THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MBEYA DISTRICT REGISTRY)
AT MBEYA
LAND APPEAL NO. 12 OF 2020

(Originating from the decision of the District Land and Housing Tribunal for Rungwe in Misc. Application No. 4 of 2020, original Land Application No. 11 of 2013)

SAPO KALOBO.....APPELLANT

VERSUS

JENIFA SAMSON MWAMWAJA.....RESPONDENT

JUDGMENT

Dated: 13th March & 19th May, 2022

KARAYEMAHA, J

On 04/03/2013 Jenifa Samson Mwamwaja (the respondent in this appeal), who is the respondent in this appeal, appeared before the District Land and Housing Tribunal for Rungwe at Rungwe (hereinafter the DLHT) to complain that Sabu Kalombo and Ambokile Kasenti, who are not part of this appeal, had trespassed in his six-acres parcel of land which she bought from Ambokile Kasenti vide two agreements dated 29/03/2011 and of 07/03/2013 valued at Tshs. 4,000,000/= respectively, harvested cocoa valued at Tshs. 2,000,000/= and cultivated the whole piece of land. Apparently, the 1st respondent didn't

file a Written Statement of Defence (WSD) and the whole application was not contested by the 2nd respondent. At the height of the trial, the Chairman and assessors who sat with him during the trial were of the unanimous decision that the respondent was the lawful owner of the purchased land.

On 04/02/2020 the respondent, being the decree holder, filed an application for execution against Sapo Kalobo and Ambokile Kasenti. Simultaneous with the reply to the application to execution, the applicant was put to notice that on the date fixed for a hearing of the said application the appellant (1st judgment debtor at the DLHT) would raise a preliminary objection (the PO) to the effect that the application was in violation of the provisions of Regulation 23 (1) of the Land Disputes Courts (District Land and Housing Tribunal) regulations 2002 as there was no any known decree issued by the DLHT or any other tribunal to be executed. The PO was raised on 17/03/2020. Nevertheless, the proceedings both typed and hand written indicates that on 07/05/2020 in the absence of the appellant, the DLHT heard the respondent who rose up and sought for an eviction order. The DLHT heeded to her prayers and ordered the appellant to vacate and hand over the suit land to the respondent in 14 days. The Isabula Village Executive Officer (VEO) was appointed to execute the DLHT's order by

evicting the appellant from the suit land. It was further ordered that the report on execution was to be furnished with the DLHT on 10/04/2020. The record indicates that the proceedings were signed on 27/03/2020 and decree issued on 05/06/2020.

Dissatisfied with the DLHT's decision, the appellant brought the present appeal before this court. His memorandum of appeal contains three (3) grounds. They are:

1. That the learned Chairman of the trial tribunal erred in law and in fact for failure to afford the appellant's right to be heard.
2. That the learned Chairman of the trial tribunal erred in law and in fact to entertain the execution proceedings while there were objections from the appellant.
3. That the decision of the trial chairman is arbitrary and illegal.

The 1st and 2nd grounds, in my settled view, can be conveniently combined into one ground that the DLHT erred in entertaining the execution proceedings without first hearing and determining the PO. Then, the 2nd ground, in this judgment will be that the decision of the trial chairman is arbitrary and illegal.

For the grounds of appeal the appellant urged this court to allow the appeal with costs and set aside the impugned decision and

proceedings with costs. The appeal was disposed of by way of written submission preferred by parties. The respondent vehemently objected the appeal. The appellant appeared in person and drew the submissions by himself. On the other side, the respondent appeared in person but her submission was drawn and filed by Mr. Simon Mwakolo, learned Counsel.

The thrust of the appellant's submission is that he raised the PO before the DLHT but the same was not heard. He was surprised when the DLHT gave an order of eviction without giving the appellant a right to be heard. Emphasizing on the right to be heard, the appellant sought aid and relied on Article 13 (6) (e) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) and the case of ***Ally Hassan Ilungulu vs. Neema Mkwaiya***, HC Land Appeal No. 26 of 2020. He argued further that the Chairman did not comply with Regulation 23 (3) (4) and (5) which requires the DLHT upon inception of the application, to make an order requiring the judgment debtor to comply with the decree or order to be executed within the period of 14 days. He said that if no objection raised within 14 days from the judgment debtor the chairman ought to order execution.

Mr. Mwakolo did not specifically respond to the grounds of appeal. His main contention is that the appeal is incompetent for reasons of signature. My quick reaction on this is that his arguments are misplaced because cases of forgery are not investigated in by the Court but by the police and in case there is prima facie truth, the criminal is charged with criminal case.

Having carefully studied the DLHT record and considered the appellant's submission, I agree with the appellant that the raised PO was not attended to by the trial Chairman. The issue is whether the decision to ignore the PO was appropriate.

As already indicated the respondent filed an application for execution on 04/02/2020. The appellant raised a preliminary objection on 17/03/2020. It appears the trial Chairman disregarded it and proceeded to issue an execution order.

With due respect, the trial Chairman misdirected himself by giving that order. Considering there was no order for hearing or mention on 17/03/2020 and no date for hearing of the application or PO, the subsequent order given on 07/05/2020 was unnecessary. The trial chairman did not bother to even allow the appellant to address him on the PO raised. What is more, the date when the order for execution was

been reached had .the party been heard because the violation is considered to be a breach of natural justice."

This violation of the right to be heard is a breach of the cardinal principle of natural justice and an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution. See: ***Mbeya Rukwa Auto Parts and Transport Limited vs. Jestina George Mwakyoma*** [2003] T.L.R. 251.

Given the settled position of the law, I am satisfied that none of the parties was availed of an opportunity to be heard on the PO raised. This vitiated the proceeding before the DLHT from the 07/05/2020 onwards, and those proceedings are thus nullified.

I find this one ground suffices, and therefore no need to dwell on the 2nd ground. I thus allow the appeal. Before ordering the record to be remitted back to the DLHT I have another observation which touches the competency of the DLHT to hear and determine the application.

The apparent reason is that in the process of composing the judgment, I spotted a serious irregularity in the proceedings touching the jurisdiction of the tribunal. 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 vs. 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 motu* this issue. These cases include ***Michael Leseni Kweka vs. John Eiliafe,***

Civil Appeal No. 51 of 1997 (unreported), ***Faustine G. Kiwi and another vs. Scolastica Paulo,*** Civil Appeal No. 24 of 2000 (unreported) and ***Nicomedes Kajungu & 1374 others vs. Bulyankulu Gold Mine (T) LTD,*** Civil Appeal No. 110 of 2008, ***Richard Julius Rukambura vs. Issack Ntwa Mwakajila another***, Civil Application No. 3 of 2004 at Mwanza (unreported) following its previous decision in ***Fanuel Mantiri Ng'unda vs. 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 vs. 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 CAT in the case of ***Richard Julius Rukambura*** (supra).

Guided by the above principles/positions, I turn to discuss the abnormality. I have discovered that the appellant filed Application No. 11 of 2013 on 4/3/2013. Now, the notable irregularity is through paragraph 3 of the application which discloses the location and address of the disputed land. A common ground tells that an application is an instrument which normally institutes proceedings before the District Land and Housing Tribunals 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 Isabula Village in Rungwe 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 cosmetic 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 *Isabula Village in Rungwe District*. 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 area of *Isabula Village*.The impression one gets from the pleadings is that the land in dispute is only part of the *Isabula Village*. It was thus imperative on the appellant 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 application.

The importance of making detailed description of suit lands in resolving disputes cannot be over 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 Utamwa, J remarked in the case of ***Ramadhan Omary Humbi and 58 others vs. 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 appellant followed the law in the instant matter when he made a blanket description of the land in dispute by calling it a disputable property located at *Isabula Village in Rungwe District.* The insufficiency in describing the land in dispute could not enable the tribunal to effectively

resolve the controversy between the parties. This anomaly was not detected by the trial Chairman. Who tried and determined the application. He went further to order eviction of the appellant from the land in dispute located in Isabula Village.

To the contrary, given the discussion above, the matter was incompetent before the tribunal for the uncertainty of the land in dispute. 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 vs. 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].

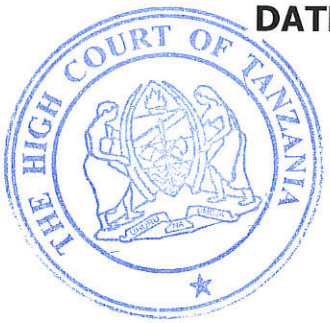
The court of Appeal of Tanzania also ventured and travelled in similar position. In ***Thomas Karumbuyo and another vs. Tanzania Telecommunications Co. Ltd,*** Civil Application No. 1 of 2005 the Court of Appeal speaking through Lubuva JA (as he then was) held:

> *"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. For the foregoing reasons, therefore, I feel constrained to order remission of the file to the DLHT to hear parties on PO because the whole matter was incompetent before it. Respondent to bear costs of this appeal.

It is so ordered.

DATED at **MBEYA** this 19th day of **May, 2022**



J. M. Karayemaha
JUDGE