THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

LAND APPEAL NO. 50 OF 2023

(Originating from Land Application No. 110 of 2019 District Land and Housing Tribunal for Morogoro)

DOMINIC MUKAMA KAMBARAGE..... APPELLANT

VERSUS

GODFREY MOSSES TUMAINI ..... RESPONDENT

JUDGMENT

Hearing date on: 28/07/2023

Judgment date on: 07/08/2023

NGWEMBE, J.

Mr. Dominic Mkama Kambarage, the appellant in this case unsuccessfully sued the respondent before the District Land and Housing Tribunal for Morogoro (the tribunal) for a claim of ownership of land estimated to measure about 42½ acres located at Ngerengere Mtaa, Mkundi ward herein Morogoro Municipality. He claimed to have purchased that land from Hamadi Saidi Omari Katoto on 25/01/2003.

Stating his cause of action, the appellant claimed that on July 2019 he noted that the respondent had invaded the land and allotted it into minor plots by pegging iron bars purporting to make boundaries in that land. That when he was faced, he claimed ownership through his father while refusing to vacate. Among others, he prayed that; the appellant be

declared a rightful owner; the respondent be ordered to remove and take away everything he brought to the land; eviction; cost and general damages.

The respondent filed his Written Statement of defence denying specifically the claim. Added that he was the administrator of his deceased father, the late Anderson Tumaini Buku and that he annexed a copy of judgment of Kingolwira Primary Court which appointed him. Stated further that the land belonged to the deceased who even had a case in 2003, in which he won against the said Hamadi Saidi Omari Katoto, he also won on a subsequent appeal which Katoto preferred; copies of judgment for both cases were annexed.

The case was heard on merits, and passed between two chairpersons; the first was Khasim who held the file and heard the plaintiff's evidence. On the special clearance session, the casefile was assigned to Hon. Mmbando who completed on the defence. It seems when the chairman was preparing his judgment, observed some impropriety. He thus raised a new issue on propriety of suing the respondent in his personal capacity instead of suing him as an administrator.

Messrs Benjamin and Tarimo represented the respondent and the appellant respectively. The chairman addressed them to argue on the issue which they both did. Eventually, the chairman was satisfied that the suit was totally improper for having been preferred against a wrong party. Because the respondent was clear that he acted as the administrator of the deceased estate. Part of his judgment stated: -

> *"Ni kweli suala la nguvu/mamlaka kwenye shauri linakwenda kwenye mzizi wa shauri. Baada ya mjibu maombi kufichua kuwa yeye sio mmiliki wa ardhi bishaniwa, na kwamba ardhi*

bishaniwa ni sehemu ya mirathi ya marehemu Andason Tumaini Buku, basi, mwombaji alikuwa na jukumu la kuomba kufanya marekebisho ya hati ya madai na kumweka mdaawa sahihi."

In the above paragraph, the tribunal proceeded to opine on *locus standi* which went to the root of the case itself. That the respondent having disclosed that the land was part of the deceased estate, the appellant was required to amend his pleading and implead the proper party. The tribunal proceeded to strike out the suit with costs and advised the appellant to sue the proper party if interested.

The appellant was not satisfied by such decision thus presented his appeal before this court putting forward five grounds of appeal which will not be reproduced for obvious reason that he expressly dropped other grounds, while maintained only ground three (3), which was to the effect that, the court erred in law for failure to declare the respondent a trespasser and for striking out the matter on the ground that the respondents had no interest.

On hearing, of this appeal Mr. Tarimo prayed to argue on grounds 3 and 5 jointly, but what he actually submitted, in my understanding was in respect of only ground 3, which challenged the tribunal's failure to declare the respondent a trespasser. Ground 5 which complained about the award of costs to the respondent was never addressed.

In his submission, Mr. Tarimo argued that, the basis of the tribunal dismissing the appellant's case was that the respondent had no interest in the disputed land, while in trespass cases the respondent need not be interested in the land. He strengthened his argument by referring this court to Order I Rule 5 of The **Civil Procedure Code, Cap 33 RE 2019,** which provides that, in order to be joined, defendants need not

be interested in all the reliefs sought. That since the respondent was the one seen placing some iron pegs in the disputed land, then he was the one trespassing. The tribunal ought to have declared him a trespasser. He further cited the case of **Jela Kalinga Vs. Omari Karumwana [1991] T.L.R 67 (CA)** which to him had the position stated in Order I Rule 5 above. He prayed this court to allow the appeal with costs.

On the respondent's side, Mr. Benjamin Jonas was the first to address. He was straight forward that striking out the application was on the ground that the appellant sued a wrong party as the respondent lacked capacity to be sued and the appellant did not challenge that fact. To him, even Order I Rule 5 of the CPC is misused by Mr. Tarimo. The suit was not struck out on the reason that the respondent was not interested in the reliefs. That the tribunal would not address other issues while the legal issue on the respondent's capacity *(locus standi)* was capable of disposing of the case. Fortified his argument by referring this court to the case of **Ally Rashid and 534 others Vs. Permanent Secretary, Civil Appeal No. 71 of 2018.**

Mr. Punge added that the issue of possession was disputed as the respondent was in actual possession, while the appellant claimed the same land. The appeal therefore be dismissed with costs, he prayed.

In rejoinder Mr. Tarimo maintained that the *locus standi* was established as the appellant established his cause of action. The tribunal erroneously decided the matter on point of law, the respondent was found in the suit land, the tribunal's decision was thus wrong.

Having summarised the parties' submission as above, it is the turn of this court to decide whether the appeal has merit. I find the decisive issue is whether the tribunal was correct in striking out the case without considering it on merit? Mr. Tarimo maintained his stance that the

tribunal was required to declare the respondent a trespasser. For the respondent Mr. Benjamin and Punge were of the contrary view, that the tribunal would not properly reach to that stage while the said respondent had no *locus standi*. This court has considered all the authorities offered by the learned advocates from both sides, all of them have been visited by this court, and most of them will feature in the course. However, at this juncture I take note of the precedent in the case of **Ally Rashid and 534 others Vs. Permanent Secretary** (supra). In that precedent, the Court of Appeal making reference to Order XIV Rule 2 of the CPC, held that if the issue of law is upheld, the court is precluded from entertaining other issues of facts. See also **Sonora Gold & Corporation & Another Vs. Minister for Energy & Minerals (Civil Appeal 112 of 2018) [2022] TZCA 183** where the court went as follows: -

> *"As a rule of thumb goes, whenever there is a point of law, the Court, has to determine it first before embarking to determine a substantive matter before it. Likewise in the case at hand, the Court shall first determine the point of law it raised suo motu."*

At the onset, it should be known that, the law permits an adjudicator to raise a new issue and make any decision and orders based on that issue. The prerequisite is that, parties to a case must be heard on that new issue, failure of which leads to miscarriage of justice. Where the new issue or any of the issues disposes of the whole matter, in the manner that there will be no need of determining other issues, the court or tribunal will not be obliged to determine each of the other issues specifically raised and or pleaded.

Having not lost trust to any of the advocates, I believe all the learned advocates are abreast of the position of the law. One of the authorities is the case of **Mussa Chande Jape Vs. Moza Mohammed Salim (Civil Appeal No. 141 of 2018) [2019] TZCA 490** where it was *inter alia* observed: -

> *"The trial judge is allowed to amend or strike out the framed issue or frame additional issues before passing a decree, but that power must be exercised judiciously by according parties the right to be heard on those additional issues"*

Likewise in another case of **Said Mohmed Said Vs. Muhusin Amiri, Civil Appeal No. 110 of 2020, (CAT – Dar),** the court insisted that, when the court has framed any new issue *suo motu* it must afford parties the right to be heard by availing them a chance to address on the issue. It observed: -

> *"As to what should a judge do in the event a new issue crops up in the due course of composing a judgment, settled law is to the effect that the new question or issue should be placed on record and the parties must be given opportunity to address the court on it"*

Further similar position of principle was pronounced in the cases of **Margwe Error & Others Vs. Moshi Bahalulu (Civil Appeal No. 111 of 2014) [2015] TZCA 282,** and **Scan-Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported)** among many others.

According to the proceeding of the tribunal, the chairperson availed the opportunity to the parties and Messrs. Tarimo and Banjamin sufficiently addressed the tribunal on the issue. The learned advocates held their respective positions and arguments which they have exhibited

to hold before this court. It follows therefore the tribunal committed no error as per the procedure.

Now whether its findings were correct, is the following question. From the facts of the case, records are clear that the respondent was in occupation of the land and it is stated that he was found by the appellant placing iron pegs in the land making sort of allotment of the land into plots and making boundaries. True also that when addressed he implied that he was in the course of discharging his duties of an administrator since the land was part of the late Anderson Tumaini Buku whose estate he was administering. Not only that, even in the Written Statement of Defence, first paragraph he stated that, he was an administrator and he annexed a copy of judgment. Even at the 7th paragraph, he stated clearly that the land belonged to the deceased who even had a case in 2003 and he won with a subsequent appeal.

Mr. Tarimo was of the unchanged position that, the respondent trespassed the land by himself. It was his argument that as the deceased never invaded that land, the respondent was to be held responsible for his trespass irrespective of his interest. Mr. Benjamin and Punge on the other side, were holding to the spirit of the respondent's capacity. Arguing that provided he was in the undertaking as the administrator of the estate, it could not be proper in law to sue him in his personal capacity.

In dealing with this issue, this court is well aware that when a person is appointed to be an administrator of the estate, he becomes two persons in one. He retains his personal capacity as a natural individual person, but also upon appointment, he secures another personality of an administrator by stepping in the shoes of the deceased person. Authorities are many, one of the most relevant in our case is the

decision in the case of **Abdulatif Mohamed Hamis Vs. Mehboob Yusuf Othman & Another (Civil Revision No. 6 of 2017) [2018] TZCA 25,** where the first respondent was sued on her own capacity while actually, she was the administratrix of the estate and the undertaking complained of was in respect of her office of the administratrix. The following is what the Court of Appeal observed and held regarding the propriety of suing her in that manner: -

> *"The 1st respondent's ownership of the suit land was not in her personal capacity, rather, it was on account of her being the legal representative of the deceased. Thus, in our view, to the extent that the suit land was vested upon the 2nd respondent by virtue of her capacity as the deceased's legal representative, any suit with respect to that property ought to have been instituted against her in that capacity."*

The personality of an administratrix, to put it clearly, is a sort of legal personality. Its existence is determined by the law and again is limited only to the subject attached, which is the estate of the deceased. This person must himself be clear in his undertaking so that a distinction is never compromised. Likewise, where any of his conduct is being called into question, the person so complaining must be specific as to whether he complains against the natural person or the legal person as an administrator/trix. In several cases we have clarified this position, see for example the case of **Edward Henerico Bubadalaja Vs. Minzimali Luchagula & 2 Others (PC. Civil Appeal No. 59 of 2021) [2022] TZHC 521,** where this court sitting at Mwanza did not accept the appellant's suit in his personal capacity whereas the matter was one concerned with the deceased estate he was administering. This court observed the following: -

"In the current suit, the appellant sued in his personal capacity instead of as an administrator of the deceased's estate. He did so after he had already been appointed as the administrator. He had no locus standi, as stated above, he could only to sue as an administrator of the deceased's estate. It is settled that the appellant in his personal capacity is a different person from the appellant in his capacity as the administrator of the deceased's estate"

The rationale of this rule, in my considered opinion is obviously clear; liabilities of the deceased estate are generally limited to the estate and assets surviving the deceased. The administrator being only a servant in whose hand the properties are collected and pass to the heirs, there must be a clear distinction of the two characters of an individual natural person and an administrator.

Given the facts of the case at hand, I am satisfied, the respondent as he frankly disclosed from the beginning of the dispute even before the suit was instituted as well as in his written statement of defence, that he was dealing with the property as an administrator of the estate. There would be no point attempting to sue him on his own capacity and expect the suit to be maintained by the tribunal. At least upon learning that the respondent acted as an administrator, the appellant's advocate would have advised his client accordingly and seek to amend the pleadings, correctly as the trial chairman reasoned in his judgment.

I have paid due regard to the fact that, Mr. Tarimo sought refuge under Order I Rule 5 of the **Civil Procedure Code** to defend his argument that the suit still deserved adjudication on merit. He was bringing forward an idea that, under that provision the suit would be maintained and determination be on merit even if the defendant had no

interest in the dispute. I understand, that provision is on joinder of the parties, same provides as hereunder: -

"It shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him."

By a plain interpretation, the rule means that a defendant may be joined (with others in a suit) even if other reliefs are against other defendants only. That it is not necessary that all the reliefs must be sought against the defendant for him to be properly joined. I do not think the code intended to mean the plaintiff may sue any person without considering his interest and capacity. Had that been the practice, decrees would be ornaments, appearing with pride but inexecutable. How would the court, for instance order eviction against a person who is not in actual occupation? Or how can the order of demolition or vacant possession be issued against a person who is neither the owner nor occupier of the premise? I think Mr. Benjamin was correct that Order I Rule 5 is misused, and I add, misplaced.

Even the case of **Jela Kalinga,** relied upon by the learned advocate Mr. Tarimo, did not have any of the above implication. This court understood that case to be much different, and I find it useful to summarise hereafter. In that case, parties among other citizens, were invited to build cottages/huts surrounding the area which was appointed to be a stadium for election celebrations. The parties' huts were next to each other. But between the two cottages, a public toilet was built leaving passages on either side. The respondent built a wall to connect between his cottage and the public toilet to block up the alley as he was ordered by the responsible officers after the celebrations were over. The appellant demolished the wall and the public toilet, then started construction of another cottage in the place, same way the appellant

was ordered by some officials. The suit for trespass was preferred by the respondent, which elevated the ladder of justice from Primary court up to the Court of Appeal. The Court of Appeal considered whether there would be trespass under those circumstances where neither of the parties owned that area in dispute. It thus held inter alia that in trespass claims, possession must be established even if it may not be legal. That as the respondent was in possession, his action against the appellant was proper.

It is very unfortunate that the case so cited is different from this at hand, not only on the facts but also the ratio decidendi made in that case cannot assist this court to resolve any of the issues. It is even not connected to Order I Rule 5 of the CPC. Had the facts been close to it, such decision would stand our guide map.

But in this case even the reliefs sought by the appellant would not be decided upon in the absence of a proper party. It was noted earlier that the appellant sought among others; *first* – a declaration that he is the legal owner of the land. It is known such declaration must be against a proper party. *Second* – that the respondent should remove anything inserted or erected on the land and eviction order.

We have already meditated that in order for the court to order for eviction the person being evicted must be in occupation. In this case, assuming the administrator was in the land as a trespasser, an eviction order must be issued against the administrator himself not any other person. In the case of **Yunus Seif Kaduguda (as Administrator of the Estate of the Late of Seif Kaduguda) Vs. Marietha Yalaselemeye (as Administratrix of The Estate of the Late Tomas Nsanzugwanko) (20 of 2021) [2022] TZHC 13719** which partly followed the case of **Abdulatif Mohamed Hamis** (supra), this

court reiterated on the tests of a proper party or a necessary party to include; whether there is a right to relief against the party and whether a decree can be executed against such a party.

This court therefore, does not underestimate the issue of parties. I am mindful of yet other numerous decisions of the Court of Appeal where the point was emphasised. Among those cases, I take note that of **M/s Mkurugenzi Nowu Eng Vs. Godfrey M. Mpezya (Civil Appeal 188 of 2018) [2021] TZCA 516** where a wrong party was sued, the court proceed to nullify the proceedings and ordered that the respondent should sue the proper party. It partly held: -

> *"As such, having been informed by the respondent, in his evidence, that his employer was DW1 and not the appellant, the wrongly instituted labour dispute against the appellant was supposed to end there and the respondent be advised to take necessary steps and institute his dispute against the proper party... As indicated above, the issue of parties to the case is a legal and central matter in all proceedings. Therefore, the act of the respondent suing a wrong party had affected the entire trial as it goes to the root of the matter"*

The way I see the facts, the appellant's claim suffered from two fatal ailments; *first,* the respondent was not a proper defendant or, as the learned advocates Mr. Benjamin and Mr. Punge put it, he lacked capacity (*locus standi*) to be sued and to properly defend the suit; *second* is the cause of action, in essence there was no cause of action against the respondent.

If that is the case, the trial tribunal was correct in its judgment that under the circumstance it would not be able to pass any decree against the estate of the deceased because its administrator was not sued.

Likewise, it could not rule against the respondent who clearly stated, from the beginning, that he was doing what he did in performance of his function as an administrator. In my considered opinion, the approach and reasoning of the tribunal were justified. The order that the appellant should sue a proper party, in my thinking, was fair to both parties and for the interest of justice.

This court is well satisfied that the procedure of suing the proper party was appropriate and if the appellant had any genuine cause would face no difficult to follow. What loss would the appellant incur if he would have instituted his case against the administrator? Much as I know that appeal is an automatic right to the parties, but to the client, suing the proper party as the tribunal so advised was a better option.

Having so reasoned, I would agree to what Mr. Benjamin and Punge, learned advocates suggested that this appeal has no merit. Finding no merit as such, I proceed to dismiss this appeal entirely. There is no reason as to why costs should not be awarded as prayed, thus I order costs be paid by the appellant to the respondent.

Order accordingly.

Dated at Morogoro this 7th day of August, 2023.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

07/08/2023

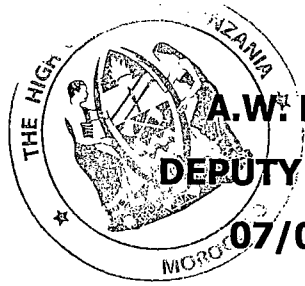
Court: Judgment delivered at Morogoro in Chambers on this 7th day of August, 2023 in the presence of the Respondent and in absence of the appellant.

A.W. Mmbando

DEPUTY REGISTRAR

07/08/2023

Court: Right to appeal to the Court of Appeal explained.



A.W. Mmbando

DEPUTY REGISTRAR

07/08/2023