

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 14 OF 2022

(Arising from decision of the District Land and Housing Tribunal of Babati in Land Application No. 34 of 2022)

METOLDI DOMEL.....APPELLANT

VERSUS

SAMSON KURAY.....1st RESPONDENT

EMMANUEL MICHAEL MATHIAS.....2nd RESPONDENT

KIBAIGWA AUCTION MART.....3rd RESPONDENT

Date of last order: 24/1/2023

Date of judgment: 27/2/2023

JUDGMENT

BARTHY, J.

The above-named appellant had sued the respondents before the District Land and Housing Tribunal of Babati, (henceforth referred to as the trial tribunal), for reliefs *inter alia* declaration that he is the lawful owner of a piece of land approximately 35 square meters situated at Endasiwold village within Hanang' District in Manyara Region (hereinafter referred to as the suit land).

The brief facts leading to the dispute before the trial tribunal as gathered from the record are such that, the first and second respondents had a dispute in which the former was claiming for a sum of money against the latter. The dispute was referred to Endasaki Primary Court (the primary court) which decided in favour of the first respondent.

The first respondent therefore sought to execute the decree of the court by way of attachment and sale of the second respondent's properties. Among the properties ordered to be attached was the suit land. The primary court appointed the third respondent to effect sale of the suit land, which was objected by the appellant claiming ownership of the said suit land.

It was stated that the second respondent had already disposed the same to the appellant. The primary court dismissed the same and ordered the third respondent to proceed with the sale of the suit land. The sale was made through a public auction to the buyer who is not the party to this matter.

The appellant aggrieved with the decision of the primary court lodged the application before the trial tribunal seeking to be declared the lawful owner and the purported auction be declared unlawful.

The trial tribunal decided the matter was improper before it, as it will interfere with the findings of the primary court over the suit land, therefore the matter was dismissed with no order for costs.

The appellant aggrieved with the decision of the trial tribunal; he lodged the present appeal to challenge its decision. The appellant raised three grounds of appeal as follows;

1. *That the trial tribunal erred in law and in fact when it decided that the land case was not properly brought in the tribunal.*
2. *That the trial tribunal erred in law and in fact when it failed to pronounce the appellant as lawful owner of the land despite concrete evidence that was tendered.*
3. *That the trial tribunal erred in law and in fact when it failed to follow the law.*

When the appeal was called on for hearing Ms. Natujwa Bakari learned advocate appeared for the appellant, whereas Mr. Abdallah Kilogwa learned advocate appeared for the first respondent. The second respondent

appeared in person unrepresented and for the third respondent her Managing Director Mr. Jeremiah Mtagwa appeared unrepresented as well.

Before hearing had commenced, Ms. Natujwa prayed to abandon the third ground of appeal and proceeded to argue the remaining two grounds of appeal.

Submitting on the first ground of appeal, Ms. Natujwa contended that the trial tribunal erred in deciding that the matter was not properly before it. The learned counsel submitted that, the appellant had filed objection proceedings before the primary court against the attachment of the suit land. The primary court dismissed the objection proceedings; hence the appellant's remedy was to file a fresh suit.

To fortify her position, she referred to the case of **Katibu Mkuu Amani Fresh Sports Club v Dogo Ubwa and another** [2004] TLR 326 where the court ruled that if the objection proceeding is futile, the remedy is to file the fresh suit.

The learned counsel also referred to the case of **Omary Juma Makumbato v Robert Kornako & another** Misc. Land Application No. 9 of 2022 High

Court of Tanzania (unreported) in which the same principle was underscored.

The learned advocate therefore was of the view that, the decision of the tribunal was erroneous as the case was properly before it.

Submitting on the second ground, Ms. Natujwa faulted the trial tribunal for not declaring the appellant the lawful owner of the suit land. She submitted further that; the appellant had even tendered the sale agreement over the said suit land.

She also submitted that there was a witness who proved the appellant's ownership, hence the trial tribunal ought to have declared the appellant the lawful owner. Ms. Natujwa urged the court to declare the appellant the lawful owner of the suit land.

On reply Mr. Abdallah opposed the appeal entirely. He contended that the trial tribunal was proper in making its findings that the matter was not properly before it. He argued, the foundation of this case was from the execution of the decree of the primary court.

Mr. Kilogwa went on to submit that, after the primary court rejected the objection, then the ordinary civil proceedings ought to have been instituted, instead of lodging fresh land suit.

With respect to the reference made on the case of **Katibu Mkuu Amani Fresh Sports Club v Dogo Ubwa and another** [supra] Mr. Kilogwa argued the appellant ought to have lodged the fresh civil caseh.

Replying to the second ground Mr. Kilogwa contended that, there was no sufficient evidence to prove that the appellant was the lawful owner of the suit land.

He submitted further that, the sale agreement relied on by the appellant leaves a lot to be desired. This was due to the fact that, the person who witnessed the same had no mandate to witness the sale agreement.

Mr. Kilogwa submitted further that, the purchase price of Tsh 2,000,000/- which is reflected on the sale agreement is doubtful, because the size of the land is small and it is also located in the village. Mr. Kilogwa was of the view that the said sale agreement was fictitious made by the appellant and the second respondents to frustrate the execution of the suit land.

The second respondent supported the appeal. He contended that the trial tribunal has the mandate to determine land matters and declare who is the lawful owner of the suit land. He further argued there was sufficient evidence to prove that the appellant was the lawful owner of the suit land.

The third respondent opposed the appeal. He went further to argue that, the decision of the tribunal was proper as it has already been determined the objection proceeding. Therefore, the primary court gave an order to attach and sale the suit land to realize the decree of the court.

In respect to the second ground of the appeal, the third respondent argued that the same lacked merit as the auction was properly conducted and the monies were paid off accordingly.

In a rejoinder submission, Ms. Natujwa maintained her arguments that, the law requires fresh suit to be instituted. She urged the court to find the appellant the owner of the suit land and allow the appeal. Having considered that the dispute involve land, therefore the proper recourse was to institute fresh and suit.

Having gone through the parties' rival submission, the sole issue for determination is whether the appeal has merit.

I will begin my deliberation with the first ground of appeal.

On this ground, the gist of the parties' argument is whether the matter was properly before the trial tribunal. The appellant and the second respondent argued the matter was properly instituted before the land tribunal. On the other hand, the first and third respondents were of the view that the matter was not properly before the trial tribunal.

Having considered the arguments of the parties, it is clear that the matter was filed before the trial tribunal after the appellant's objection had been unsuccessful before the primary court.

With respect to this matter, I have keenly gone through the authorities referred to by Ms. Natujwa learned advocate for the appellant. In both decisions of **Katibu Mkuu Amani Fresh Sports Club v Dogo Ubwa and another** and **Omary Juma Makumbato v Robert Kornako & another** [supra] the court had decided that, where objection proceeding has become unsuccessful, the remedy available to the objector is to file a fresh suit to prove the claim of the property.

This position is clearly provided under Order XXI Rule 62 of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC) which reads;

Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Now, the issue that tasked my mind a great deal is; in the instant matter, where the objection proceedings was determined, the CPC does not apply in primary court. The law applicable in primary court is the **Magistrates' Courts (Civil Procedure in Primary Courts) Rules** G.N. No. 310 of 1964 (hereinafter referred as the Rules).

The Rules allows the third party who is not the party to the original case to file objection on execution of immovable property. This is provided under Rule 70 (1) of the Rules.

Despite the fact that the rules of the primary court do not provide for any avenue for remedy, the party against whom an order has been made in the objection proceeding has the right to file the fresh suit. Similar findings have been stated by this court in various decisions.

As decided by my Justice brothers; where Justice Tiganga in the case of **Onesmo Samwel Kisabo and another vs James Kitindi (PC Civil Appeal 23 of 2021) [2021] TZHC 6471** and in the case of **Rahel Chossa Vs Gabaseki Kuboja Mgewa & another (PC Civil Appeal 68 of 2021) [2022] TZHC 13735 (07 October 2022)** where Justice Morris held *inter alia*;

*One, the objector should not knock on the doors of another judicial forum for trial before the executing court has received such objection for investigation. It is good and settled practice (**Kangaulu Mussa v Mpunghati Mchodo [1984] TLR 348**)*

Two, the hearing envisaged under the above provision is by way of investigation of the objector's interest in the property being attached.

Three, investigation covered here is not the substitute of adjudication or trial.

Four, investigation is a process that is less intensive than the hearing of the main suit.

Five, its aim is to establish a prima-facie interest of the objector in the property so attached.

Six, the outcome of the investigation about the lodged objection, particularly if it is not sustained, does not bar the interested party to go for litigation afresh.

*Seven, the investigation does not render the subsequent matter between parties as res judicata (**Omoke Oloo v Werema Magira** [1983] TLR 144).*

Eight, the court which was involved in the investigation does not become functus officio for the newly filed suit (assuming the fresh matter is determinable in the hierarchy to which such court belongs.

Similarly in the present matter, I find that the appellant's remedy was to file fresh suit to establish the right over the property in dispute.

Considering that this matter is over the land dispute, therefore the appellant was proper to file the suit before the land tribunal as the machinery vested with exclusive jurisdiction to deal with land matter. The first ground of appeal is therefore meritorious and it is upheld.

Turning to the second ground, the appellant is challenging the trial tribunal for failure to pronounce the appellant as lawful owner of the suit land despite concrete evidence of sale agreement that was tendered to prove ownership.

Basing on those facts Ms. Natujwa argued this court to declare the appellant the lawful owner of the suit land.

On the first respondent's side, Mr. Kilogwa on this ground contended that, the sale agreement relied on by the appellant was witnessed with the person who had no mandate. He also challenged the purchase price of Tsh. 2,000,000/- in consideration of the size of the land which is small and its located in the village.

Mr. Kilongwa was of the view that the sale agreement was fictitious to avoid the execution of suit land.

The second respondent supported the appeal while the third respondent was in favour of the decision of the tribunal and that of primary court.

With respect to this ground, the records reveal that, after the first respondent was declared the winner against the second respondent before Endasaki primary court, he went ahead seeking to execute the decree.

The court then appointed the third respondent to execute the decree of the trial court. However, the appellant appeared before the trial court to object the attachment and sale claiming he had bought the suit land from the

second respondent. The objection which was unsuccessful before the primary court.

The appellant therefore filed the suit before the land tribunal claiming ownership of the suit land. The records show that he had bought the land on 20/11/2019 from the second respondent and the attachment order of the primary court was made on 4/7/2022.

The appellant tendered the sale agreement to show the suit land was disposed to him and he had the suburb chairperson to prove he had witnessed the sale transaction.

The first respondent in her testimony she only flaunted the second respondent and the appellant to have been intended to frustrate the execution process. On the side of the third respondent, he stated he was just executing the order of the primary court.

The trial tribunal on its findings it held that, there was the possibility that the suit land belonged to the appellant; but new findings may contradict with the findings of the primary court and it could not revoke the sale of the suit land as it was determined by another machinery.

The trial chairperson further held that;

Mleta maombi alikuwa na uwezo kuendelea na njia ya kukaza kukata rufaa mahakama ya wilaya na sio kuleta kuchalengi maamuzi/ mnada wa mahakama ya mwanzo.

The trial tribunal thought the proper remedy was for the appellant to file the appeal to challenge the decision of the objection proceedings.

Since the objection proceedings is meant to investigate on the claim only, when it becomes unsuccessful, the party need to file fresh suit for proper determination. See the case of **Rahel Chossa Vs Gabaseki Kuboja Mgeva & another (supra)**.

Hence the parties are remedied to institute the fresh suit in a court of competent jurisdiction to establish the right which he claims over the property in dispute.

The trial tribunal was therefore supposed to resolve the dispute evolved between the parties with respect to the evidence tendered. However, the trial tribunal evaded to do the noble task trusted by the law.

As decided by the Court of Appeal in the case of **Mantra Tanzania Limited v. Joaquim Bona Venture**, Civil Appeal No. 145 of 2018 (unreported) where it held that;

When an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter.

With respect to the present matter, this court cannot step into the shoes of the trial tribunal and make its own findings for the matter that was not ultimately determined.

In that event, since the tribunal did not make determination on the matter, I therefore remit the case file to the trial tribunal to make its proper findings of the matters in dispute between the parties.

This appeal has succeeded to that extent and in the circumstances of this case, I make no order for costs.

It is so ordered.

DATED at **Babati** this 27th day of February 2023.



G. N. BARTHY,

JUDGE

27/2/2023

Delivered in the presence Mr. Kilogwa the counsel for the first respondent also holding brief of Ms. Natujwa the counsel for the appellant and all the parties in person.