *suo motto* basing on the veracity that an issue of jurisdiction is a fundamental one that must be decided before a court decides any other issues. I am fortified by a line of decisions of the Court of Appeal; the

highest court of the land, which give me strength to raise *suo motto* this issue. These cases include ***Michael Leseni Kweka v John Eiliafe,*** Civil Appeal No. 51 of 1997 (unreported), ***Faustine G. Kiwi and another v Scolastica Paulo,*** Civil Appeal No. 24 of 2000 (unreported) and ***Nicomedes Kajungu &1374 others v Bulyankulu Gold Mine (T) LTD,*** Civil Appeal No. 110 of 2008, ***Richard Julius Rukambura v Issack Ntwa Mwakajila and another***, Civil Application No. 3 of 2004 at Mwanza (unreported) following its previous decision in ***Fanuel Mantiri Ng'unda v Herman Mantiri Ng'unda and 20 others,*** Civil Appeal No. 8 of 1995 to mention but a few.

For instance in ***Nicomedes Kajungu*** Case (supra) the Court of Appeal speaking through Othman, J.A (as he then was) held thus:

> *"...it is the duty of the Court to satisfy itself that it is properly seized or vested with the requisite jurisdiction to hear and determine a matter. It is a well settled principle that a question of jurisdiction ...goes to the root of determination – see* ***Michale Leseni Kweka v John Eiliafe****, Civil Appeal No. 51 of 1997 (CA) (unreported).* ***A challenge of jurisdiction is also a question of competence".*** [Emphasis supplied].

Furthermore, the law is to the effect that where a court is underway composing the verdict discovers a serious irregularity in the proceedings touching the issue of jurisdiction, it can decide on it without reopening the proceedings for inviting parties to address it. This position was underscored by the Court of Appeal in the case of ***Richard Julius Rukambura*** (supra).

Guided by the above principles/positions, I turn to discuss the abnormality. On reading the application, I have discovered that the 1st respondent filed the same on 10/10/2017. Now, the notable irregularity is through paragraph 3 of the application which couched to disclose the location and address of the disputed land. A common ground tells that an application is an instrument which normally institutes proceedings before the DLHT as per Regulation 3 (1) of the Land Disputes Courts Act (the District Land and Housing Tribunal) Regulations, 2003 (GN. No. 174 of 2003) (henceforth the Regulation). This instrument replaces the pleadings (a plaint) in suits under the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC). Paragraph 3 of the application in the present matter purported to comply with the mandatory provisions of the law which require an application to disclose the address or location of the suit land. (See regulation 3 (2) (b) of the Regulations. The paragraph under

subject, however, only indicates that the suit property is *"located at Mumba village within Mbeya Rural District"* and no more details.

My take is that the description of the land provided for under paragraph 3 of the application was insufficient for determination of a land dispute. The legal requirement for disclosure of the location or address was not put in place for decoration purposes. It was intended to inform the tribunal of a sufficient description so as to specify the land in dispute for purposes of identifying it from other pieces of land around it. In case of a surveyed land, efforts to mention the plot and block numbers or other specifications suffice the purpose. This is so because, such particulars are capable of identifying the suit land specifically so as to effectively distinguish it from any other land adjacent it. In respect of un - surveyed land, specification of boundaries and or permanent features surrounding the land in dispute are important particulars for the purpose of identifying it from other pieces of land neighbouring it. This is what is envisaged by regulation 3 (2) (b) of the Regulation when it talks of the term *location*. The Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009 at page 1024 similarly defines the term *location;*

> *"As a specific place or position of a thing; and in land matters (real Estate) it means the designation*

of the boundaries of a particular piece of land, either on the record or land itself."

In view of the foregoing definition, it was thus inadequate for the appellant to simply mention that the suit land was in Mumba village. My view is based on the fact that the totality of the pleadings (the application) does not make an impression that the land in dispute covers the whole of Mumba village. The impression one gets from the pleadings is that the land in dispute is only part of the land forming the village. It was thus imperative on the 1st respondent to disclose the details of the boundaries and other permanent peculiar features (if any) surrounding the land in dispute for the purposes of identifying it from other pieces of land in the same area. The appellant failed to do so in the pleadings and in the evidence.

In fact, the 1st respondent's testimony does not include any version describing the location or address of the suit land apart from testifying that he was located an unoccupied land for the purpose of planting trees at Mumba village bordering Inyara village and that he knew the boundaries of the village. However, that was insufficient for the purposes of describing the location and boundaries of the suit land.

The importance of making detailed description of suit lands in resolving disputes can be emphasized. The law, through all amendments, has been constantly underscoring this significance. The provisions of Order VII Rule 3 of the CPC, for instance give lucid wording of the requirement. It guides as follows:

> *"Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number".*

In my settled opinion Rule 3 (2) (b) of the Regulation should be construed to mean what is envisaged by Order VII Rule 3 of the CPC.

The legal requirement highlighted above is indeed intended for the purposes of an authentic identification of the land in dispute. The intention of the law is to ensure that, the court determines the controversy between the two sides of a suit related to landed property effectively by dealing with a specific and definite piece of land. The law intends further that, when the court passes a decree, the same becomes certain and executable. Facing the same scenario, my brother Hon. Utamwa, J remarked in the case of ***Ramadhan Omary Humbi and 58***

others v Aneth Paulina Nkinda and another, HC Land Case No. 99 of 2013 at DSM (unreported) to the effect that held that:

> *"It is the law that Court orders must be certain and executable. It follows thus where the description of the land in dispute is uncertain, it will not be possible for the court to make any definite order and execute it".*

Owing to the above reasons, it cannot be argued that the 1st respondent complied with the law in the instant matter when he made a blanket description of the suit land by calling it a disputable property located at Mumba village in Mbeya council within Mbeya Region. The insufficiency in describing the land in dispute could not enable the tribunal to effectively resolve the controversy between the parties.

This anomaly was noted detected by the trial Chairman. He tried the matter and determined it. To the contrary, given the discussion above, the matter was incompetent before the Tribunal for the uncertainty of the matter. It is a common knowledge that Courts and Tribunals of law do not have jurisdiction to entertain incompetent matters, that is, disputes on uncertain matters.

This irregularity, therefore, vitiates the proceedings and verdict of the trial tribunal, for the order it made could not resolve the dispute between the parties for want of certainty of the disputed land.

The question that presses my mind at this juncture is whether I should dismiss this appeal or strike out. There are decisions of the Court of Appeal which direct, in situations, as in the present one, where the application is incompetently before the court, that the proper course to take should be to strike the appeal out. The distinction between dismissing and striking out an appeal was well articulated by the cerebrated case of ***Ngoni-Matengo Cooperative Marketing Union Ltd v Alima Mohamed Osman,*** 1959 EA 577. At page 580, it was held that:

> *"... [The] Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this Court ought strictly to have done ... was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it;* ***for the latter phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of".*** [Emphasis supplied].

The court of Appeal of Tanzania has also ventured and travelled in similar position. In ***Thomas Karumbuyo and another v Tanzania Telecommunications Co. Ltd,*** Civil Application No. 1 of 2005 the Court of Appeal speaking through Lubuva JA (as he then was) held:

> *"From the outset, and without prejudice, it is to be observed that the learned judge having upheld the preliminary objection that the application was hopelessly out of time, and therefore incompetent, should have proceeded to strike it out.* ***Dismissing the application as happened in this case, presupposes that the application was competent and that it was heard on merits".*** [Emphasis supplied]

Since this appeal was not heard on merits, in the light of the authorities cited above, this appeal deserves a punishment of being struck out as incompetent rather than dismissing it. I therefore strike out the suit for reasons given above. Given the fact that this matter has been concluded on legal point raised *suo motto* by this Court, I desist from awarding costs to any party.

It is so ordered.

Dated at **MBEYA** this **24th** day of **February, 2021**

J. M. Karayemaha
JUDGE