IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB - REGISTRY

AT ARUSHA

LAND APPEAL NO. 158 OF 2022

(Appeal from Land Application No. 09 of 2019 in the District Land and Housing Tribunal for Kiteto at Kibaya)

MORORO KITONYO ..... APPELLANT

VERSUS

NJAPAI SABALULA ..... 1ST RESPONDENT

LEPINA NJAPAY ..... 2ND RESPONDENT

KIPULESI NJAPAY ..... 3RD RESPONDENT

LESHALA MALUJA .....4TH RESPONDENT

JUDGMENT

05th June & 25th July 2023

KAMUZORA, J.

The Appellant herein was the Respondent before the District Land and Housing Tribunal (DLHT) for Kiteto at Kibaya in Land Application No. 09 of 2019 that was decided in favour of the Respondents herein. The respondents' claim against the appellant was a piece of land located at Olgira Village within Kiteto District in Manyara region (hereinafter "the suit land"). The Respondents claimed to be the lawful owners of the suit land for they cleared and occupied virgin land that was allocated to

them by Olgira village council. They sued the appellant before the DLHT for trespassing into their land. In his defence, the Appellant denied trespass and insisted that he was the lawful owner of the suit land for he was allocated 28 acres of land by the Olgira Village Council. He also mentioned that there was similar dispute as between the parties before Sunya Ward Tribunal, Land case No. 19 of 2013 in which the Appellant was declared lawful owner of the suit land.

The trial Tribunal decided in favour of the Respondents and the Appellant was ordered to vacate the suit land and permanently restricted from entering the suit land. He was also ordered to pay the costs of the suit. Aggrieved by the trial tribunal's decision, the Appellant preferred this appeal raising 5 grounds and with the leave of this court added one more ground. The said grounds are reshaped as hereunder: -

1) *That, the Honourable chairman erred both in law and in facts by failing to analyse evidence from both sides and ended up to a wrong conclusion.*
2) *That, the Honourable chairman erred both in law and in facts for not giving weight Documentary evidence mainly exhibits D1, D2 and D3 and ending up with a wrong conclusion which contradicts the law.*
3) *That, the Honourable chairman erred both in law and in facts by creating his own evidence and witness.*

4) *That, The Honourable trial Chairman was biased while analysing evidence.*
5) *That, the disputed land was not properly described to make it easy for the execution process.*
6) *That, the Honourable trial chairman F. Kanyerinyeri lacked jurisdiction to try land Application No. 09 of 2019 of the Kiteto District Land and housing Tribunal at Kibaya.*

At the hearing of the appeal, the Appellant was represented by Pastor Forence Kong'oke, learned counsel while Mr. Mathias Nkingwa, learned counsel appeared for the Respondents. The appeal was heard by way of written submissions and both parties complied to the submissions schedule save for the rejoinder submission. The Appellant's counsel submitted jointly for the 1st and 4th grounds of appeal and argued separately the remaining grounds.

I will first deliberate on the 6th grounds because it touches the jurisdiction of the trial tribunal in determining the case. It was argued by the appellant's counsel that the tribunal Chairman lacked jurisdiction to try the case because Land Application No. 09/2019 was assigned to Honourable H. E. Mwihava chairman who conducted proceeding on the Preliminary objection. That, Hon. J.F. Kanyerinyeri took over the proceedings without recording reasons for taking over hence, violated Order XVIII Rule 10(1) of Civil Procedure Code Cap 33 R.E 2019. For

him, Hon. J.F Kanyerinyeri acted without jurisdiction. To buttress his submission, he cited the case of **National Microfinace bank Vs. Augustino Wesaka Gidimara T/A Builders Paints & General Enterprises,** Tanganyika Law Society Law report (2017) 310.

The counsel for the Respondent conceded to this ground and further added that, the remedy is to remit the file back to the trial court for the same to proceed from the stage where the successor chairman took over the proceedings, on 21/04/2021. He agreed that the later proceedings are nullity and illegal in the eyes of law and deserves to be expunged from record. The respondent referred this court to the case of **Tryphone Elias @ Ryphone Elias and another Vs. Majaliwa Daudi Mayaya,** Civil Appeal 186 of 2017 (Unreported), **Inter- Consult Limited Vs. Mrs Nora Kassanga & another** [2019] 362. The respondents maintained that since the matter proceeded in contravention of Order XVII Rule 10(1) of the CPC Cap 33 R.E 2022, this court has power to order and remit the records to the trial tribunal with direction for the trial to continue to where Hon. Mwihava Chairman ended.

On the issue of costs, the Respondents prayed for each part to bear own costs as the fault was not attributed by parties. Reference was

made to the case of **William Getari Kegege Vs. Equity Bank and another,** Civil Application No 24/2019 CAT at Mwanza (Unreported).

It is settled principle that failure to disclose the reason for the transfer of the file or taking over of the proceedings by another judicial officer vitiates the proceedings, judgment and decree issued thereafter. This omission goes to the root of the matter as it touches jurisdiction of successor chairman, magistrate or judge thus, occasion to failure of justice. The provision of Order XVIII Rule 10 of the Civil Procure Code Cap 33 RE 2019 govern procedures for taking over the proceedings. The said provision read: -

> *"10. -(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*

While interpreting the above provision the court of appeal in **Tryphone Elias @ Ryphone Elias and another Vs. Majaliwa Daudi Mayaya,** (supra) insisted that assigning reason for taking over the proceeding is crucial otherwise the subsequent judge will not have jurisdiction to try the case. The court of appeal in the above cited with

approval its decision in the case of **Ms Georges Centre Ltd Vs. The Attorney General & Another**, Civil Appeal No. 29 of 2016 where it was held: -

> *"The general premise that can be gathered from the above provision is that once a trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge of magistrate an obligation to put on record why he/she has to take up a case that is* ***partly heard by another****. There are a number of reasons why it is important that the trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. for one thing, as suggested by Mr. Maro* ***the one who sees and hears the witness is in the best position to assess the witness's credibility****. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice can be compromised."*

See also the Court of Appeal decision in **Leticia Mwombeki Vs. Faraja Safarali and 2 others,** Civil Appeal No. 133 of 2019 where it was held that;

> *"... the silence of the record as to how the court file found its way from the predecessor Judge to the successor Judge puts* ***to test the integrity and transparency of the***

proceedings in question. *It was also observed that where the successor judicial officer takes over the proceedings without assigning reasons, whatever he does in the case he does it without jurisdiction and the omission goes to the root of the matter."*

Based on the provision of Order XVIII Rule 10 of the CPC of Order and the interpretation given in the above cited cases, it is clear that assigning reasons will only be necessary where the evidence for one or more witnesses is already recorded and the trial chairman is unable to conclude the trial.

In the matter at hand, it is evident at page 5 of the trial typed proceedings on the coram dated 21/4/2021 that Hon J.F Kanyerinyeri Chairman took over the matter from Hon. H. E. Mwihava chairman who was initially proceeding with the hearing of the matter and did not assign reason for so doing. However, the omission in this case in my view did not offend the law.

It is clear from the record that when Hon. Kanyerinyeri took over the proceedings, hearing of evidence was not yet commenced. Thus, even if no reason was assigned, I do not see how parties were affected by such omission. The record also reveals that before Hon J. F Kanyerinyeri, commenced hearing, the application was amended and he

was the one who heard the evidence by both parties and delivered judgment thereto. I therefore find that the trial tribunal chairman had jurisdiction to try the case and failure to assign the reason for change of trial chairman in the circumstance of this case, did not offend the law. That being said, I find that ground 6 of appeal is devoid of merit and fails.

Before I deliberate on other grounds, I find pertinent to determine the 5th ground which also touches the validity of the claim before the trial tribunal. It was contended that the pleadings filed before the tribunal did not describe the disputed land. That, despite the order for the amendment of the application, still the same did not describe the suit land.

It is a legal requirement under Order VII rule 3 of the Civil Procedure Code, Cap. 33 R. E. 2019 and Regulation 3 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (GN. No. 174 of 2003) that a party instituting claim for immovable property, land inclusive has to give a clear description of the same in his/her pleadings. Order VII rule 3 reads: -

> *"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."

Regulation 3 also requires details of the description of the suit property. Reading the pleadings before the trial tribunal, at paragraph 3 of the amended application, the applicants (respondents herein) described the suit land as estimated 20 acres located at Olgira Village within Kiteto District in Manyara region. In his defence the respondent (appellant herein) disputed the claims but did not describe the suit land. Thus, there was no clear description of the suit property because the appellant's description does not contain demarcation to make it easy for anyone to distinguish it from other peoples' land.

In their evidence before the trial tribunal, neither the appellant nor the respondents described the suit land by stating the demarcations. While the respondents claimed the suit land to be 20 acres, the appellant mentioned that he was owning 28 acres. Neither of the witness described the boundaries of the suit land.

I agree with the appellant that since there was no proper description of the suit land, the decision made cannot be executable. It is clear that omission to properly describe the disputed land is fatal and in contravention of Order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019. See also the case of **Fredrick Rajabu Vs. Ilemela**

Municipal Councill and Synergy Tanzania Company Limited, Civil Appeal No 197 of 2019 CAT at Mwanza (Unreported).

The purpose of having clear description of the suit land is to facilitate the execution process. It is clear that court orders must be certain and executable therefore if the land in dispute has not been well described it will be difficult for the court to make orders and execute the same. Luck of description of the suit land may result into more conflict at the time of execution as there is likelihood of executing the land not part of dispute.

I am fortified by the decision of my brother Utamwa, J (as he then was) in the case of **Agast Green Mwamanda (as Administrator of the Estate of the late ABEL MWAMANDA) Vs. Jena Martin,** Misc. Land Appeal No.40 of 2019, HC Mbeya where he made the following remarks with regard to description of land;

> *".....In fact, the answer to both questions is negative. This is because, the Ward Tribunal can only entertain a dispute related to a specific piece of land so that it can give orders related to that specific piece of land as differentiated from other pieces of land surrounding it. It follows thus, that, upon a proper construction of the provisions of law cited above, it is conclusive that, a sufficient identification of the location of the disputed land in land cases before a Ward Tribunal, especially those related to disputes of ownership or*

possession, is not an option, but a mandatory legal requirement.

The same view was observed by Hon. Maghimbi, J in the case of **Victoria Kokubana as an Attorney of Angelina Mimbazi Byarugaba vs Wilson Gervas & Anor**, Land Case No. 70 of 2016, HC Dar es Salaam where it was stated that;

" Owing to the developed fact, I become hesitant to continue with writing a judgment or passing any order regarding a Suitland description of which is insufficient. I have asked myself, should the matter be decided in favour of the plaintiff, what is it that she will execute against the defendant? How will the execution order ascertain to what extent are the defendants to be evicted? On the other hand, if the defendant is declared the lawful owner of the suit property, what is the size and description of that he is declared an owner of?

Subscribing to the reasoning of the above cited cases and applying the said principle in the current appeal, it is the findings of this court that, since the suit land was not well described before the trial tribunal, the omission vitiated the proceedings and contravened the law. The remedy in my view was for the trial tribunal to strike out the pleadings and direct parties to file proper pleading describing the suit property.

The determination of this ground suffices to dispose of the appeal. I will not therefore labour much in determining the rest of the grounds. In

the event, this appeal succeeds to the extent above explained. The proceedings, judgment and decree of the trial tribunal are hereby nullified. Costs be borne by the respondents.

DATED at **ARUSHA** this 25th day of July 2023.

D.C. KAMUZORA

JUDGE