IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO.143 OF 2022

(C/f Land Application No.73 of 2020 in the District Land and Housing Tribunal for Babati at Babati.)

WALANGI GINAKU..... .....APPELLANT

Vs

GIDANYASH GIDAGWANDU..... RESPONDENT

JUDGMENT

Date of last order: 28-4/2023

Date of judgment: 12-6-2023

B.K.PHILLIP,J

Aggrieved by the judgment of the District Land and Housing Tribunal for Babati District at Babati (Henceforth "The Land Tribunal"), the appellant herein lodged this appeal to challenge it. The grounds of appeal are reproduced verbatim hereunder;

(i) That, the whole judgment and decree in application no.73 of 2020 involves serious irregularities and painted with illegalities and gross abuse of court process.

(ii) That, the trial tribunal failed to properly evaluate evidence hence arrived into a wrong verdict.

(iii) That, the trial tribunal erred both in law and fact when it unfairly heard appellant's case as respondent before it during defence.

The appellant prays that this appeal to be allowed with costs and the judgment of the District Land and Housing Tribunal be set aside.

Briefly stated, the background to this appeal is as follows; The respondent herein was the applicant at the Land Tribunal. He instituted a case against the appellant herein claiming that the appellant trespassed into his land measuring 27 acres located at Mugucha village, Gehandu Ward in Hanang District. After full trial the Land Tribunal decided the case in favour of the respondent.

At the hearing of this appeal the learned advocate Erick Erasmus Mbeya appeared for the appellant whereas learned advocate Raymond Joackim appeared for the respondent.

The appeal was heard viva voice. Mr. Mbeya started his submission by pointing out that he was going to submit on grounds of appeal conjointly. His submission was to the effect that the Land Tribunal was supposed to dismiss the respondent's case for want of prosecution because the respondent was not present before the Land Tribunal when the case was called for hearing. He referred this Court to page 23 of the proceedings, Regulation 11 (b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2002 (Henceforth G.N. 174/2003) and Order IX Rule 5 of the Civil Procedure Code (Henceforth " the CPC") to cement his argument.

Moreover, Mr.Mbeya raised the following arguments; **One,** that the application changed hands from M.S. Mahelele to Hon. Mtumengwa, Hon. Mdachi and finally to Hon.Mwihava contrary to the acceptable procedures . He contended that no reasons were given in the proceedings for such change of hands of the case file. To buttress his argument, he cited the case of **Mirage Lite Ltd Vs Best Tigra**

Industries, Civil Appeal No.78 of 2016 (unreported). He also referred this Court to Order 18 Rule 10 (1) of the CPC.

Two, that the impugned judgment does contain opinion of assessors.He was of the view that lack of assessors' opinion is fatal. To cement his argument, he cited the case of **Veneranda Nyamheya Vs Husna Khalid Hussein, Land Appeal No.4 of 2021** (unreported) and section 23 (1) (2) of Cap 216 and Regulation 19 (2) of GN. No. 74 of 2003.

Three, that the Land Tribunal did not visit the *locus in quo* and the respondent's evidence concerning the size of the land was contradictory. He contended that the proceedings shows that the respondent was not consistent in his testimony at one time he said the size of the disputed land is 5 acres and he had built a house in the disputed land. Later on he changed his statement and said that the disputed land is 27 acres and there was no house in the disputed land.Mr. Mbeya was emphatic that due to the allegedly contradictions, it was important for the Land Tribunal to visit the *locus in quo*. To support his position, he cited the case of **Said Hassan Shehoza Vs The Chairman of CCM Branch and others, Land Appeal No.147 of 2019,** (unreported).

Four, that Mr. Joakim amended the application beyond the orders granted by the Land Tribunal because he changed the respondent's name from Gidanyas Gidagwandu to Gidanyesh Gidagwandu.**Five,** that the failure to join the respondent's father who was allegedly that he gave the disputed land to the respondent was fatal. **Six,** that the testimony of PW1 was a hearsay contrary to section 62 (1) of the Evidence Act. **Seven,** that the appellant's application was incompetent for contravening section 13 (4) Cap 216 read to Written laws (Misc

amendment) Act No.3 of 2021 for want of requisite certification from the Ward Tribunal since no certificate from the Ward Tribunal was presented before the Land Tribunal to certify that the Ward Tribunal failed to solve the dispute between the parties. He insisted that it is trite law that once a procedural law is acted it applies retrospectively. He referred this Court to the Written Laws (Misc. Amendments) No.3 Act of 2021 GN. No.41of 2021.Also he cited the case of **Benbros Motors Tanganyika Ltd vs Ramanlal Harribai Patel (1967) HCD No.435** and **Henry Bubinza (Administrator of the estate of the late Mathias Njile Bubinza vs Agricultural Inputs Trust Fund and 3 Others, Civil Appeal No. 114/11/2019** (unreported).He prayed the appeal to be allowed, the proceedings of Land Tribunal be quashed and its judgment set aside with costs.

In rebuttal, Joakim started his submission by pointing out the following; that Mr. Mbeya's submission included on issues which were not pleaded in the memorandum of appeal. He failed to submit on the alleged gross abuse of the court process indicate in the 1st ground of appeal. He failed to substantiate his contention indicated in the 2nd ground of appeal that the Land Tribunal failed to evaluate the evidence adduced by the parties and did not submit on the 3rd ground of appeal at all.

Moreover Mr. Joakim contended that the cases cited by Mr. Mbeya are irrelevant in this appeal and Regulation 11 (1) GN No. 174/2003 was cited out of context since the case proceed for the defence hearing in the absence of the both advocates. The respondent decide to proceed with the hearing of the case on his own and there was nothing wrong with the order made by the Land Tribunal for the defence case to proceed in the absence of the advocates. He insisted that a case can be

dismissed if it has been abandoned. To cement his arguments he referred this court to the proceedings of Land Tribunal dated 27th July 2022 and Regulation 15 of GN. No.174 of 2003 which provides that when there is non-appearance of the applicant the application can be dismissed. He insisted that in this case the parties have never defaulted to enter appearance in court that is why the Land Tribunal heard the case to its finality.

With regard to Mr. Mbeya's contention that there was change of hands of the application in contravention of the legal procedure, Joakim submitted that same is misconceived as the application was heard and finally determined by one Chairman only, (Hon. Ngonyani). Hon. M.S. Mahelele, Hon. Mtumengwa and Hon. Mdachi presided over the application for adjournment purposes only not for the hearing.

On the issue concerning visiting *locus in quo*, Mr. Joakim argued that it was not mandatory for the Land Tribunal to visit the *locus in quo* . Normally visiting the *locus in quo* is done where is necessary to do so, contended Mr. Joakim.

Mr. Joakim refuted Mr. Mbeya's contention that the respondent's testimony was inconsistent. He argued the same is a misconceived because the respondent prayed to amend his application so as to indicate the correct size of the land invaded by the appellant. The prayer for amendment was granted and the application was amended accordingly. He maintained that the amended application indicates that the disputed land was 27 acres and the same can be seen in proceedings. He went on submitting that there was no amendment of the respondent's name as alleged by Mr. Mbeya. He added that if there

any letter missing in the respondent's name then, that is just a slip of a pen/typing error.

Moreover, he submitted that respondent's father was not supposed to be joined in the case since there was no any dispute between the respondent and his father, and he was not a necessary party to the case.Mr. Joakim refuted Mr. Mbeya's argument that the testimony of PW1 was a hearsay. He contended that the respondent's testimony was direct evidence because he heard what he said from his father and was given the disputed land by his father.

With regard to the assessors' opinion, Mr. Joakim submitted that assessors' opinions were taken into consideration. To cement his argument he referred this court to page 4 of the impugned judgment.

With regard to the competence of the application Mr. Joakim argued that the amendment of the law cited by Mr. Mbeya was on the jurisdiction of the Ward Tribunal. It was not on the procedures pertaining to the filing of cases before the Land Tribunal. In conclusion of this application Mr. Joakim prayed for the dismissal of this application with costs.

In rejoinder, Mr. Mbeya reiterated his submission in chief and added that a point of law can be raised at any point. He insisted that his argument on the incompetence of the application is part of the illegalities complained of by the appellant and the Written Laws (Misc. Amendments) No.3 Act of 2021 GN No.41of 202 is on the procedures of filing cases thus, applicable in this matter.

I have dispassionately analyzed the competing arguments raised by the learned advocates appearing herein. However, before dealing with

the merit of this appeal I find myself compelled to deal with the pertinent preliminary issue raised by Mr. Joakim, to wit; that Mr. Mbeya's submitted on non-existing grounds of appeal/ issues not pleaded in the memorandum of appeal. Let me say outright here that Mr. Joakim's contention aforesaid is correct as I will elaborate soon hereunder.

Upon reading the grounds of appeal between the line as well as the submissions made by Mr. Mbeya, I noted that Mr. Mbeya's submission included a number of grounds/issues which are not in the memorandum of appeal and cannot be blended in any of the grounds of appeal. For instance, the issues on the amendment of the respondent's application, joining the respondent's father in the application and visiting the *locus in quo* just to mention a few. It is trite law that parties are bound by their own pleadings. They are not allowed to depart from their pleadings by raising new claims/arguments not founded in the pleadings or inconsistent with what is pleaded. It is also worthy note that the law is very clear that the grounds of appeal have to be concise and are served to the respondent in order to enable him/her to prepare himself/ herself properly for the hearing. And the appellant is not allowed to argue or be heard in support of any ground of objection not set forth in the memorandum of appeal except by the leave of the court.(See Order XXXIX Rule 1 (2) of the CPC). In short I am in agreement with Mr.Joakim that Mr.Mbeya submitted on issues which do not form part of the ground of appeal without the leave of the court, failed completely to submit on the alleged abuse of the court process stated in the 1st ground of appeal and did not make any submission in support of the 3rd ground of appeal at all. Thus, guided by the provision of the law I

have stated herein above, I will not deal with the points of objection/grounds not raised in the memorandum of appeal.

Starting with the first ground of appeal, one of the relevant argument raised Mr. Mbeya on the first ground of appeal is on the assessors' opinion. As correctly submitted by Mr. Joakim, the assessors' opinions were considered by the Land Tribunal in its judgment. (See page four of the impugned judgment).The court's records show that the assessors' opinion were presented and read in court on 5th January 2023. Written copies of the assessor's opinion are in the court's records. Thus, the requirements of the law in section 23(1) (2) of Cap 216 were complied with. The case of **Veneranda Nyamuhanga** (supra) cited by Mr. Mbeya is distinguishable from this case because it has different sets of fact. For instance in that judgment it is stated that assessors missed some of the hearing sessions thus, they did not fully and actively participate in the hearing of the case.

Another relevant issue is on Mr. Mbeya's contention that there was change of hands of the case file un-procedurally. Upon perusing the court's records i found out that the same is misconceived since the court's records reveal that the case was heard by Hon Ngonyani only. There was no change of hands of the case file. However, there were some adjournments of the case made by that is Hon. Mwihava, Hon. Ntumengwa and Hoh. Mahelele. It is noteworthy that adjournment of a case by another Chairman apart from the one who has been assigned to adjudicate the case is acceptable in law and cannot be termed as change of hands of the case file. The court's holding in the case of **Mirage Lite Ltd** (supra) cited by Mr. Mbeya is not applicable in this case.

Coming to the 2nd ground of appeal on the evaluation and analysis of the evidence adduced, i do not see any plausible reasons to fault the analysis and evaluation of the evidence as well as the findings of the Land Tribunal that the respondent's evidence was heavier than the appellant's evidence. In a nutshell, the respondent's testimony is to the effect that the disputed land was not occupied by anybody. In 1999-2001 he shifted to the disputed land which was a forest area. He cleared 5 acres and reserved part of the land for cattle rearing. When the respondent came from Morogoro he found him in occupation of the disputed land. The testimonies of this witnesses, DW2 and DW3 testified that they knew the appellant (DW1) since 2020 when he used to own 1 acre of land. He has been expanding his land slowly and now owns a total of 20 acres.

On the other hand, the testimony of AW1 is to effect that he was given the disputed land by his father. He built a house therein. There was a time he moved to Morogoro with his herd of cattle and left the disputed land under the care of his father. While he was in Morogoro his father allowed the appellant to use the disputed land after being requested by the appellant. When he came back from Morogoro he found the respondent occupying his house and land (the disputed land).He requested him to vacate from the disputed but he refused do so. At the beginning he had been using 5 acres of his land but he continued trespassing into more land.AW1's testimony is supported by the testimony of AW2, who testified that the respondent herein is the rightful owner of the disputed land he was given the same by his father. He built a house thereon. The appellant herein is from a Mugucha Hamlet while the disputed land is in Qwarse Hamlet. Moreover, he

testified that he attended a family meeting of Gidagwandu Hababwa in which the disputed land was given to the respondent. People who are residing around /nearby the disputed land are family members of Gidagwadu family.All of them are children of the late Gidagwandu. He mentioned them as Rayani, Farja, Gidagwandu and Klebu.

Having made critical consideration of the evidence narrated herein above, I am inclined to agree with the views held by the chairman that the testimony of DW2 and DW3 supported the respondent's case because their testimony was to the effect that they know the appellant (DW1) since 2020 when he used to own 1 acre and has been increasing the size of his land slowly and now has a total of 20 acres. The chairman was of the view the above explained testimony of DW2 and DW3 supports the appellant's testimony who among other things testified that at the beginning the respondent invaded 5 acres only and then went on trespassing into more land.

For avoidance of doubts, I have take into consideration the Arguments raised by Mr. Mbeya regarding the evidence adduce and in my opinion the same have no merit as will elaborate soon hereunder;

As correctly submitted by Advocate Joakim the respondent herein sought and obtained the leave of the Land Tribunal to amend his application. He filed his amended application which indicates that the size of the disputed land is 27 acres. It is indicated in the amended application that at initially the appellant invaded 5 acres but he has been tresspassing into more land. Consequently the land he invaded reached 27 acres. In his testimony the appellant testified that he built a house at the disputed area. In fact there is no any contradiction on the size of

the disputed area and the respondent's testimony that he built a house at the disputed land which is currently occupied by the respondent.

With regard to the appellant's testimony, I am not inclined to agree with Mr. Mbeya's contention that the same is hearsay since the appellant testified information he personally heard from his father. Thus, the provision of section 62 (1) of the Evidence Act cited by Mr. Mbeya is irrelevant.

From the foregoing, it is the finding of this court that all grounds of appeal have no merit. However, without prejudice to my findings herein above and by passing I wish to point out that court's record reveal that both parties were accorded their right to be heard. On 27th July 2022 the Land Tribunal ordered the respondent's case to be closed and the defence case to proceed ex-parte in his absence following his failure to enter appearance in court. The aforesaid Land Tribunal's order was correct because the respondent had already testified together with his witness thus, the Land Tribunal had already received the respondent's evidence and there was no way it could discard it . The court' records also reveal that the Land Tribunal did not visit the *locus in quo* and none of the parties prayed for visiting the *locus in quo*.It is noteworthy that visiting *locus in quo* is not a must. It is within the discretional powers of the Land Tribunal and the same has to be done where necessary with great caution.[See the case of **Said Hassan Shehoza** (supra)]

In the upshot, this appeal is hereby dismissed in its entirety with costs.

Dated this 12th day of June 2023

B.K.PHILLIP

JUDGE.