

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 206 OF 2022

(C/F Land Application No. 11 of 2019 District Land and Housing Tribunal of Arusha at Arusha)

WAZIRI MATOGOLO APPELLANT

VERSUS

THE SCHOOL OF ST. JUDE LTD RESPONDENT

RULING

11th October & 10th November, 2023

TIGANGA, J.

This appeal originates from Arusha District ad Housing Tribunal (the trial tribunal), in Land Application No. 11 of 2019 whereby the respondent herein sued the appellant for trespassing on her piece of land measuring 2 acres situated at Kiwawa Village, Imbaseni Ward within Meru District Council in Arusha Region (the suit land).

According to the application filed at the trial tribunal, the applicant claimed to be the lawful owner of the suit land which is part of the land situated in a farm commonly known as farm No. 65/6/1 located at USA River, in Arumeru District. That in 2006 one Lucy Ndetaulwa Urio legally transferred her ownership of the parcel of land measuring thirty (30) acres with Certificate of Tittle No. 9369 to the respondent herein. The same is within Farm No. 65/6/1 and following such transfer a Certificate of Tittle

(CT) No. 22335 was issued. Further to that, in 2017, the appellant herein encroached to the suit land and started farming activities and despite several formal attempts to stop him, he proceeded with cultivation. The respondent decided to fence the suit land in the urge to protect it from further encroachment. She also decided to file the application subject to this appeal before the trial tribunal praying, among other order, to be declared a lawful owner of the suit land. Also, the appellant to be declared a trespasser hence a permanent injunction order be issued against him and his agents to stop them from dealing with the suit land in any manner.

Objecting the claims, the appellant herein filed a Written Statement of Defence (WSD) accompanied with a Counter Claim alleging that, the suit land does not form part and parcel of the CT No. 22335. That, the suit land was jointly owned by Ruth Ndetaulwa Urio, Solomon Ole Kokan, and Elisante Lukas Urio and it was Elisante Lukas Urio and Lucy Ndetaulwa Urio who licenced him to conduct farming activities in the suit land. So his occupation of the land and the use thereat is based on the licence he was given.

As to the Counterclaim, the appellant claimed to be paid Tshs. 24,364,000/= being the total value of the crops destroyed by the

respondent herein and the loss of income occasioned by the respondent's act of fencing the suit land.

During trial of the application, the trial tribunal scheduled the matter to be heard on 8th December, 2021. However, on that day, the respondent herein failed to give evidence as she had no witnesses hence the matter was dismissed with cost for want of prosecution. On the same day, the trial tribunal ordered the appellant to amend the Counterclaim and add other necessary parties whom he claimed licensed him to use the suit land so that hearing of the Counterclaim could commence. On 22nd December, 2021, the appellant herein heeded to the order of amending the Counterclaim however, he did not join the party (ies) whom he claimed they licenced him to use the suit land. But added some other reliefs which were not part of the original counter claim.

In the event, respondent's herein raised a preliminary objection (PO), on point of law that, the amended Counterclaim contravened the Order given by the trial tribunal on 8th December, 2021. She prayed the same to be struck out. In its decision the trial tribunal sustained the objection and expunged paragraph 16 and 18 which were amended without its order and in violation or excess of the order issued by the trial tribunal on 8th December, 2021. In the said expunged paragraphs, the

appellant claimed that the said Ruth Ndetaulwa and Elisante Lucas Urio are the current joint owners of the suit land and that the respondent herein unlawfully encroached and fenced the suit land with appellants' crops in the farm. The trial tribunal *inter-alia* expunged the added paragraphs and strike off the appellant's counterclaim.

Aggrieved by the decision the appellant preferred this appeal on the following two grounds;

1. That, the trial chairman erred in law and in fact in ordering dismissal of the matter at hand instead of striking out the application.
2. That, the trial tribunal erred in law and in fact in denying the Application the right to be heard.

During hearing, the appellant was represented by Ms. Rose Lyimo whereas the defendant was represent Rehema Arnold Kitally both learned Advocates.

Supporting the appeal, Ms. Lyimo submitted that, the trial chairman of the tribunal erred in dismissing the appellant's Counterclaim instead of striking out the same. She asserted that, having determined the preliminary objection rose by the respondent herein and sustained the same, the trial tribunal dismissed the said Counterclaim instead of giving an order to expunge the extra words which were not supposed to be in

it. On top of that, another reason used by the trial tribunal to dismiss the application was the fact that, the same did not disclose the cause of action. However, on the latter reason, none of the parties were given the right to address the tribunal as the same was raised and decided by the trial tribunal *suo motu*.

According to Ms. Lyimo the law is clear that, when the plaint does not disclose the cause of action, the court has two alternatives, either to order amendment of the same or striking it out. To cement her argument, she cited the cases of **JB Shirima @ Others Express Bus Serviss vs. Humphrey Meena t/a Comfort Bus Services** [1992] TLR 290 and **Said Mohamed Said vs Muhusin Amiri & Another**, Civil Appeal No. 110 of 2020, CAT at Dsm. In the latter case, the Court of Appeal emphasized that when there is a new issue raised in court, parties must be availed with right to be heard on the same before the decision is given.

The learned counsel contended that, the trial tribunal ought to have confined itself only to the PO raised and not on the issue of cause of action which was not discussed. She went on submitting that, by dismissing the appellant's counter claim, the appellant was prejudiced as he will be barred from filing another similar application. She insisted that, the trial

tribunal erred in dismissing the Counterclaim without the same being heard on merit instead of striking it out.

On the 2nd ground, Ms. Lyimo submitted as extension of the 1st ground that, the trial chairman erred in determining the fact that the Counterclaim had lacked cause of action and consequently dismissed it without affording the parties right to be heard. Supporting her contention, she cited the case of **Charles Christopher Humphrey Kombe t/a Kombe Building Materials vs. Kindondoni Municipal Council**, Civil Appeal No. 19 of 2019 CAT at Dsm and Article 13 (6)(a) of the **Constitution of the United Republic of Tanzania**, 1977 which all emphasize on the importance of right to be heard. She prayed that, this appeal be allowed with costs and the trial tribunal's decision be set aside.

In reply, Ms. Kitaly submitted on the 1st ground that, the same is misconceived and taken out of misapprehension of the reasons and order given by the trial tribunal. According to her, the trial chairman struck out the appellant's Counterclaim. He did not dismiss it as claimed by the appellant as held in the case of **JB Shirima & Others** (supra). She argued that, the trial chairman used the words "*...hati yenye madai kinzani...imefutwa*" which is equivalent to the counter claim being strike out and not dismissed. She also referred the Court to the **English-**

Swahili Dictionary, 2nd Edition, Institute of Kiswahili Research, University of Dar es Salaam, 2000 where the word Strike off means *"Ondoa, futa"* whereas the word Dismiss means *"Kataa, kufukuza, Kukataa."*

Ms. Kitaly's further cited the case of **Cyprian Mamboleo Hizza vs Eva Kioso & Another**, Civil Application No. 03 of 2010 CAT at Tanga where the Court of Appeal distinguished between the word 'striking out' and 'dismissing' to the effect that, the latter phrase means a competent appeal has been disposed, while the former phrase implies that, there was no proper or competent appeal capable of being disposed off. In the circumstances, the appellant's counterclaim was struck out as there was no proper claim capable of being disposed of as held in the cited authority, she said.

On the 2nd ground, learned counsel submitted that, after striking out the Counterclaim, the appellant was given an opportunity to present a proper and competent claim hence, he was not infringed his right to be heard. More so, the trial chairman did not raise any new issue in respect of the cause of action thus, the appellant ought to have acted promptly and filed his proper counterclaim. She finally challenged the appellant for filing this appeal prematurely instead resorting back to the trial tribunal

and file a proper counter claim. He prayed that, this appeal be dismissed with costs.

In her rejoinder, Ms. Lyimo reiterated her earlier submission and maintained that appellant's counter claim was dismissed without him being availed with right to be heard.

Having gone through the trial tribunal's records and parties' submissions, this Court is now tasked to determine as to whether this appeal has merit.

Starting with the 1st ground, the appellant claims that, the trial chairman erred in dismissing his unheard Counterclaim instead of striking out the same. The respondent argued that, the same was not dismissed but rather struck out. Going through the trial tribunal's decision, the chairman made the following final order;

*"Nafhamu kwamba hatua ya kuchukua pale hati ya madai (kwa shauri lililo mbele yangu hati yenye madai kinzani) isipoonyesha sababu ya madai (cause of action) ni ama kuifuta hati hiyo au kuamuru yafanyike marekebisho kwenye hati husika. Ufahamu wangu huo ni kwa kadri ya uamuzi wa Mahakama Kuu ya Tanzania, Masjala ya Arusha, katika shauri la **J B Shirima & Others Express Bus Service versus Humphrey Meena t/a Comfort Bus Service (1992) TLR 290.***

*Nadhani ninapaswa nifuate njia ya kwanza ya kuifuta hati yenye madai kinzani. Hii ni kwa sababu njia ya pili inayohusiana nakuamuru marekebisho ilishafuatwa lakini mjibu maombi ameshindwa kuitekeleza kwa namna ilivyotakiwa na hakuna sababu yeyote ya msingi iliyotolewa kwa yeye kushindwa huko. Mazingira yanayofanana na haya ya shauri hili pia yalijitokeza katika shauri la **J B Shirima** nililorejea hapo juu ambapo Mahakama ilichukua hatua ya kuifuta hati ya madai. Lakini pia hata matakwa ya Amri ya VI kanuni ya 18 ya **Sheria ya Mwenendo wa Mashauri ya Madai** yanakataza kwa mjibu maombi kupewa nafasi nyingine ya kuleta hati yenye madai kinzani iliyorekebisha.*

*Kwa kuhitimisha mjadala huu na ikiwa ni uamuzi wa Baraza hili, hati yenye madai kinzani iliyopokelewa barazani tarehe 22 Desemba, 2021 **imefutwa** na mleta maombi arejeshewe gharama zake.*

F Mdachi

MWENYEKITI

30/06/2022"

Reading between lines, it is my considered opinion that the contradiction here is the use of the Swahili word '**imefutwa**'. According to English-Swahili Dictionary, 2nd Edition, Oxford Press, 1902, the word strike off means '*futa, kata, katia mbali*' whereas the word Dismiss means '*ondosha, achia mbali*'. I have to admit that, there is a thin line between the two when put in Swahili context, however in the context used in the impugned decision the meaning was to strike the Counterclaim and not

was no proper appeal capable of being disposed of."
(emphasis added)

The above principle has consistently been followed in a number of decisions, in **Mabibo Beer Wines & Spirits Ltd vs Fair Competition Commission & 3 Others** (Civil Application No.132 of 2015) [2018] TZCA 277, for instance it was held that;

"We should pause here to observe, albeit en passant, that it will turn differently if the relevant legislation or rules of the court imposes, on the court a duty or discretion to give a dismissal order with respect to a matter which has not been heard on merit."

In simple words when the matter is struck out, it can be refiled, while the matter which has been dismissed cannot be refiled. In the appeal at hand, as rightly argued by Ms. Kitaly, the word used by the trial chairman that '*hati yenye madai kinzani ... imefutwa*' meant that the Counterclaim was struck out. And as gleaned from the brief history hereinabove, one of the reason for striking it out was its incompetence for non-joinder of a necessary party and failure to disclose the cause of action. In the circumstances, the trial tribunal's decision did not bar the appellant from filing another competent application before the same tribunal after joining a necessary parties. This ground has no merit and the same is dismissed.

As to the 2nd ground, the appellant claimed that, rules of natural justice were flouted as the issue of cause of action was raised by the trial chairman in his ruling and decided *suo motu* without giving parties right to be heard on the same. From the outset, I wish to respectfully differ with this contention on the ground that, the trial tribunal reached such decision after the appellant herein changed the contents of his Counterclaim which touched the root of the case. As the history shows, the appellant was ordered to only add necessary parties to the case whom he claimed had licensed the suit land to him. He however did not add them but rather changed the content of his claims to the effect that the suit land belongs to the said licensors. In his decision on the matter, the trial chairman expunged the added paragraphs, he held thus;

"Aidha, kwakuwa aya hizo zilizoondolewa ndio zilibeba msingi wa nafuu zilizoombwa kwenye madai kinzani ni Dhahiri kwamba madai hayo hayatakuwa na miguu ya kusimamia. Madai Kinzani yatapaswa nayo yafutwe kwa kukosa sababu ya madai."

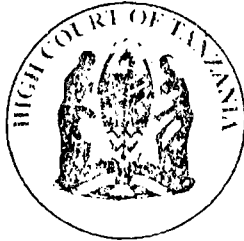
Bearing in mind that, there was no order to amend the contents of the Counterclaim but rather only join the necessary parties, I do not see how the appellant was prejudiced by the trial tribunal's decision for his own negligent inaction. The unauthorised amended paragraphs were the root of the contentious matter to be determined by the tribunal, hence,

for them being expunged, the claims remained legless. This ground also fails.

Consequently, this appeal fails in its entirety, the same is dismissed with costs. The trial tribunal's decision is hereby upheld.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 10th day of November, 2023




J.C. TIGANGA
JUDGE