

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 102 OF 2021**

(Originating from the decision of the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 4 of 2017)

**MARIAM KALUPANDE (A administratix of the
late Letson Ndabila Kalupande)..... APPELLANT**

VERSUS

WOMEN AND CHILDREN FOUNDATION

GROUP @WAKINA1ST RESPONDENT

HARAKA VILLAGE COUNCIL....2ND RESPONDENT

MBOZI DISTRICT COUNCIL.....3RD RESPONDENT

JUDGMENT

Dated: 22nd February, & 16th March, 2023

KARAYEMAHA, J.

This appeal stems from the decision of the District Land and Housing Tribunal for Mbeya at Mbeya (the DLHT) in Land Application No. 4 of 2017. The appellant posing as the administratrix of the estate of the late Letson Ndabila Kalupande (deceased) sued the respondents for trespassing in the 31 acres land (suit land) which she alleged belonged to the deceased.

The story gathered from the record that prior to 2012 the deceased acquired the suit land from Shangala Halinga, his grandfather. Later after marriage the deceased and the appellant continued to develop it hence becoming a joint property. In 1990s the deceased invited his friend Karin Vetter who together formed and registered an NGO called WAKINA MAMA NA WATOTO FOUNDATION (WAKINA), the 1st respondent. It was the appellant's contention that at first, they had no office. Therefore, the deceased invited them in the office standing in the suit land and was under the family's control. After the death of Karin Vetter in 2004, the deceased continued to use the office and other buildings used by visitors during Karin Vetter's life. It was the appellant's case that in 2016 and 2017 after the deceased's death, the unknown body of members with no legal effect changed the constitution and replaced it with a new one, the 1st respondent alleged that the suit land belonged to her. Efforts to inform them that the suit land belonged to the family proved futile. Apart from those complaints in relevant authorities ended in abyss. It was this background that pushed the appellant to enlist the intervention of the DLHT.

The application met a serious opposition from the respondents and the appellant was put to strict proof. After a hearing that saw the

appellant marshal attendance of three witnesses against five for the respondent, the DLHT found that the appellant failed to prove her case to the balance of probabilities. Besides dismissing the appellant's claim, the Chairman declared the 1st respondent the lawful owner of the suit land. This decision did not amuse the appellant. She decided to challenge it through the instant appeal which has eight grounds of appeal which are reproduced as hereunder:

- 1. That the trial tribunal chairman erred in law and facts by failure to determine the dispute according to issues framed.*
- 2. That the trial tribunal chairman erred in law and facts when declared the 1st respondent lawfully owner of the disputed land without prove of all pre conditions of acquiring customary right of occupancy.*
- 3. That the trial tribunal erred in law and fact when declared the 1st respondent as the lawfully owner of the disputed land despite the availability of enough evidence to the effect that the 1st respondent was/is not legally capable of owning the disputed plot.*
- 4. That the trial tribunal chairman erred in law when introduced extraneous factual matters which were not challenged by the respondent just to fault the appellant's evidences.*
- 5. That the trial tribunal never recognized that the 1st respondent was a mere invitee who operated her business in the disputed landed property.*

6. *That the trial tribunal relied on evidence that the 1st respondent acquired the disputed land by being allocated by Village in 1991 while at that material time the 1st respondent did not exist.*
7. *That the trial chairman erred in law and facts by disregarding the evidence of the appellant and the evidence of PW2 and PW3 to the effects he has been occupied the disputed land and made exhaustive improvement for long time.*
8. *That the trial chairman erred in law and facts by failure to analyze well the evidence on record hence reached to unfair decision.*

When the appeal was called on for hearing, the appellant was represented by Mr. Baraka Mbwilo, learned advocate, whereas the first respondent had the service of Mr. Mika Mbise, learned advocate and the 2nd and 3rd respondents enjoyed the legal services of Mr. Jerry January, learned State Attorney. Both parties agreed to dispose the appeal by way of written submission and complied with the schedule.

In disposing of this matter, I felt that the location of the suit land was not properly described. Given the legal effect of the anomaly, I invited parties to address the court and give the way forward.

Mr. Mbwilo rolled the first ball. He submitted that the appellant properly described the location of the suit land as required by Regulation 3 (2) (b) of the Land District Disputes (the District Land and Housing

Tribunal) GN. No. 174 of 2003 (hereinafter the Regulation). Of significance, the learned counsel submitted citing paragraphs 8 (u) and (v) and 9(iv) of the application that documents referred thereto indicate where the suit property stands. He added that the certificate of customary right of occupancy was not objected when it was tendered hence its contents were proved. To bolster his position, he cited the case of **Makubu Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (CAT- Shinyanga) (unreported).

In contrast, Mr. Mbise argued that the application being a foundation of a case in the DLHT ought to embody the location of the suit property and address. He invited this court to visit paragraph 5 of the application. Mr. Mbise argued further that paragraph 5 cannot be cured by the subsequent paragraphs because each paragraph is independent. Mr. January, supported Mr. Mbise's submission.

I commend parties' counsel for their assistance and researched submissions that have shed a light on the necessity of describing the location of the suit property and the impact of such a failure.

I have considered the rival submissions in line with the judgment and the application lodged by the appellant in the DLHT on 11/01/2018.

I am in agreement with Mr. Mbwilo that the location of the suit property

was properly described. Undeniably, the duty of the applicant was to give a description sufficient to identify the property in dispute. In the case at hand, the suit land is unsurveyed as rightly pointed out by both counsel. It is a cardinal principle that for unsurveyed land as it is the case at hand, permanent features surrounding the land at issue are important particulars for purpose of identifying the suit land from other pieces of land. After all, the appellant annexed the certificate of Customary Right of Occupancy as pleaded under paragraph 8(u) and (v). It is settled that annexures are part of the Pleint or Application. They help to elaborate on what is stated in the Pleint or Application. I am persuaded by the finding in the case of **Mbwana M. Chuma & 2 others v. Dar es Salaam Park Land Holding Limited**, Land Appeal No. 34 OF 2022 (HC Land Division aT Dar es Salaam) which quoted the case of **Oilcom Tanzania Ltd versus Christopher Letson Mgalla**, Land Case No. 29 of 2015 (unreported) (both unreported) that:

"In my thinking however, in construing pleadings, courts should also consider annexures attached to them (if any) so as to properly understand the actual disputes between the parties for the purpose of resolving it effectively. The view is based on the fact that, annexures form part of pleadings since they assist in elaborating the material facts pleaded in the pleadings. The broader meaning of pleadings for the purpose of promoting the right of a fair trial to parties,

therefore, should be that, annexures are part and parcel of pleadings."

Basing on the above-cited authority, the legal requirement highlighted above, whose intention is for an authentic identification of the suit land so as to afford a court of law to make certain and executable order and decree, was complied with. The certainty of the suit property makes it possible for the court to make a definite order and execute it.

All said and done, let me turn to the gist of the appeal. As I have introduced above, the appellant challenges the decision of the DLHT armed with an eight-ground memorandum of appeal.

For reasons that will be apparent, I will confine my analysis to ground one of the appeal. The broad contention by the appellant in this ground is that the DLHT failed to determine the dispute according to farmed issues. This contention has been discounted by the appellant. Given its importance, I am tempted to consider it first, as I believe the same is capable of disposing of the appeal without going into the substance of the rest of the grounds.

Submitting in respect of the 1st ground Mr. Mbwilo contended that six (6) issues were framed but only five issues are reflected in the judgment. On this he cited page 3 and 4 of the judgment. The learned counsel argued further that although the trial Chairman proposed to start with issue number one and then number two but he could not understand if he discussed it because at the end of page 4 the trial Chairman simply said that issue number one was answered in affirmative. It was his observation that apart from combining issues number 1, 4 and 5, issue number two was not discussed and mentioned anywhere. The learned counsel wound up by remarking that the Court is bound to decide each issue framed and make decision on each issue.

In his reply, Mr. Mbise had a different view. He submitted that the second issue was fully considered at page 4 and 5 of the impugned judgment where in his view it was decided that the 1st respondent was a proper party. According to him, it was just a slip of a pen when it was referred to as the first issue but the substance is squarely that of issue number two. He firmly submitted that all issues framed were considered by the DLHT in its judgment in accordance with the law that provides for the manner in which judgments of those tribunals should be composed.

Mr. January's reply was substantially in consonance with Mr. Mbise's. He too was convinced that the five framed issues were discussed by the trial Chairman including the 2nd issue which was discussed at page 4 paragraph 2 of the typed judgment. He as well submitted that all framed issues were duly and faithfully considered.

From these submissions, the Court's task is to pronounce itself on whether all framed issues were considered by the DLHT in its judgment.

As the record reveals, it is a correct position that the DLHT framed six (6) issues arising from the pleadings and in their evidence, the parties had adduced evidence on them. They are:

- 1. Who is the lawful owner of the land in dispute?*
- 2. Whether this application has been brought against proper and necessary party 1st respondent.*
- 3. Whether this application was properly brought by applicant alone.*
- 4. Whether the suit land is part of the estate of late Letson Kabila Kalupande.*
- 5. Whether the respondent are trespassed (sic) on the suit land.*
- 6. To what reliefs are the parties entitled.*

However, on examining the record I share Mr. Mbwilo's observations that the DLHT did determine five (5) issues. It is categorical in the typed judgment at pages 3 and 4 that:

"Mambo yafuatayo ndiyo yaliyokubaliwa kuwa ndiyo yenye kubishaniwa (issues).

- 1. Nani ni mmiliki halali wa ardhi yenye mgogoro.*
- 2. Iwapo mjibu maombi wa kwanza ni mdaawa sahihi (proper party).*
- 3. Iwapo ardhi yenye mgogoro ni sehemu ya mirathi ya marehemu Letson Kalupande.*
- 4. Kama wajibu maombi ni wavamizi.*
- 5. Nafuu zipi wadaawa wanastahili."*

A thorough examination of the judgment at page 2 and 3, issue number three appearing in the proceedings at page 40, was not listed in the judgment. It was however discussed. The DLHT said:

"Kuhusu jambo la tatu. Hili suala la kisheria. Katika Ushahidi wake mleta maombi alisema kuwa katika kikao chao walikubaliana ashitaki peke yake japo anasema wasimamizi wawili... Lakini sheria iko wazi kwamba mtu/mdaawa hawezi kulazimishwa kuunganishwa kwenye kesi kama mdai. Mleta maombi anasimamia maslahi za (sic) marehemu bila mipaka katika kesi hii. Hivyo anauwezo wa kudai peke yake."

The message we get from the above excerpt is that the 3rd issue was considered even though it was not listed in the judgment.

While agreeing with Mr. Mbise and Mr. January that issue number 2 was fully considered only that there was typing errors, what I have discovered is that issue number three in the judgment (which is issue

number 4 in the proceedings) was not considered. It was listed in the judgment but it was not expressly provided that it would be one of the issues to be considered. Under issue number three, the trial Chairman discussed issue number 3 appearing in the proceedings. The call to the DLHT was to determine whether the suit land formed part of the estate of late Letson Kabila Kalupande. I have keenly read the judgment. In my view there is no sentence illuminating on whether or not the suit land formed part of the estate. What I have gathered from it is that the appellant failed to prove to the balance of preponderance that the suit land was Shangala Halinga's property. Of course, on reaching at that conclusion the trial Chairman was discussing issues No. 1, 4 and 5. It is obvious, therefore, that he could not have stated categorically because that was not a discussion relating to issue number three appearing in the judgment. In my opinion, the trial Chairman had to tackle that issue and give a decision on it. With respect, I am unable to agree with Mr. Mbise and Mr. January that, by giving a passing over statement that issue number 3 was expressly determined.

Since my decision is clear that issue number three appearing in the judgment was not determined, the issue is what is the effect of such irregularity.

I am in agreement with Mr. Mbwilo, that the consequence of all this is to render the judgment incomplete and defective. Determination of issue No. 3, that is, whether the suit land was part of the estate of the late Latson Kabila Kalupande, was crucial. As stated above, the omission renders the judgment defective. The gravity of this infraction has been held to be a fundamental effect and the courts have not disguised their unhappiness about it. In **Stanbic Bank Tanzania LTD v. Trust Engineering Work LTD**, Civil Appeal No. 374 of 2019 the upper Bench splendidly guided as follows:

*"Secondly, determination of the issue framed by the trial court (issue No. 4), that is; whether the appellant was entitled to the reliefs sought in the counterclaim, was crucial. The reason is that, if the answer to that issue should have been in the affirmative, then it would have an effect on the award of the reliefs claimed by the parties. In our considered view therefore, the omission is fatal. We are supported in that view by the decisions of the Court in the cases of **Sosthenes Bruno** (supra) cited by the counsel for the appellant and **Runway (T) Limited v. WIA Company Limited and Another**, Civil Appeal No. 59 of 2015 (unreported). In the latter case, despite the existence of a counterclaim from which an issue was framed, the same was not heard and determined. As a result of that omission, the Court proceeded to nullify the judgment and set aside the resultant orders."*

See also the case of **Abraham Wavi Kinyonga v. Kereto Nanga Ndarivoi**, Land Appeal No. 43 of 2019 which quoted the case of **Amirali Ismail v. Regina**, 1 T.L.R 370.

In this case, although issue No. 1, 2, 4, and 5 were answered the issue on whether the suit land was part of the estate of the late Latson Kabila Kalupande was left undetermined. In my view, the issue was left undetermined not because other issues were disposing of the suit but I believe the trial Chairman forgot it. The judgment was for that reason rendered defective. In the circumstances, guided by the decision in **Stanbic Bank Tanzania LTD** (supra) the same is hereby nullified and the orders arising therefrom are set aside. In the event, I order that the record be remitted to the DLHT for it to compose a judgment afresh in accordance with the law.

It is so ordered.



Dated at **MBEYA** this 16th day of March, 2023

A handwritten signature in black ink, appearing to read 'J.M. Karayemaha', written over a horizontal line.

J. M. Karayemaha
JUDGE