THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 20 OF 2023

(Originating from Morogoro District Land and Housing Tribunal in Land Application No. 161 of 2019)

MUSSA TWAHA MBASHA (administrator

of the late MWAJABU HASSANI) ..... **APPELLANT**

VERSUS

NJEMA RAMADHANI OMARI MNYANDWA..... RESPONDENT

JUDGEMENT

Hearing date on: 24/08/2023

Judgment date on: 11/09/2023

NGWEMBE, J.

Before this house of justice, stands this first appeal presented by the appellant who claims to have been aggrieved with the decision made by the district land and housing tribunal for Morogoro (DLHT). The parties have had numerous suits against each other over the same land before the ward tribunal of Sungaji and DLHT.

About those suits, I will give a brief chronology. The disputants are relatives, one being an aunt and a nephew respectively. They are scrambling over a piece of farm land about two (2) acres located at Komsanga Dunduma, Kilimanjaro Village in Mvomero district, Morogoro region. This land was originally owned by the appellant's late father who was also the grandfather of the respondent.

The respondent claimed to have inherited from his father since 1986, and had been in occupation since then to 2003 when he was

arrested for murder charges. Upon being acquitted in year 2017, he found the appellant in occupation of the land. He successfully sued her at the ward tribunal. Such decision was nullified on the appellant's appeal in the same year of 2017 on point of law related to *locus standi* of the parties. An order was issued to the respondent (by then was also the respondent) if he so wishes, must seek an appointment as an administrator for he claimed on behalf of his deceased father. Being required to secure letters for the capacity to litigate over the suit land, he instituted a probate and administration case No. 02 of 2018. Upon obtaining letters of administration, he went back to the Ward tribunal and instituted Land Dispute No. 44 of 2018, which was decided *ex parte* in his favour.

Later he filed at DLHT application for execution, but the tribunal nullified the Ward tribunal's decision and ordered the respondent herein to institute the matter before the DLHT afresh. He thus instituted Land Application No. 161 of 2019 subject of this appeal, seeking for a declaratory order that the appellant herein is a trespasser, vacant possession and specific damages to the tune of Tshs. 15,000,000/=.

Having heard both parties, the district tribunal granted the application and awarded all the reliefs sought. The reason was that, the respondent successfully proved that, he secured the disputed land through probate/inheritance from his father since the year 1986. That the appellant's evidence was contradictory and wanting in some aspects.

Such decision seriously displeased the appellant, therefore, under assistance of Mr. Jovin Manyama, learned advocate from UBJ Law Chamber, she accordingly filed an appeal before this court on 09/02/2023 raising a total of five grounds. But it happened that on 24/02/2023 the appellant Mwajabu Hassani passed away and this court was properly informed by Mr. Jovit Byarugaba, another learned advocate from UBJ Law Chambers.

Several adjournments were made waiting for the administrator of the estate of the deceased Mwajabu Hassani to be appointed. On 09/08/2023 Mr. Byarugaba informed this court that, the administrator has already been appointed and prayed to substitute the amended petition of appeal which now had the name of the administrator in lieu of the deceased. This court granted the prayer and scheduled the appeal to be heard on 24/08/2023. On the hearing date, the appellant was represented by learned advocate Byarugaba, while the respondent had the services of Ms. Kabula Barnabas, learned advocate. Hereunder are the grounds of appeal: -

1) That the trial tribunal erred in law and fact by entertaining the suit brought by the respondent who had no *locus standi* to sue over the property in his personal capacity, while the land was in dispute before distribution was done and the respondent was aware.
2) That the trial tribunal erred in law and fact by declaring the respondent as the rightful owner of the disputed land basing its decision on contradictory evidence adduced by the respondent regarding to inheritance of the disputed land.
3) That the trial tribunal erred in law by entertaining the application brought by the respondent without jurisdiction (pecuniary).
4) That the trial tribunal erred in law by awarding compensation for damages which was not strictly pleaded and proved.
5) That the trial tribunal erred in law by declaring the respondent as the rightful owner of the disputed land which was not clearly described.

The appeal was heard on 24/08/2023 when both learned advocates addressed the grounds of appeal orally. Mr. Byarugaba submitting in support of the appeal, he addressed the first ground that

the respondent instituted the suit in his own capacity while claiming that he acquired the land after demise of his late father in 1980s. That he applied for letters of Administration Cause No. 2 of 2018 Turiani Primary Court and the court made specific orders, cited the case of **William Sulumbi Vs. Joseph S. Wajanga, Civil Appeal No. 193 of 2019** at page 16 -18 maintained that suing without *locus* is fatal.

Addressing on ground two, submitted that the respondent stated in his testimony to have acquired the land since 1980s after demise of his father while in another place he testified that he acquired it after distribution to the heirs. Prayed that such contradiction be resolved in favour of the appellant, while citing **Mohamed Said Matula Vs. R [1995] TLR. 3.**

In respect of ground 3 which challenges the jurisdiction of the trial tribunal, he pointed out categorically that, the value of the land in dispute was stated to be Tshs. 1,000,000/= thus, the tribunal had no jurisdiction to entertain the matter as in accordance to section **15 of The Land Disputes Court Act**. To bolster his argument on this ground, he made reference to the case of **Kubilu Suluhu Vs. Mhindi Shija, Misc. Land Case Appeal No. 15 of 2020** page 4.

Coming to the fourth ground, it was Mr. Byarugaba's submission that, the damage was never proved as there was no evidence to that effect, the trial tribunal erred in awarding the damages. Tossing his last dice in ground five, the learned advocate argued that the disputed land was not properly described. He cited to this court the decision of **Anderson Makengo Vs. Andrew Hongoli, Land Appeal No. 14 of 2020,** then rested by a prayer that this appeal be allowed.

When his turn was ripe, Ms. Kabula demonstrated her resistance to the appeal while submitting her arguments to counter the fellow learned advocate's observations.

Starting with the first ground, she was firm that the respondent had *locus standi* because he was dully appointed an administrator of his deceased father's estate and at the time, he was the true heir. Extending the point, the learned advocate illustratively explained that the respondent was appointed in 2018 and in 2019 he distributed the land in dispute. Therefore, at the time of trial he was already the heir of the said land, thus an owner. So, he had the capacity and *locus* to sue.

Regarding the complaint that the respondent's evidence was contradictory, Ms. Kabula denied it. She stated that the evidence was clear as the tribunal addressed the same at page 2 of the judgment. That the respondent instituted a case at the ward tribunal and he won. On the other hand, the appellant's evidence had contradictions. She cited the case of **Amiri Vs. Hamza Amiri and another, Civil Appeal No. 8 of 2020** to argue that, parties are bound by their pleadings. Cited other cases on the standard of proof, **Hemedi Said Vs. Mohamed Mbilu [1984] TLR. 114**.

Advancing to the third ground, she referred at page 3 of the tribunal's judgment, specifically at paragraph 3 arguing that, it was the appellant who prayed for transfer of the case from the ward tribunal to the district land and housing tribunal. Facing the fourth ground, Ms. Kabula argued that, the appellant harvested the sugarcane where she did not plant, compensation therefore was automatic. Regarding the last ground, the learned advocate was brief that, the land in dispute was well known and the boundaries were pleaded. She prayed the appeal be dismissed.

Mr. Byarugaba had some points to rejoin. He reiterated by submitting that, properties of the deceased cannot pass unless through the hands of an administrator. That orders of the court must be respected and the respondent's conduct should not be blessed by this court while he did not respect the court's orders.

Having given a recap of the parties' submissions, the controlling issue is whether the appeal has any merit. To tell about the merit of the appeal is through determination of those grounds raised and argued by the parties. Having considered the grounds and the submissions, I have preferred to make reference to some principles at least before going into the actual determination of this appeal.

First is on the sequence of determining issues, the rule has been that issues of law must first be determined before going into issues of facts. The rationale is obvious, when issues of law are upheld, the proceedings may be nullified or otherwise merit of the appeal which usually dwell in facts may be pre-empted. I am interested with the clear exemplification demonstrated by the Court of Appeal in the case of **Ally Rashid & Others Vs. Permanent Secretary, Ministry of Industry & Trade & Another (Civil Appeal 71 of 2018) [2021] TZCA 460** which was given as follows: -

> *"There are two types of issues, there are issues of law and issues of fact. These issues are not determinable at random. According to law they must be determined in sequence, the issues of law start and if they are overruled, those of facts follow. Let us hasten to state right here that if the issues of law are upheld, the court is precluded from entertaining issues of facts"*

The court went into further reference to **The Civil Procedure Code,** which provides under Order XIV Rule 2 that where issues both of law and of fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first. The court then rested as follows: -

> *"In civil trials and even in criminal proceedings, trial courts are required by rules of procedure to try and determine issues of*

law first if such issues arise before getting to determining issues of facts"

Being aware of the fact that this case at hand is not perfectly similar to the precedent above, I have taken the principle as a guiding rule upon this court. Noteworthily, the case at hand since the grounds raised are mixed, there are grounds which raise issues of law (ground 1 and 3), regarding the *locus standi* of the respondent and pecuniary jurisdiction of the trial tribunal. Then ground 2, 4 and 5 raise the issues of fact in respect of the evidence upon which the tribunal relied. Obedient to the principle above, this court is bound to deal with the legal issues first.

In case the issues of fact will be determined, there is a rule governing first appellate courts. This is about the duty to cautiously reevaluate the evidence presented before the trial tribunal. The rule was stated in **Watt Vs. Thomas (1947) 1 ALL ER 582** then followed in many other cases including, **Mbogo and Another Vs. Shah (1968) E.A 93, R. Vs. Makuzi Zaidi and Another [1969] H.C.D 249** and **Attorney General & 3 Others Vs. Nobert Yamsebo [2013] T.L.R. 501.** It was comprehensively stated in **Makuzi Zaidi** as follows: -

"As in all appeals, it is the duty of the court to weigh the evidence and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...It must be borne in mind, however, that the appellate court in exercising its jurisdiction to review evidence and determine whether the conclusions of the trial judge should stand should do so with caution. Where it is clear that the trial judge has plainly gone wrong and had failed to appreciate the weight or bearing of circumstances admitted or proved the appellate

court should not hesitate to interfere (Peters v. Sunday Post Limited [1958] E.A. 424)."

Having drawn reference to the principles above, this court is now going to deal with the first ground of appeal. In that ground, the appellant maintained that the respondent did not have the *locus standi*. He pointed that though he secured administration of his deceased father's estate, he sued in his own capacity, yet in the pleadings and evidence claimed to have inherited the property upon demise of the deceased father. On the same facts, the respondent's advocate was of the opposite view. She held strongly to the position that at the time of trial the respondent was the rightful owner of the land.

In dealing with this ground, I agree with the appellant that the respondent was appointed as an administrator but this case was instituted in his capacity. True also that if a person institutes a suit without *locus*, the whole proceeding becomes nullity. I have taken note of what was decided in **William Sullus.** On the other hand, I have noted the theme of the respondent's advocate. But in my perusal of the pleadings and the records, I found out clearly that the respondent instituted the suit in his own capacity. Not only that he registered the case in his own name, but also in para 6 (a)(i) he stated clearly that he is claiming the land in dispute to be his own. That he inherited the same from his late father in the year 1986. Although it is known that, he will have that duty to prove his inheritance, for the purpose of this ground, the respondent has *locus standi* depending on what he was claiming. The first ground is thus unmerited and is dismissed.

Facing the third ground regarding the pecuniary jurisdiction of the district land and housing tribunal, I have considered the parties submissions seriously. This court is well aware that at the time when the suit was instituted, section 15 and 33 (2) of **The Land Disputes**

Courts Act, Cap 216 RE 2019 were in place. Such sections before amendment provided thus: -

> *Section 15. "Notwithstanding the provisions of section 10 of the Ward Tribunals Act, the jurisdiction of the Tribunal shall in all proceedings of a civil nature relating to land be limited to the disputed land or property valued at three million shillings."*
> *Section 33 (2) "The jurisdiction conferred under subsection (1) shall be limited -*
> *(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed three hundred million shillings;"*

Reading from the above sections, the ward tribunal had the jurisdiction to hear and decide land disputes whose value did not exceed Tshs. 3,000,000/= while the district land and housing tribunal has the powers to determine cases of a dispute whose property is valued not to exceed Three Hundred Million Shillings (Tshs. 300,000,000/=). There is also a rule that any case will be instituted in the court of the lowest jurisdiction, as **the Civil Procedure Code** provides under section 13 that;

> *"Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section, a court of a resident magistrate and a district court shall be deemed to be courts of the same grade: Provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court."*

The value of the land in dispute according to the respondent in his plaint (Application) is Tshs. 1,000,000/= as stated in paragraph 4 of the Application. Yet the law is still as stated in the case of **Francis Andrew Vs. Kamyn Industries (T) Ltd [1986] T.L.R 31**, among many others, that the court lacks jurisdiction to hear and determine the matter whose

value is below the court's pecuniary jurisdiction. In this case, the value of Tshs. 1,000,000/= falls within the ward tribunal's pecuniary jurisdiction.

I understand that the respondent's advocate argued that the district land and housing tribunal dealt with the matter after the same being transferred from the ward tribunal. The records are silent about the issue of transfer. Instead, the application (plaint), Written Statement of Defence and even the proceedings by the tribunal shows that the case was a fresh suit before the tribunal. It is unknown how the transfer was done, and how the trial tribunal acquired the pecuniary jurisdiction.

The law is clear that jurisdiction is a creature of statute. Where jurisdiction is never created by the statute, it should obviously be known that same does not exist. The general rule applicable in our jurisdiction is that neither parties can confer jurisdiction to a court which it does not have, nor the court can confer itself a jurisdiction with which its creator did not create it or confer at any later stage.

Any attempt to cloth itself with the non-existing jurisdiction or a wrongful enjoyment of the purported jurisdiction conferred by parties under the circumstance when the parties are not authorised, is nothing but vanity, when not guarded against, breeds illegality in court proceedings. We know usually illegality brings forth injustices. In the case of **Francis Andrew Vs. Kamyn Industries**(supra) this court in dealing with an issue of pecuniary jurisdiction, reasoned and held as follows: -

> *"The only relief which can be claimed is what has been pleaded in the plaint. It follows therefore that the amount claimed in this case is only Shs. 14,549/= which is below the jurisdiction of this Court. In terms of Section 13 of the Civil Procedure Code this court has no jurisdiction to try the suit."*

Same position was maintained in the case of **Mwananchi Communications Ltd & Others Vs. Joshua K. Kajula & Others**

2020] 1 T.L.R. 495 [CA] and the court proceeded to nullify the proceedings which were conducted by the trial court without jurisdiction.

Due to the significance of filing cases in the lower court, I am of the view that under the circumstance of this case where the DLHT and the ward tribunal had never possessed concurrent pecuniary jurisdiction, the chairperson was required to abstain from entertaining the case which was within the ward tribunal's domain. The third ground is meritorious and same is upheld. It follows therefore, that all what was done before the DLHT, the decision and orders made were nullity.

The above ground would have sufficed. However, having supervisory powers over the District Land and Housing Tribunals under section 43 of **The Land Dispute Court Act,** this court feels obliged to address on the manner the case was handled. There are errors committed on which this court thinks it will be healthy to the DLHT if brief guidance is given. The purpose is to assist the tribunal eliminate future errors not only in this dispute in case same is reinstituted, but also for other similar cases. The other consideration is that, parties who are relatives have been in court corridors for years since 2017 to date, not to mention other disputes originating from this same land which appears to have been filed as early as 2006. Some were dismissed for lack of *locus standi* and non-appearance. Yet other decisions of the ward tribunal which conclusively determined the matter were nullified by the DLHT for lack of *locus standi* of the parties. To tell it briefly, parties have been unsettled for almost 17 years now.

From the facts glanced, the respondent stated that in 2018 after securing letters of administration, he decided to file an inventory before Turiani Primary Court (the appointing court) as there were no dispute on the distribution among the family members.

It is also clear that when he applied for letters of administration, the dispute over the suit land was apparent. The appellant filed his

objection on that same basis. The appointing court was very clear about the objection which involved the dispute. Correctly so, it proceeded to appoint the respondent but categorically ordered that the disputed land should not be distributed until and subject to resolving of the dispute. See page 1 and 2 of the Turiani Primary Court judgment after appointing the respondent, it proceeded: -

> *"Mali anazotakiwa kuzigawa ni zile zisizokuwa na mgogoro wa kesi;1. Viwanja viwili vilivyopo Kijiji cha Kilimanjaro, kimoja robo eka, cha pili eka moja. 2. Kuna shamba la eka nne lipo Vilemela Kijiji cha Kilimanjaro. 3. Agawe shamba la eka sita lililopo Vilemela. 4. Shamba lililopo Dunduma lenye eka moja lililopo Kijiji cha Kilimanjaro. Muombaji asigawe shamba lenye mgogoro lililopo Komsanga linamgogoro wa ardhi na bado mgogoro huo haujatatuliwa wameelekezwa wote wafunguwe mirathi ili shauri lianze kusikilizwa baraza la ardhi la wilaya na nyumba Morogoro na Mpingaji alitambue hilo"*

The above probate judgment and corresponding orders were issued on 18/07/2018. The respondent filed this case before the DLHT on 15/11/2019 in which he states that there was no dispute about division of the land. He filed the case after filing inventory.

Even during hearing at the DLHT, the respondent had contradicting statements in support of the claim. He stated that, the land was given to him in distributing the estate, which should have been after 2018 when there was a formal administration procedure. But in some other place he said he was given the land by his late father in the year 1986.

The other fact this court has noted is that there was Land Dispute No. 10 of 2006 wherein, Aisha Omari and Mwanahawa Omari the respondent's sisters were sued by the appellant for interfering with the appellant's occupation of the land. In that case the sisters claimed to be supervisors of the land on behalf of the respondent. The appellant

therefore won. Another person, presumably, the respondent's brother, one Ramadhani Omari Mnyandwa filed Land Appeal No. 117 of 2006 before the DLHT which was decided on 2007 by dismissal for want of *locus standi*. Again in 2008 it appears in record the respondent filed an application against the appellant, same was dismissed for want of prosecution.

The facts above would strongly show to the DLHT that the respondent was never known to be the owner of the suit land, and therefore strong evidences were required before conclusion.

The Primary Court as earlier seen, made an order that the land in dispute should not be distributed until and subject to determination of the land in dispute. But the respondent acted to the contrary, he purportedly distributed the land and then filed the case over the same land. Not only that, but also before the DLHT he relied on the probate proceeding among others, having intentionally defied the orders made by the Primary Court in determining the probate.

Even the respondent's statement in his pleadings that there was no dispute about division and that the deceased estate was already divided since 1979 was problematic. This is because before the primary court, he listed all the undivided properties including the disputed land. Again, there is no document exhibiting such distribution which Ms. Kabula referred. Under the circumstance the testimonies and documentary exhibits altogether contradicted the pleadings. The principle that parties, as well as the courts are bound by the pleadings is still binding upon the DLHT, the DLHT was required to follow the rule, but it did not for reasons only known to the Chairman.

On the other hand, the appellant stated that she inherited the land from their father (the respondent's grandfather), but the respondent was temporarily invited thereon. She tendered a number of documents which established that she owned the farm and even registered by the Mtibwa

Sugar Outgrowers Association with all the boundaries. Witnesses from both sides did not dispute the fact that the appellant was in occupation of the land. What was not clear to the witnesses, the way I see, who is on rightful ownership between the parties.

The law of evidence charges the claimant with the duty to prove his claim on the standard of probability. This is according to section 110, 112 and 3 (2)(b) of **The Evidence Act, Cap 6 R.E 2022** along with the precedents in the cases of **Mathias Erasto Manga Vs. Ms. Simon Group (T) Limited, Civil Appeal No. 43 of 2013** and **Daniel Apael Urio Vs. Exim T. Bank (Civil Appeal 185 of 2019) [2020] TZCA 163,** among others, where it was held: -

> *"We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019 as well as the position that the standard of proof in a civil case is on a preponderance of probabilities, meaning that the court will sustain such evidence that is more credible than the other on a particular fact to be proved."*

Above that, the appellant was in occupation of the farm for years, although there was no adverse possession, the law presumes her to be the owner. Such a presumption would be rebutted by the respondent by adducing strong evidence. Section 119 of **The Evidence Act** which should be read together with other sections cited on the burden and standard of proof, provides as follows: -

> ***Section 119.*** *"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner."*

In an overall assessment, the respondent was therefore, required to satisfy the tribunal by proving at least the following: -

a) That the dispute which prevailed between the deceased estate and the appellant was resolved in favour of his deceased father's estate to make the land part of it;
b) That the said property, having been in his deceased father's estate, was duly distributed among the heirs and that he is the heir who was given the property, hence the owner; and
c) That the appellant trespassed into that land without colour of right so that the tribunal should make the declaratory orders ordering vacant possession against the appellant.

The above would at least assist the tribunal to resolve the case conclusively, considering that the respondent sued under his own capacity. I understand even if he had sued as an administrator, the issues on division of the property, filing of inventory and even whether or not he inherited the land from his deceased father would never arise, instead the question would be whether the farmland belonged to the estate of the deceased.

All the above were not considered in the course of hearing by the land tribunal. Knowing that the respondent had the higher burden than that of the appellant in this case, it was expected for the chairperson to evaluate the evidence of the respondent and test the inconsistences of his evidence if had any effect thereof and pronounce about its weight and strength before addressing on the weakness of the appellant's evidence. This is what was ruled in the case of **Mohamedi Kakanga Vs. Selemani Mvogo (Land Appeal 112 of 2022) [2023] TZHC 16244**, that: -

> *"The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party"*

Regarding the orders for damages, the tribunal was correct. Had the appellant been the trespasser to the farm it should have meant that she was not entitled to any harvest from the farm. During hearing, she testified even herself that she was selling the sugar cane to Mtibwa Outgrowers' Association and tendered her documents. Without prejudice to other grounds, I think it was proper for the DLHT to award damages and ordering evaluation as the value of specific damages must have depended on the value of the harvests and sales which the appellant made from the farm.

But in the overall examination, it has been shown that the tribunal did not have jurisdiction over the matter, yet entertained it. Again, during determination, it did not follow the rules of evidence in appreciating the evidence. If it was not for the issue of jurisdiction pointed herein, which cannot be ignored, this court would conclude on the strength of the respondent's evidence since the DLHT did not make any proper analysis.

However, due to the fact that the DLHT exercised the matter without jurisdiction, the appeal bears merit, same is allowed. This court has no other remedy than to nullify the whole proceeding of the DLHT. The subsequent judgment as well as the decree are quashed and the orders emanating therefrom are set aside.

It is unfortunate that this is a third time proceedings are being nullified instead of having the dispute conclusively determined. However, there is still a hope that parties being relatives have the advantage of resolving this dispute by mediation before resorting to litigation. The alternative dispute resolution, if faced with genuine intent, parties may get done with the seeming endless marathon without any much adjudication. Due to the nature of the dispute, each party shall bear his own costs.

Order accordingly.

Dated at Morogoro this 11th day of September, 2023.

P. J. NGWEMBE

JUDGE

11/09/2023

Court: Judgement delivered at Morogoro in Chambers this 11th day of September, 2023 in the presence of Mr. Jovit Byarugaba, Learned Advocate for the appellant and Ms. Kabula Barnabas, Learned Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

L. B. Lyakinana

Ag DEPUTY REGISTRAR

11/09/2023