

IN THE HIGH COURT OF TANZANIA

(IN MWANZA SUB-REGISTRY)

AT MWANZA

LAND APPEAL NO.43 OF 2023

(Originating from Land Application No. 40 of 2021 in the District Land and Housing

Tribunal for Sengerema at Sengerema)

ADRIAN TIZEBA.....APPELLANT

VERSUS

LAURENCIA MLALO.....RESPONDENT

JUDGMENT

Date of Last Order:25/08/2023

Date of Judgment:25/09/2023

Kamana, J:

Adrian Tizeba, the appellant, was not amused by the decision of the District Land and Housing Tribunal (DLHT) for Sengerema which dismissed his application against Laurencia Mlalo, the respondent. Given that, he invited this Court to determine his appeal which was premised on the following grounds:

1. That the trial tribunal erred in law and fact by dismissing the application instead of striking it out after finding that the appellant's suit did not properly describe the suit land.

2. That the trial tribunal erred in law and fact by holding that the appellant had encroached onto the four acres of land owned by Angela Alphonse without any proof thereof.
3. That the trial tribunal erred in law and fact by failing to hold that the appellant has proved his case against the respondent on the balance of probability.

Armed with those grounds, the appellant beseeched the Court to quash and set aside the judgment and decree issued by the DLHT. Alternatively, the appellant wanted the Court to pronounce that the respondent had encroached onto his three acres of land.

It is of relevance to have, albeit briefly, facts that led to this appeal. The appellant filed an application in the DLHT alleging that the respondent has barred him from harvesting trees that were on his land on the ground that the land belongs to her. The land in question is situated at Izengabasumba Hamlet, Kalebezo Village in Sengerema District. Concerned by the respondent's assertion, the appellant knocked on the DLHT's doors whereby his application was disputed by the respondent. Having heard the parties, the DLHT dismissed the

application on the ground that the appellant had failed considerably to properly describe the suit land.

When the appeal was set for hearing, the parties appeared in person. At their instance and leave of the Court, the appeal was argued for and against by way of written submission. I hasten to state that for this judgment I will summarize the arguments in relation to the first ground as the same determines the appeal in its entirety.

Submitting in support of the first ground, the appellant contended that the DLHT misdirected itself by dismissing the suit instead of striking it out. The appellant argued that the proper recourse when the suit fails to properly describe the suit land is to strike it out and not to dismiss it. The appellant invited the Court to consider Order VII Rule 3 of the Civil Procedure Code, Cap.33 [RE.2019] and the cases of **Fereji Saidi Fereji v. Jaluma General Supplies Ltd**, Land Case 86 of 2020 and **Fatuma Shabani Said Dololo (Legal Representative of the Late Shabani Said Dololo) v. Abdallah Said Mgaza and Another**, Land Case No. 138 of 2020.

Rebutting, the respondent echoed the position taken by the DLHT as a correct one on the grounds that the application was heard and determined on merits. In her view, when the matter is determined on

merits, the only recourse when the plaintiff fails to prove his case is to dismiss it and not to strike it out. Buttressing her position, the respondent cited the cases of **Issa Idrissa v. Fereji Said**, Civil Appeal No.225 of 2016 and **Mwanzani Ramadhani Duma (Administrator of the Estate of the Late Hamisa Abdallah) v. Peter Kiula and 3 Others**, Land Case No.321 of 2022.

Rejoining, the appellant stressed his submission in chief. He went on to argue that the suit was incompetent and the DLHT heard and determined the incompetent suit hence it cannot be said that the suit was determined on merit.

Before, I delve into determining the merits of the appeal, I wish to first consider the issue regarding non-adherence to the Court's order in respect of the number of pages and line spaces relating to written submission. Indeed, the appellant's written submission did not conform to the Court's order as submitted by the respondent. However, I restrain myself from expunging it from the records as prayed by the respondent. This Court being the fountain of justice should be cognizant of human errors as human beings are not infallible. I agree with the reasons advanced by the appellant that his memory, so far as the Court's order, lapsed. While I do so, I am mindful of the position taken by the Court of

Appeal in the case of **Zuberi Mussa v. Shinyanga Town Council**,
Civil Application No.3 of 2007 observed the following:

'Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case, if, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But if he makes only a minor lapse or oversight only once and makes a difference on next time that would not, in my view, amount to lack of diligence.'

If the Court of Appeal, given the circumstances of the cited case, condoned the mistakes made by an advocate, I see no justification for this Court to close the door on the appellant, a lay person, in the circumstances of this case.

Reverting to the appeal, without repeating the parties' arguments, I think it is relevant to reproduce Order VII Rule 3 as follows:

'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.'

Based on the cited provision, I am of the opinion that when the crux of the dispute is immovable property, such property must be described in the plaint to the extent of making it identifiable. According to that provision, when the disputed land is registered, the plaintiff is required to state in his plaint the title number. In case the land is not registered, as in this case, the plaint is expected to disclose particulars that make the disputable land identifiable and distinguishable from other lands. The particulars include the size of the land in question and boundaries.

That being the position, when the plaint fails to disclose the particulars that make the disputed land discernable and distinguishable, the Court may end up issuing orders that are inexecutable. This view was well recapitulated in the case of **Joel Kondela Maduhu v. Siya Ndeja**, Land Appeal No. 3 of 2021 where this Court (Mkwizu, J) had this to state:

'It is a settled principle of the law that, any claim of land should comprise a proper description of the suit land for definite and complete execution order.'

From the records, the suit land was not the registered one. Hence, the question of title number is inapplicable. The only description provided by the appellant is where the land is situated. In my opinion, the location of the land is insufficient to describe the land as to its identification.

Having taken that position, the question that arises is the effect of the suit that does not describe the disputed land. There is a plethora of authorities in that regard. Suffices to state that when the suit land is not described properly, the suit is taken to be incompetent before the adjudicating body.

Since the provisions of Order VII Rule 3 stipulate as mandatory for the plaintiff to properly disclose the description of the suit land, by hearing and determining the application that did not properly describe the suit land, the DLHT misdirected itself. In essence, the DLHT worked on an incompetent suit that was supposed to be struck out in the first place.

Given that, the argument that the application was determined on merits and hence was correctly dismissed is devoid of merits. This is

because what was before the DLHT was incompetent and the adjudication of the same on merits did not launder it. In this regard, I borrow the wisdom of the Court of Appeal in the case of **Exim Bank Tanzania Ltd v. Yahya Hamisi Musa (As the Administrator of the Estate of the Late Hamisi Musa Mohamed t/a Mapilau General Traders)**, Civil Appeal No. 275 of 2019 where it quoted with approval the decision of the defunct East African Court of Appeal in the celebrated case of **Ngoni Matengo Cooperative Marketing Union Ltd. v. Ali Mohamed Osman** (1959) E.A. 577 where it was held:

'This Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have dismissed" it; for the latter implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used...'

Fortified by that holding, I invoke my revisionary powers by quashing and setting aside the proceedings and orders pronounced by the DLHT. Given that, I see no reason to determine other grounds of appeal as doing so amounts to blessing the incompetent suit. Any party who wishes to engage in a legal battle may institute a competent suit. Each party to bear its costs.

Order accordingly.

Right To Appeal Explained.

DATED at MWANZA this 25th day of September, 2023.



KS KAMANA

JUDGE