IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

LAND APPEAL NO. 127 OF 2024

(Arising from the decision of the District Land and Housing Tribunal for Ulanga at Mahenge in Land Application No. 24 of 2023 by Mmbando, CP)

HASSAN NGUKUYAWENE .... APPELLANT

VERSUS

MARTINI TOBIASI MAKELO ....RESPONDENT

JUDGMENT

30/04/2024 & 29/05/2024

KINYAKA, J.:

The dispute that escalated to this Court through the present appeal, emanated from the Ward Tribunal of Minepa that the respondent referred through Land Case No. 05 of 2023 in respect a piece of land measuring ¾ acre that he alleged to have been trespassed by the appellant. The Ward Tribunal failed to mediate the parties on the dispute over ¾ acre of land and referred the matter to the District Land and Housing Tribunal of Ulanga at Mahenge, hereinafter "the District Tribunal" for adjudication.

At the District Tribunal, vide Land Case No. 24 of 2023, the respondent sued the appellant for invading his 3 ¾ acres of land located at Kivukoni Village, Chikago Area, Minepa Ward in Ulanga District that he owned by clearing bush and later on obtained a customary right of occupancy from the village council on 12th April 2019 in respect of the disputed land measuring 9.583 acres.

On his part, the appellant contended before the District Tribunal that he was given the right to the suit land by the Village Council in 1997 and used it until 2004 when he was sentenced to imprisonment in jail in 2004. He stated that the respondent took advantage of the time that he was in jail to obtain a customary right of occupancy in his name.

Upon hearing the respondent's two witnesses and the appellant's three witnesses, the District Tribunal found the respondent the lawful owner of the suit and ordered permanent injunction against the appellant. Aggrieved, the appellant preferred the present appeal. In his amended memorandum of appeal, the appellant registered five grounds of appeal as follows:-

1. The trial Tribunal failed to properly analyze and assess the evidence on record and in so doing he came to the conclusion that was not in line with what was on the record;

2. The trial Tribunal erred in law and upon facts when he held that the respondent, being holder of Certificate of Customary Right of Occupancy, had absolute right to the suit property and in so doing he erroneously disregarded all credible evidence to the contrary;
3. The trial Tribunal erred in holding that there was no evidence to counter the validity of the Certificate of Customary Right of Occupancy fronted by the respondent when it was abundantly clear from the record that the respondent had invaded the appellant's land, and there is no evidence that he was allocated the same by the village council;
4. The trial Tribunal erroneously disregarded the contradiction in the location of the suit property and so erroneously held the land carrying the Certificate of Customary Right of Occupancy was the one in dispute, without carrying site visit ascertain the same; and
5. The trial Tribunal erred in shifting to the applicant the burden of proof.

The appeal was argued by written submissions. Mr. J.R. Kambamwene, learned advocate drew the submissions on behalf of the appellant while Mr. Bageni Elijah drew the reply submissions for the respondent.

In support of the first ground of appeal, Mr. Kambamwene joined issue with the District Tribunal's holding that the certificate of customary right of

occupancy was the conclusive proof of the respondent's ownership as there was no proof to the contrary. He faulted the District Tribunal for its failure to appreciate that the appellant was given the suit land in 1997 which the village council was, or ought to be aware that the plot was granted to the appellant on a condition to surrender to the village the moment the appellant moves out of the village. He argued that there was no evidence that the village council took back the plot or that the appellant had surrendered the same to the village, adding that when the respondent claimed to clear the bush in 1998, the land was under occupation of the appellant.

Mr. Kambamwene submitted that the certificate of title has evidential value that entitle a person to use and occupy a specified land but had no effect of extinguishing the ownership of those who have no title as in the present case the respondent's certificate of title was not superior to the appellant's ownership dating back from 1997. He cited the decision in the case of **Amina Maulid Ambali & Others v. Ramadhani Juma, Civil Appeal No. 35 of 2019** [2020] TZCA 19 (25 February 2020) and argued that a certificate of title is not a conclusive proof and can be impeached by proof or cogent evidence at the trial, filing of counter claim and joinder of the relevant authority.

Regarding the second and third grounds of appeal, Mr. Kambamwene submitted that there should have been a counter claim in which if the respondent's suit failed, the suit would automatically belong to the appellant. He submitted in rebuttal that there was no need of filing a separate counter claim as the inherent claim by the appellant was a counter claim enough. Regarding whether the certificate of title was lawfully procured, he submitted that Exhibit D1 prove that the appellant was given the land by the village council in 1997 while the respondent claimed to have acquired it through clearing bush in 1998. He was of the view that the respondent's certificate was void and unlawfully procured as it was procured on top of another title granted prior to the same.

He submitted that the Village Council ought to have been joined in the proceedings involving parties with opposing claims and where there are competing interests, as a necessary party. He argued that the decision in the case of **Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another, Civil Revision No. 6 of 2017** [2018] TZCA 25 (24 July 2018) that the requirement under Order 1 Rule 9 of the Civil Procedure Code Cap. 33 R.E. 2019, hereinafter "the CPC" that 'no suit shall be defeated by reason of misjoinder or non-joinder of parties' applies only to non-necessary parties.

He added that the Court has powers to order joinder of parties under Order 1 Rule 10(2) of the CPC. He argued that the absence of the village council prevented the appellant from asserting and proving that the respondent's certificate of title was obtained unlawfully. He prayed for the appeal to be allowed with costs and the Court to remit the file back to the District Tribunal for joinder of the necessary party, the village council.

Responding to the appellant's submissions, Mr. Elijah, learned advocate for the respondent began by highlighting that the appellant failed to submit on the fourth and fifth grounds of appeal and raised new ground not among the grounds in the amended memorandum of appeal including failure to join the village council as a necessary party. He added that the appellant submitted on false matters including that the appellant initiated a dispute at the Ward Tribunal of Kivukoni and won the same which is contrary to the records. He stated that it is the respondent who initiated the land dispute at the Ward Tribunal of Minepa and upon failure of mediation, he preferred the application at the District Tribunal. He prayed for the Court to ignore the ne raised grounds based on an established principle that parties are bound by their own pleadings.

As to the first, second, and third grounds of appeal, he submitted that the appellant has appreciated the holding of the District Tribunal that the respondent who holds a certificate of customary right of occupancy holds a better title than the appellant, as the same is a conclusive proof. He argued that SM1, the respondent testified how he cleaned a virgin land in 1998 and cultivated the same in 2000 while SM2 testified to have been employed by the respondent to clear the suit land which is part of 9.5 acres. He added that the respondent continued to use the land until 2019 when he was granted a certificate of customary right of occupancy admitted as Exhibit PE1. He proceeded that the appellant did not prove that he was in jail but his and SU3's testimonies that the respondent was using the land prove the respondent's occupation. He added that the appellant failed to call his siblings to testify that the respondent was invited to the land by the former's mother. He argued that as the respondent occupied the land from 2004 when the appellant was jailed up to 2023 when the dispute arose, the respondent got the land by adverse possession if assuming that the appellant's story is true. He prayed for dismissal of the appeal with costs.

Rejoining, Mr. Kambamwene attacked the District Tribunal for not looking beyond the respondent's certificate of title to find that the suit land belonged

to the appellant since 1997 which prove that the certificate was unlawfully obtained. He submitted that the respondent's new raised issue of adverse possession thought irrelevant and not part of the decided matters before the District Tribunal, is a clear admission that he occupies the land belonging to somebody else. He added that there was no proof that the land became vacant to permit another issuance of certificate of title. He reiterated that joining the village council was necessary as it would have explained the circumstances of issuance of customary right of occupancy to the respondent over the suit land which it issued to the appellant in 1997 and be accountable for the injustice that ensued. He reiterated his prayer for the appeal to be allowed with costs.

In the course of composing judgement, I noted that the District Tribunal heard the land dispute measuring 3 ¾ acres while the Ward Tribunal failed to mediate parties over a dispute preferred by the respondent measuring ¾ acre of land as reflected in Ward Tribunal's certificate of failure to mediate the parties. I invited parties to inform the Court if the District Tribunal had mandate to hear the dispute over 3 ¾ acres of land.

The appellant contended that he informed the District Tribunal on the differences of the suit land of ¾ acre that they were mediated at the Ward

Tribunal and 3¾ acres preferred by the respondent at the District Tribunal. He stated that it was not correct for the District Tribunal to hear the dispute over the 3¾ acres while the dispute was over ¾ acres before the Ward Tribunal.

Mr. Elijah admitted that the record show that the certificate of failure to mediate parties is contrary to the respondent's application before the District Tribunal on the size of the land. But he submitted that the appellant was aware that the dispute involved 3¾ acres and that even the issue for determination before the District Tribunal was whether the respondent was the owner of 3¾ acres. He contended that the District Tribunal was correct to entertain the dispute because the important stage of mediation was conducted. He argued that it would have been different if mediation was not conducted at all. He submitted the appellant did not raise an objection to that effect but proceeded with the case on merit which according to him, was an admission on part of the appellant that the dispute involved 3¾ acres.

He prayed for the Court to invoke the overriding objective principle as the appellant knew through as evidenced by his testimony that the disputed land is not less than 3 acres and according to him, 3¾ acres are within the 3

acres. He proceeded that the Court's application of the overriding principle will save time of the parties as the essence of mediation is to mediate parties and that be as it may, the parties will return to the courts over the same dispute. He added that the discrepancy reflected in the certificate of the Ward Tribunal is a slip of the pen because the District Tribunal does not receive all proceedings and other documents that were made available to the Ward Tribunal except the certificate. He contended that if the Court will take trouble to read the proceedings of the Ward Tribunal, it will find that the dispute was on 3¾ acres and not ¾ acre. He prayed for the Court to proceed to compose judgement on merit for the interest of justice.

In his rejoinder, the appellant refuted to have admitted the size of the disputed land as 3¾ acres. He stated that he raised the issue, but the District Tribunal ignored the same.

Upon completion of the parties' submissions on the grounds of appeal and the ground that was raised by the Court *suo moto*, I now turn to proceed with determination of the present appeal. However, as the issue on the District Tribunal's jurisdiction to hear the dispute over 3¾ acres as opposed to ¾ acre referred to the Ward Tribunal being a pint of law, I will begin with its determination.

It is the requirement of the law under section 13(4) of the Land Disputes Court Act, Cap. 216 hereinafter "the LDCA" as amended by section 45 (c) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2021 that the District Tribunal shall hear a proceeding affecting title or any interest in land if the Ward Tribunal has certified that it has failed to settle the matter amicably. The provision stipulates:-

> *"Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceeding affecting the title or any interest in land unless the Ward Tribunal has certified that it has failed to settle the matter amicably"*

In respect of the present matter is what was in dispute, or the interest in land or the matter as the case may be that was referred by the respondent to and litigated at the District Tribunal? In my understanding of the proceedings before the District Tribunal is that the interest or matter in dispute was in respect of ownership of 3 ¾ acres of land. But again, what was the dispute that was referred by the respondent to and failed to be mediated at the Ward Tribunal? The record of the proceedings of the District Tribunal through the Ward Tribunal's certificate of failure to mediate the

parties reveal that it failed to mediate a dispute over ¾ acre written as '*ROBO TATU EKARI ¾*'

Not only the certificate of title but also the appellant's written statement of defence in paragraph 6 and his testimony in chief intimated the differences in the size of the disputed land in the following words:

> "*Kwamba aya ya 6(a)(l) ya maombi inapingwa mpaka mleta maombi atakapothibitishia baraza hili tukufu uwepo wa madai yake hayo, ayah hii inakizana na aya ya 3 maombi ambayo inasema kuwa eneo linalogombewa ni ekari tatu na robo tatu ekari pamoja na hati ya usuluhishi ambayo inasema kuwa ni eneo lenye ukubwa was ¾.*"

At the end of his testimony in chief, the appellant, SU1 testified:

> "....*Ndipo nililetewa wito nimeshtakiwa Baraza la Kata Minepa robo tatu ekari. Huyu mwombaji alipewa karatasi na Baraza la Kata akaja huku, ndio mimi nimeitwa.*"

The record of the District Tribunal reveal that despite all the above, the respondent did not dispute and never spoke of the issue at any point in the proceedings. Neither was there any attempt by the respondent to rectify the certificate if there was a mistake in the certificate of the Ward Tribunal as contended by Mr. Elijah, learned Counsel for the respondent. Similarly, the

District Tribunal was never concerned of such a point of law likely affecting its jurisdiction to entertain the matter regarding the matter before it.

It is quite clear that a dispute over ¾ acre of land is different from a dispute over 3 ¾ acres of land. This fact has been admitted by the Mr. Elijah, the learned Counsel for the respondent that the record show that the certificate of failure to mediate parties is contrary to the respondent's application before the District Tribunal on the size of the land. It is my considered finding that the District Tribunal heard and determined the Land Application No. 24 of 2023 in respect of a dispute over 3 ¾ acres of land without being passed through and mediated by the Ward Tribunal.

I do not accept the invitation by Mr. Elijah that the appellant ought to have raised it as a preliminary objection on a point of law and that proceeding with hearing of the case before the District Tribunal was tantamount to an admission that the suit was properly before the District Tribunal and the disputed land was 3¾ acres. The appellant being lay person and unrepresented, was not expected to comprehend matters of law including raising the issue through a preliminary objection and not in his defence or testimony. As the issue was raised in the pleadings, it was required of the District Tribunal to determine the same at the onset of the proceedings or

at the hearing as a point of law can be raised and deliberated at any time before a judgement is pronounced. [See the case of **Richard Julius Rukambura vs Isaack Ntwa Mwakajila & Another, Civil Appeal No. 2 of 1998** [2004] TZCA 67 (19 January 2004), and **Gem & Rock Ventures Co. Ltd v. Yona Hamis Mvutah, Civil Reference No. 1 of 2010** [2011] TZCA 200 (6 October 2011)]

The District Tribunal's determination of the suit relating to a dispute over 3¾ acres, not only took the appellant by surprise but, it was unknown whether the same was within or different from the ¾ acre that the parties were mediated at the Ward Tribunal, especially in this case where the District Tribunal did not visit the *locus in quo*. The Justice was flawed.

Mr. Elijah has prayed for the Court to invoke the overriding objective principle to save costs of litigation especially in this matter that the appellant was aware of the disputed 3 acres of land. In my considered view, the oxygen principle is not a panacea of all wrongs. The oxygen principle enshrined under section 3A and 3B cannot apply to a fundamental defect like the present one which goes to the root of affecting the jurisdiction of the District Tribunal to hear the dispute before it. That was the position in the case of **Njake Enterprises Ltd vs Blue Rock Ltd & Another (Civil Appeal 69**

of 2017) [2018] TZCA 304 (3 December 2018), where the Court of Appeal underscored that:-

> "*.....the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;*
>
> > "*The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms....*"

For as long as the matter, interest or disputed land, the subject matter of mediation before the Ward Tribunal was different from the one that was preferred and litigated at the District Tribunal, I am of a firm opinion that the District Tribunal heard the matter without being conferred with requisite jurisdiction in abrogation of the requirement of section 13(4) of the LDCA. It is now a settled position that the question of jurisdiction is fundamental as it touches the root of the court's authority to entertain a matter before it. In the case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 2 Others [1995] T.L.R. 155** it was categorically held thus:

"The question of jurisdiction for any court is basic it goes to the very root of the authority of the court to adjudicate upon cases of different nature........The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position and the commencement of the trial....it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."

In view of the above observations, I hold that the District Tribunal heard the Land Application No. 24 of 2024 involving as dispute over 3 ¾ acres of land without a certificate from the Ward Tribunal certifying that the later failed to mediate the appellant and the respondent contrary to section 13(4) of the LDCA. In the circumstances, pursuant to the revisionary powers granted to this Court under section 43(1)(b) of the LDCA, I nullify the proceedings and quash the resultant judgement and orders of the District Tribunal stemming from Land Application No. 24 of 2023. If any party to this case still wishes to pursue for his rights, he may prefer a fresh application at the District Tribunal in accordance with the relevant laws and procedures.

Upon nullifying the proceedings and the resultant judgement, I do not find the need to determine the grounds of appeal preferred by the appellant, as

determining them will not change the fate of the propriety of the proceedings and resultant decision of the District Tribunal appealed against.

As the issue regarding the propriety of the proceedings of the District Tribunal was raised by the Court *suo moto*, I order each party to bear its own costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 29th day of May 2024.

H. A. KINYAKA

JUDGE

29/05/2024