

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB – REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO 232 OF 2024

(Arising from Land Application No 8 of 2017 of the Babati District Land and Housing Tribunal)

LAWAY NG'AIDA APPELLANT

VERSUS

**1. MARTIN GWANDU
2. SHABANI NADA.....
3. GINUWE GIDANO** } **RESPONDENTS**

JUDGMENT

20th February and 22nd March 2024

MIRINDO, J.:

This is a land dispute among neighbours at Simbay Village in Hanang' District. Sometimes in September 1999, the appellant, Laway Ng'aida, purchased a plot from the third respondent, Ginuwe Gidano. A dispute arose early 2015 when Martin Gwandu, the first respondent, cultivated the plot sold to him by the second respondent, Shabani Nada. In an action before Babati District Land and Housing Tribunal, Laway Ng'aida complained that Martin Gwandu had intruded into one and a half acre of the piece of land originally sold to him by Ginuwe Gidano. He further complained that it was a mistake for Ginuwe Gidano to

witness the sale of the same plot to Martin Gwandu He prayed for a declaration that he was the lawful owner of the land in dispute, for eviction order against the first respondent and that the first respondent and his employees be permanently restrained from entering and using the land in dispute. He also prayed for general and specific damages, and any other relief that the Tribunal deemed fit to grant. Ginuwe Gidano did not file his defence and it was ordered that the case proceed *ex parte* against him. It is noticeable that Ginuwe Gidano appeared on certain days during the trial and testified as a witness for the first respondent. The Babati District Land and Housing Tribunal held in favour of the respondents.

Laway Ng'aida has appealed to this Court on two main grounds and at the hearing of the appeal he appeared in person. Only the first respondent appeared on appeal. Laway Nga'ida adopted his grounds of appeal and did not have much to add.

The first ground of appeal is that Ginuwe Gidano, the third respondent was not entitled to testify before the trial Tribunal since it was ordered that the case against him be dealt with *ex parte*. The procedure for proceeding *ex parte* in a district land and housing tribunal is set forth under Regulation 11(1) (c) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No 174 of 2013. A District Land and Housing Tribunal is authorised to proceed *ex parte* by oral evidence where the respondent is absent without good cause



provided that the respondent was duly served with notice of hearing or the hearing date was fixed in the presence of the respondent.

I am of the opinion that the provisions of sub-regulation (1) (c) of Regulation 11(b) do not cater for cases where the respondent has not filed a written statement of defence as is the case here. Under these circumstances, I am entitled to apply the provisions of the Civil Procedure Code to cure this inadequacy in terms of subsection (2) of section 51 of the Land Disputes Courts Act [Cap 216 RE 2024].

Bearing in mind that the dispute was filed before the Babati District Land and Housing Tribunal in 2017, I will apply the provisions of Order 8 Rule 14 of the Civil Procedure Code [Cap 33 RE 2002] before the amendment of 2019.

Rule 14 (1) sets out two courses of action where a party does not file a written statement of defence. In the first place, the court may pronounce judgment against the defaulting party. In the second place, the court may “make such order...as it thinks fit.” Under Rule 14 (2) (a) the court may enter judgment in favour of the plaintiff if the claim is for ten thousand shillings. The present claim being above ten thousand shillings was clearly not governed by the provision. Under Rule 14 (2) (b), the court will fix a date for *ex parte* proof and, upon proof, pronounce judgment in favour of the plaintiff. When the court fixes the date for *ex parte* proof, the defendant cannot subsequently present a written statement of defence. Despite being barred from producing the written statement



of defence, the defendant is not barred from appearing at the hearing of *ex parte* proof. This position is summed up by Prasada BM and Mohan M (eds), *Mulla: The Code of Civil Procedure*, 18th edn, Haryana: Lexis Nexis, 2013 at page 1953:

The right to appear in a suit is different from the right to file a written statement of defence.... Since the right to appear is a distinct right, a defendant, though he has failed to file his written statement, within the time allowed has nevertheless the right to appear at the hearing of the suit. If on the day fixed for filing the written statement, the suit is not heard and postponed to another date, the defendant can appear at such next hearing and can cross-examine the plaintiff and his witnesses on facts deposed by them in the examination - in-chief. He would not, however, be allowed to cross-examine on other facts which by his failure to file the written statement he has not pleaded.

In the present case, the Babati Tribunal allowed the third respondent to testify for the second respondent, Shabani Nada. In fairness to the appellant, I would disregard the evidence of Ginuwe Gidano. However, I would not go as far as to nullify the proceedings. Even though the Babati Tribunal did not fix the date for *ex parte* proof, there was full trial in which the liability of Ginuwe Gidano and his co-respondents was at issue.

Now the question is whether Laway Nga'ida's case was proved on the balance of probabilities. This brings me to the second ground of appeal which states that the Tribunal did not properly evaluate the evidence adduced before it. Laway Ng'aida argued that the Tribunal erred in not holding that the second

respondent, Shabani Nada, sold a piece of land to Martin Gwandu which did not belong to him. It was important for the Babati District Land and Housing Tribunal to consider the location of the suit land and visit the *locus in quo*. Besides, Ng'aida argued that Fausta Sarawat, a village executive officer, who testified for the respondents was unreliable witness because she refused to be questioned by the Tribunal.

In dealing with these complaints, it is instructive to note that at the trial Laway Ng'aida testified about purchasing a piece of land from Ginuwe Gidano whose size he described in Kiswahili as follows:

.... Hatukuandika ukubwa wa eneo aliloniuzia kwa kuwa lilikuwa pori. Tulihisia ekari sita....

It is clear from this statement that Laway Ng'aida himself was unsure of the actual size of the plot sold to him. Despite Ng'aida's claim that the suit land sold to Martin Gwandu was one acre and a half, there is ample evidence that it was one acre and a quarter. The size has been evidenced by the sale agreement between Shabani Nada and Martin Gwandu.

In his description of the suit land at the trial, Laway Ng'aida stated that on the northern side, the suit land borders with the plot of Joseph Auneari and that Joseph Auneari invaded the suit land in 2007. The dispute was resolved in favour of Laway Ng'aida by Simbay Village authorities on 25th June 2007. It was Ng'aida's case that it is the same piece of land that has now been invaded by

Martin Gwandu. It is evident from the minutes of that meeting entitled “Yah: Mgogoro Kati ya Laway Ngaida na Joseph Dangat”, duly admitted in evidence, the main evidence in support of Ng’aida’s complaint came from Mateo S Ginawe.

If the suit land was once a subject to reconciliation by village authorities in 2007, it is important to clarify whether Joseph Auneari and Joseph Dangati are one and the same person. The name Joseph Dangati is first mentioned by Laway Ng’aida in cross examination when he states that he does not know how Joseph Dangati obtained his plot. Surprised by this new name, the trial Tribunal records this “new person” as “Joseph Dangati (Auneari?)”. This person was again mentioned by respondent witnesses’ as being located on northern side either of the suit land or their own plots. Joseph Dangati is further mentioned in the sale agreement between Shabani Nada and Martin Gwandu as being located on the northern side of the suit land. On the balance of probabilities, Joseph Dangati is the same person referred to as Joseph Auneari in the testimony of Laway Ng’aida.

However, since Laway Ng’aida mentions Joseph Dangati to be still on the northern side; it is not entirely clear whether it was the same plot that was in dispute in 2007 taking into account that neither party called Joseph Dangati as a witness.

From this conclusion, I would return to the evidence of Mateo S Ginawe before the Babati District Land and Housing Tribunal. Mateo S Ginawe, who featured in the proceedings before the Tribunal as Mateo Salia, was *Kitongoji*

chairman in Simbay Village between 1994 and 1999. At that meeting before village authorities, he pinpointed the boundaries of the disputed land because he was responsible for apportioning plots at that time. In his evidence, Laway Ng'aida mentions Mateo Salia as among persons who witnessed his purchase of the plot from Ginuwe Gidano. Furthermore, Mateo Salia was one of Ng'aida's witnesses before the trial Tribunal who re-affirmed witnessing the sale of the plot between Laway Ng'aida and Ginuwe Gidano. In cross-examination and re-examination, he maintained that the suit land belonged to Martin Gwandu, the first respondent because Ng'aida's plot does not border that of Martin Gwandu. The fact that Ng'aida's plot was not closer to that of Martin Gwandu is corroborated by the evidence of Shabani Nada who sold that plot to Martin Gwandu.

Like the trial Tribunal, I find Mateo Salia to be a credible witness who ably identified the boundaries relating to the suit land before the village authorities in 2007. Even though he was called as Laway Ng'aida's witness, he categorically testified that the suit land belonged to the first respondent. It was incumbent upon Ng'aida to prove the size of the piece of land sold to him. He failed to do so. On the balance of probabilities, I find that the second respondent, Shabani Nada sold his plot to the first respondent, Martin Gwandu.

For the above reasons, I uphold the judgment of the Babati District Land and Housing Tribunal and dismiss the appeal. Each party to bear its own costs.



DATED at BABATI this 2nd March 2024.



A handwritten signature in blue ink, appearing to read "F.M. Mirindo", is written over the seal.

F.M. MIRINDO

JUDGE