IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

LAND APPEAL NO. 20240300000001765

(Arising From the decision in Land Application No.7 of 2019 before District Land and Housing Tribunal of Maswa at Maswa)

JOSEPH GAPANI (As Administrator of Estates of the Late Gapani Selegenha) .....APPELLANT

Versus

1. SALU IYONDI
2. MAYUNGA IYONDI .... RESPONDENTS

JUDGMENT

7/5/2024

F.H. MAHIMBALI, J

The appellant filed Land application before the trial tribunal claiming for his parcel of land measuring 24 acres for been trespassed by the respondents. The matter was heard on merit but before the judgment was delivered the trial tribunal chairman raised legal concern that the administrator of the estate the late Gapani Selegenha was not made a party to the case as the disputed land belongs to the late father of the

respondents and thus there was the need of administrator of the said person, the Honourable Chairman thus dismissed the matter.

Aggrieved by such decision, the appellant approached this Court armed with one ground of appeal that; the trial tribunal erred in law to dismiss Land Application No.7 of 2019 without affording parties a right to be heard.

During the hearing, the appellant had legal representation of Mr. Kaunda learned advocate while the respondents appeared in person and unrepresented. Before the hearing has taken the movie, Mr. Kaunda, added new ground of appeal that; The trial tribunal had erred to strike out the appeal on ground that there ought to be an administrator of Iyondi Moma as a party to the case.

Arguing for the appeal, Mr. Kaunda submitted that, as per order ix, rule 9 of the CPC, provides that no suit shall be defeated on ground of non-joinder of a party. It is also trite law that if the respondents had filed a counter claim against the appellant, then the issue of administrator of the estate would have arisen (see Rule 7 (2) of the GN 174 of 2003. Even if that had been complied with, then the trial tribunal would have under

rule 16 of the GN 174 of 2003 read together with order IX, Rule 10(2)(3) of the CPC.

Mr. Kaunda pressed that for these encountered errors, the DLHT had legally erred to strike out the said suit. Thus, under section 43 (b) of the LDCA, Cap 216 this Court be pleased to set aside the decision of the DLHT of Maswa for it to compose judgment as per law.

On the side of the 1st Respondent, provided that he doesn't think if this contention is legally right. So long as the DLHT of Maswa made its decision, it must stand. The applicant advocate Mr. Sabini had agreed with it. Nevertheless, as there is no decision, let the DLHT compose its judgement as per law. The 2nd Respondent submitted that the Chairperson should compose the judgment as per law as there was no justification for the decision reached.

Having hear rival submission of the parties, I have now to determine this appeal and the issue for consideration is whether this appeal is merited.

It is Mr. Kaunda assertion that the trial chairman erred to dismiss the matter without according the parties with the right to be heard and thus the dismissal order based on the legal issues which does not affect

the matter as the same would have pleaded in counter claim by the respondents but was not the case.

I have gone through the trial records tribunal and submission of the parties. But honestly the referred Order to wit IX rule 9, 10 (2) (3) of the CPC is misplaced with the argued point of law. The order is all about effects of non appearance before the court when the matter fixed for hearing which is not an issue to the case at hand.

However, I sincerely I agree with the assertion by Mr. Kaunda that if the complained disputed land belonged to their respondents' late father, then when filing their WSD would have encroached it with a counter claim. Otherwise, would have no effect as the applicant/appellant was burdened to select a proper person to sue, see Order I Rule 1 of CPC. Also, the case of **Lujuna Shubi Balozi vs Registered Trustees of Chama cha Mapinduzi (1996) TLR 203,** where the court discussed the consequence of suing the wrong party.

Rule 7(2) of The Land Disputes Courts (The District Land and Housing Tribunal) regulation 2003 provides that';

" where the written statement of defence contains a counter claims, the tribunal shall serve the applicant with a copy of the counter claim and

the applicant shall within 21 days of the service file his written statement of defence to the counter claim"

Rule 16 (supra) provides " *the chairman may on his own motion or on application by either party order amendment of the pleadings"*

Guided by the above principles, I held without scintilla of doubts that the respondents were supposed to make counter claim when composing their written statement of defence. Meanwhile, the chairman when noticed the same would have ordered the parties to make amendment of the pleadings.

It is true that the chairperson of Maswa DLHT escaped the law after it heard the matter and refrained from making decision instead raised a trivio legal issue and on it based his decision. Since the matter had reached to the apex stage of delivery of judgement the chairman was barred from escaping that duty. As I have noted earlier that the applicant/appellant was the one supposed to choose the proper party to sue and not the respondents.

However, I must be clear, it is not true that the parties were not accorded the right to address on the issue raised by the Hon. Chairman. From the trial tribunal records, vividly provides that all parties responded

to the issue raised. The only complaint is whether, was it proper for the Chairman to raise such legal issue at that stage? By the way it has escaped his mind as the said administrator of the estate the late Gapani Selegenha appears in record, as the applicant at the trial tribunal was **JOSEPH GAPANI** suing as the administrator of the late Gapani Selegenha. Perhaps the trial chairperson was making reference to the respondents who claimed to have acquired the said land vide their parents. My reply to this is, even if that is true, so long as they were not applicants to the case, they had nothing to hinder the outcome of the case as they had not raised any counterclaim. Had they done so, then the legal concern by the learned trial chairperson would hold water.

As correctly argued by Mr. Kaunda, the trial Chairman was not correct. By way of analogy, the Court of Appeal in a number of criminal cases have been so reluctant ordering retrial for fear of crafting evidences by the prosecution **(See Peter Kongoli Maliwa and 4 Others V. the Republic, Criminal Appeal No. 253 of 2020, Fatehali Manji V, Republic [1966] E.A343).** In a similar vein, in civil cases, where a case has been fully heard as it is in the current case, retrial (after closure of the case will save no good purpose save an opportunity for the prosecution to craft their evidence and fill in the gaps and thus

occasioning injustices to the appellant, the cause I am not ready to condone it. I am further inspired by the Court of Appeal's holding in the case **of Tumaini Frank Abraham vs Republic (Criminal Appeal No.40of 2020) [2023] TZCA17467(1 August 2023)** it was held that: We are mindful of both the law and logic that once a party to case has closed the case, from there his hands are tied and his mouth is closed. Except, as regards entering nolle prosequi in terms of section 91(1) of the CPA where the Director of Public Prosecutions is at liberty to withdraw its case at any stage before judgment.

Similarly, in the current case, where the parties had finished giving their evidences and closed their cases, their hands were tied and mouths closed to do or say anything more about their case. Another incidence is as discussed in the case of **S. M. Z. vs Machano Khamis Ali and 17 Others (Criminal Application 8 of 2000) [2000] TZCA 22 (21 November 2000),** in which the Court of Appeal despite the appellant had decided otherwise with the appeal, the Court proceeded to determine it for the interests of justice. I know this is a civil case, nevertheless, my insistence is the same that as the respondents had finished giving their evidence and closed their case, their hands were tied up to decide

anything on the case as well as their mouth closed to say anything but only a greeting to the Court.

In the end, as I have noted errors material to the merit of the case, which have occasioned injustice to the appellant, I consequently allow this appeal. For that matter, the said legal issue raised is quashed and set aside. The ruling emanating from it is consequently nullified. The resulting effect, the DLHT of Maswa is hereby ordered to compose its judgement as per evidence in record and accordingly deliver it to the parties soonest possible.

Parties shall bear their own costs.

It is so ordered.

DATED at SHINYANGA this 7th day of May 2024.

F.H. MAHIMBALI

JUDGE