**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND APPEAL NO. 60 OF 2022**

*(Arising from the Ruling of District Land and Housing Tribunal Moshi at Moshi in Land Application no. 115 of 2019 dated 16th September, 2022)*

**REUBEN ISAAC MLAY..... APPELLANT**

***VERSUS***

**SOLOMON ONESMO MMARI.....RESPONDENT**

# JUDGMENT

13th July & 9th August, 2023

**A.P.KILIMI, J.:**

The appellant hereinabove filed an application at the District Land and Housing Tribunal of Moshi at Moshi praying to be declared owner of the suit property, declaration that respondent hereinabove is a trespasser to the said land in dispute, general damage for the loss he incurred and costs of the suit. On the course of reply the above application, the respondent filed preliminary objection on the point of law to the effect that, the application is incompetent for it has no a proper description of the suit property contrary to the law. After this objection being heard the District

Tribunal ruled out that the objection raised has merit and dismissed the application with costs.

The appellant being dissatisfied with the above decision and order thereto, has stepped into the floor of this court being equipped with the following two grounds: -

1. That, the trial magistrate erred in law and in fact by dismissing the application by offending the requirement of Order VII Rule 3 of the civil Procedure Code Cap 33 R.E. 2019 and Rule 3(2) of the Land Disputes (District Land and Housing Tribunal) Regulation GN. No. 174 of 2003.
2. That, the trial magistrate erred in law and in fact by dismissing the application on ground that the suit property was not properly identified while the matter was not heard on merit and proper remedy was not dismissal.

Both parties to this appeal proposed the appeal be argued by way of written submission, the court acceded to their prayers and they duly submitted as per schedule ordered. The submission for appellant was drawn by Wilhad A. Kitaly learned counsel while for the respondent was Victor Jonass Bernard learned counsel.

The learned advocate for appellant submitting for the first ground submitted that, it is clear that both under the Civil Procedure Code and GN. No. 174 of 2003 provides that description of the property which is sufficient

to identify it, whereas the GN. 174 of 2003 went further by providing that the application has to describe the location of the land in dispute as the requirement of Rule 3(2)(b) and as provided under FORM No. 1 paragraph 3 of the GN. 174 of 2003.

He further submitted that, basing on above law, the application is required to describe the location of the disputed land, which the application at the tribunal did by describing the neighbors of the disputed land in both directions under paragraph 3 of the appellant's application. Therefore, the description described the location was sufficient enough to identify it rather than describing by size as required by respondent which is not the requirement of the law. Also he added that the land is unsurvayed thus it was difficult to identify it by size although it was not the requirement of the law, since it is well settled position of the law that, for unsurveyed land the boundaries and/or permanent features surrounding the land at issue are very important particulars sufficient to proper identification. To fortify this position the counsel has cited the case of **Daniel Ndagala Kanuda (As an Administrator of the estate of the late Mbalu Kushaha Mbaluda vs. Masaka Meho And 4 Others**, Land Appeal No. 26 of 2015, HC. at Tabora, (Unreported).

Responding to the above, the learned counsel for respondent contended on the first ground that the question of description of property is provided under Regulation 3(2)(b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulation,2002, GN No. 174 of 2003 and order VII rule 3 of the Civil Procedure Code [Cap 33 R.E 2019] which states that all application before the tribunal has to state clear the address of the suit property or location of the disputed land, this will helps the court in establishing the territorial jurisdiction and most importantly, assists in issuing executable orders. This law narrates properly that for non-surveyed land the applicant in his application has to state the boundaries, location and Size of the land.

The counsel further submitted that, at paragraph 3 of the application, the respondent mentioned location to be NAYAKALE plainly without state whether is Ward or Village or District, but also did not state the size of the suit land, which may infer that Appellant claimed the whole area of NAKA YALE regardless is village or a ward, or district which is very ascertained for execution for lacking proper description of the suit land. To bolster this stance the counsel referred the cases of **Mwanahamisi Habibu & 7 Others vs. Justin Ndunge Justine Lyatuu** (supra) and **Victoria**

**Kokubana (As an Attorney of Angelina Mimbazi Byarugaba) vs. Wilson Gervas & Anirod Oromi**, Land Case No. 70 of 2016, High Court (Land Division) at Dar-es-Salaam (Unreported).

In disposing the first ground, I find convenient to be backed by the law in respect to the gist of this ground. Order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019 provides that;

> *"Where the subject matter of the suit is immovable property, the plaint shall contain the 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"*

The same under Rule 3(2) of the Land Disputes (District Land and Housing Tribunal) Regulation GN. 174 of 2003 provides that;

> *"(a) N/A.*
> *(b) the address of the suit premises or location of the land involved in the dispute to which the application relates"*

In the application filed at the tribunal, the appellant stated in his application at paragraph 3 Location and address of the suit premises land as follows;

> *"NAYAKALE*
> *ALONG NLEY-KOBOKO ROAD*
>
> *BOUNDARIES*
> *North-AbdiNyari*
> *South- Anna Mmari*
> *East- Nley- Koboko mas*
> *West- Joseph Kimatare"*

Now, the point to be consider is whether the above stated description was sufficient enough to identify the said suit land as provided by the law above.

In my view, I think the import of order VII rule 3 of the Procedure Code, Cap. 33, R.E. 2019 and Regulation 3(2) (b) Land Disputes Court (District Land and Housing Tribunal) Regulation of 2002, G.N. No.174/2003 is to make sure that, the trial tribunal or court should have a portrayal of the suit land, which will ensure visiting locus in quo if necessary and later execution after conclusion of the matter.

I am in agreement with all cases by the appellant's counsel in this ground but, I am mostly persuaded by the case of **Mwanahamisi Habibu & 7 Others vs. Justin Ndunge Justine Lyatuu (supra)** whereby the High Court observed at Page 4 that;

> *"I made a perusal of the plaint on the noted two paragraphs. I totally agree with learned counsel Kilonzo that, the suit land was not well described. The two paragraphs are too general. They are* ***not specific enough to describe property in terms of size, location, and boundaries of the land in question.****Reading the plaint particularly paragraph 6, it seems like the plaintiffs' claim is on the* ***whole land surrounding Mapinga Village*** *and not part of it within the said area. This kind of description of the suit land offends the provisions of Order VII Rule 3 of the Civil Procedure Code Cap 33, R.E 2019"*
>
> [ Emphasis supplied]

The description explained by the appellant at his application filed at the trial tribunal as shown above, despite of not mentioning its size, it was not specific to describe the location which is very crucial, mentioning name alone without saying whether is hamlet, village or ward or district to my view remained vague to show the locality. It is therefore, my considered

opinion, the requirement of the law was not complied with, and consequently I find this ground has no merit thus dismissed forthwith.

Coming to second ground, submitting in support to this ground, the counsel for appellant argued that the trial Chairman erred in law and in fact by dismissing the application on ground that the suit property was not properly identified while the matter was not heard on merit and proper remedy was not dismissal. This is because the preliminary objection raised was not capable to determine the application to its finality because the dismissal does not go to the root of the application which is ownership of the suit land in issue, therefore even if the preliminary objection was sustained, the application ought to have been struck out, so as to enable the applicant to refile the same in the Tribunal. To buttress this argument the counsel for appellant invited me to consider the case of **Athumani Salehe Magogo & 14 others vs. Gabius Edger Maganga and Another** Land Case No. 206 of 2021 and **Mwanahamisi Habibu & 7 Others vs. Justine Ndunge Justine Lyatuu (As Administratix of the Estate of the late Justine Aitalia Lytuu & 173 Others** Land case No. 130 of 2018.

Replying the second ground of appeal, the counsel for respondent agreed with the applicant that there is no proper translation of English word "strike out " and "Dismiss" in Swahili language all words mean "futa, kataza, ondoa" but the High court sitting at Arusha has established the position in the case of **Amani Karaine & 3 Others vs. Betuel Lengiye & Another**, Land Appeal No. 14 of 2021 (Unreported) when it referred the case of **Ngoni Matengo Cooperative Marketing Union Ltd vs. Ali mahomed Osman** (1959) EA 577, and observed that in Swahili language in the term **"yatatupiliwa mbali"** symbolizes dismissal whereas the word **"yamefutwa"** connotes that, the application was struck out.

In my view, I don't dispute interpretation above, but, despite the fact that the respondent is saying that the word used means the application was struck out and cited above cases, the crux remains to look on the proceeds after the said application, as rightly said by the appellant advocate, its end did not determine the said application to its finality. I think the use of these final order "struck out" and "dismissed" have essential use, the first is used to give way for aggrieved party to seek avenue for substantive justice and the latter is used when the substantive

justice was heard on merit, thus pave a way for aggrieved party not to return in the same manner but use other remedies such as appeal etc.

According to the matter at hand, there is no dispute that the application was not determined on merit, thus no substantive justice reached, therefore, it was right for the tribunal to struck out and not to dismiss. The appellant worries were un avoided due proper meaning of the words used in Swahili, whether it means struck out or dismissed, but I think the above stance might be useful.

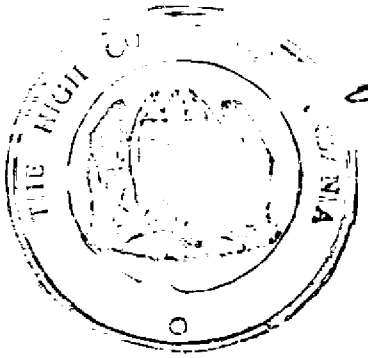
In the premises, I hold that the application at the tribunal was not dismissed but rightly struck out, therefore the trial tribunal decision was justified and cannot be faulted by this court.

In upshot, the first ground is dismissed, thus I subscribe to the trial magistrate the application offended the requirement of Order VII Rule 3 of the civil Procedure Code Cap 33 R.E. 2019 and Rule 3(2) of the Land Disputes (District Land and Housing Tribunal) Regulation (supra) therefore the trial tribunal decision is not disturbed, while the second ground which in fact needed interpretation, I hold the application at the trial tribunal was struck out.

In the final event and foregoing said, this appeal fails to that extent, and in the circumstances, I grant no costs.

It is so ordered.

**DATED at MOSHI** this 9th day of August, 2023



**A.P.KILIMI**

**JUDGE**

**9/8/2023**