

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 178 OF 2018

JOSEPH NYAEZA APPELLANT

VERSUS

**DISMAS H. MINGI (LEGAL REPRESENTATIVE
OF DENIS DAUDI MASATI) RESPONDENT**

**(Appeal from the decision of the District Land and Housing Tribunal for
Kilombero/Ulanga District at Ifakara)**

Dated the 25th day of April, 2016

in

Land Application No. 68 of 2014

JUDGMENT

S.M. KALUNDE, J.:

This appeal arises from the decision of the District Land and Housing Tribunal for Kilombero/Ulanga District at Ifakara (**“the trial tribunal”**) in **Land Application No. 68 of 2014** delivered on 25th day of April 2016. In that case, the respondent, in his capacity as a legal representative of DENIS DAUDI MASATI, claimed that the applicant had encroached into a piece of land identified as Plot No. 156, Block K, located at Jongo Area, Ifakara Township (**“the suit property”**). The respondent claimed to be an administrator of the of the estate of the late Denis Daudi Masati having been appointed by the Ifakara Primary Court in the letters of

administration dated 12th June, 2014. The applicant alleged that the suit property was allocated to Denis Daudi Masati in 1998 by the Ifakara Town Council through a letter of offer with **Reference No. KB/LD/K/156** dated 09th November, 1998. It was the respondent's contention that around the year 2013 he noticed that the applicant, against his permission, had encroached into the suit property and started effecting developments.

He further protested that, despite several warnings, the appellant refused desist from trespassing into the suit property and interfere with the respondents right of peaceful enjoyment of his property. The respondent, thus, filed a suit claiming *inter alia*:

- (a) A declaratory judgment that the disputed premise belongs to the late Denis Daudi Masati now under the administration of the Applicant;
- (b) The respondent be declared a trespasser;
- (c) The respondent be condemned to pay general damages to the tune of Tanzania Shillings Thirty Million Only (Tsh. 30,000,000.00) for deliberately trespassing into, and developing that land against proprietors will hence impeding the proprietor/Applicant from developing that land;
- (d) The respondent be condemned to pay punitive damages to the tune of Tanzania Shillings Ten Million Only (Tsh. 10,000,000.00) for deliberately interfering with the proprietor/Applicant's right to develop that land;
- (e) Costs of the suit; and any other reliefs as may be deemed just and proper to be granted.

The appellant filed their defence denying the respondents allegations. The applicant denied that the respondent was an administrator of the estate of the late Denis Daudi Masati. Together with that, the appellant contended that he was a legitimate owner of the suit property having lawfully bought it from the original owner one Antoni Mhanyika on 12th August, 1997 for a consideration of Tshs. 90,000.00. He also contended that the letter of offer was not valid as the respondent failed to comply with the condition for payment of compensation to the original owner property. In addition to that the appellant argued that, for 15 years from 2003 when Denis Daudi Masati died the appellant had lived in the area without being approached by the appellant. He intimated that that fact can be proved by the fact that letters of administration were applied in 2013 almost 11 years after the passing of Denis Daudi Masati in 2003. The applicant requested that the application be dismissed and further that, an order that the appellant be estopped from disturbing his peaceful enjoyment of the suit property, and costs of the suit.

Upon completion of filing parties' pleadings and for the purpose of determining the controversy between the parties, on the 04th March, 2015 the trial tribunal framed and recorded the following three issues which were agreed upon by the parties: -

- (i). *Whether the applicant is a legal representative of the deceased;*
- (ii). *If the applicant is a legal representative of the deceased, whether the disputed land does*

*belong to the applicant or to the respondent;
and*

(iii). What other reliefs parties are entitled to?

During hearing, at the trial tribunal, the respondent, DISMAS H. MINGI, testified as **PW1**. He also invited one **Privatus Ndopweli, PW2**, to testify in his favour. Together with his oral testimony, he presented four (4) exhibits: letter of administration (**Exhibit P.1**); a letter of offer with Reference No. KB/LD/K/156 dated 09th November, 1988 (**Exhibit P.2**); land rent receipts (**Exhibit P.3**); and site plan (**Exhibit P.4**). On his part the appellant, testified as **DW1**, he also paraded two more witnesses. Antoni Cyprian Mhanyika (**DW2**) and Gasto Mathias (**DW3**). He also tendered the sale agreement (**Exhibit D.1**).

Having heard the two witnesses for the respondent and three for the Chairman of the trial tribunal was satisfied that, when the appellant bought the suit property in 1998, the plot had been surveyed and allocated to Denis Daudi Masati. The tribunal reasoned that, at the time DW2 sold the suit property to the appellant he had to good title to pass to the appellant. Supported by the opinion of the wise assessors who sat and opined during the trial, the Chairman of the tribunal concluded thus:

"I therefore proceed to allow this case by declaring the disputed premise, Plot No. 156, Block K, located at Jongo, Ifakara Town as a rightful property of the late Denis Daudi Masati. The respondent is forthwith ordered to give

vacant possession of it. The matter is accordingly allowed with costs."

Aggrieved by that decision, the appellant lodged the present appeal. In the petition of appeal filed before this Court, the appellant has preferred four (4) grounds contending that: -

1. That the trial tribunal erred in law and in fact for accepting a letter of administration dated 12th June, 2016 which was fraudulently presented;
2. That the trial tribunal erred in law and in fact in deciding that the granted right of occupancy extinguishes the customary right of occupancy;
3. That the trial tribunal erred in law and in fact for not considering the statutory limitation for recovery of land; and
4. That the trial tribunal erred in law and in fact by making a decision without considering that the land was not compensated.

Hearing of the appeal was conducted through written submissions. Unrepresented, the applicant prepared and filed his own submissions whilst the respondent enjoyed the legal services of learned counsel **Mr. Daniel A. Lisanga** in drawing and filing the

reply submissions. Submissions were filed in accordance with the schedule issued by the Court. However, it worth noting that the appellants did not exercise their rights to file a rejoinder, understandably, it is within their rights.

To appreciate the gamut of the submissions advanced, I took a liberty to revisit the tribunal records and noted a fundamental irregularity in trial tribunal proceedings. The irregularity related on the question whether there was a decision by the trial tribunal sufficient for this Court to exercise its appellate powers.

It is on record that, prior to commencement of trial the tribunal framed three issues. The first two key issues were, firstly, *whether the applicant is a legal representative of the deceased*, and secondly that, if the first issue is answered in the positive, *whether the disputed land does belong to the applicant or to the respondent*. It is an elementary principle of pleading that each issue framed should be resolved one way or the other. This aspect was touched on by the Court in **James B. Kumonywa v Mara Cooperative Union (1984) Ltd and The Attorney General**, Civil Appeal No. 22 of 1995 (unreported) and most recently in **Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others** (Civil Appeal No.239 of 2017) [2020] TZCA 1889; (11 December 2020).

In **Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others** (supra) the Court of Appeal (**Kerefu, J.A**) observed that:

*"...we are in agreement with Mr. Chamani that it is an elementary principle of pleadings that each issue framed should be resolved. Therefore, a trial court is required and expected to decide on each and every issue framed before it, hence failure to do so renders the judgment defective. We are supported in that position by the cases of **Alnoor Shariff Jamal** (supra) cited to us by Mr. Chamani and **Sosthenes Bruno and Another v. Flora Shaun**, Civil Appeal No. 81 of 2016 (unreported). In **Alnoor Shariff Jamal** (supra) the Court being faced with a similar situation, cited with approval the decision of the Court of Appeal of Kenya in the case of **Kukal Properties Development Ltd v. Maloo & Others** [1990 - 1994] E.A 281 where it was held that: -*

"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure."
[Emphasis added]."

The question now is whether the trial tribunal resolved the first issue where it was called in to respond to the question whether the applicant is a legal representative of the deceased. The records and the typed judgment show that after summarizing the evidence presented during trial the tribunal the Chairman of the tribunal made the following remarks:

"The evidence of the case provides as well that the said premises prior the allocation of it to the late Denis Daudi Masati in 1988 was a natural premises occupied by Anthony Cyprian Mahanyika. As a matter of law once a premises becomes a declared township and thus being surveyed the customary ownership of the same ceases to operate and the same must be under the deem granted right of ownership. In this

case it is not clear as to when the said premises was surveyed but obviously it must be prior 1988 when was offered to the late Denis Daudi Masati.

In that meaning the suit premise being a surveyed one obviously the recognized ownership cannot be the customary one which the Respondent claims to have on the said premise. It is clear that when the Respondent went to purchase the said premise in 1998, the same had already been surveyed and allocated to the late Denis Daud Masati meaning that even the one who did sell it to Respondent had no title over a suit premise to pass to the Respondent.

It is not sure or well clear as to when the seller of a suit premise to the Respondent came into occupation of the same naturally but as long as the authority which did survey and allocate it to the Applicant has never been challenged for any kind of irregularities by any one in so doing obviously the allocation made by the authority remains as the legal one.

In that since therefore I remain to support the opinion of my both assessors that the legal and proper ownership of a suit premise is the one the Applicant has on this matter. I therefore proceed to allow this case by declaring the disputed premise, Plot No. 156 Block K. Jongo Ifakara Town as a rightful property of the late Denis Daudi Masati. The Respondent is forthwith ordered to give vacant possession of it. The matter is accordingly allowed with costs."

The above quoted portion of the judgment of the tribunal summed up the analysis and evaluation of evidence from both parties as well as the findings of the tribunal in relation to the three issues framed. The question now is whether the decision of the

tribunal resolved the issues framed for determination. As pointed out earlier the two substantive issues were:

- (a) Whether the applicant is a legal representative of the deceased, and*
- (b) If the first issue is answered in the positive, whether the disputed land does belong to the applicant or to the respondent.*

Having carefully gone through the records of the proceedings and judgment of the tribunal, I am satisfied that the tribunal did not resolve the issues which were framed for determination. All the Chairperson did was to declare the deceased a rightful owner of the disputed land, but it did not make any categorical finding on any of the issues. For example, the question whether the applicant, DISMAS H. MINGI, was the legal representative of the deceased Denis Daudi Masati, was not resolved. That issue was meant to resolve the first prayer of the applicant (respondent herein) that the suit property be declared the property of Denis Daudi Masati hence the property falls under him as the administrator of the estate of the deceased. Having failed to establish the first issue meant that the second issue could not be resolved, or it should have been resolved in favour of the appellant herein.

As observed above, it is an elementary principle of pleadings that each issue framed should be resolved. See **Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others** (supra).

The appellate powers of this Court under 46 of **the Land Disputes Courts Act, Cap. 216 R.E. 2019** are only exercisable once a decision has been handed down. The relevant section provides that:

*"The High Court shall in the exercise of its appellate jurisdiction have power to take or to order the District Land and Housing Tribunal to take and certify additional evidence and whether additional evidence is taken or not, to confirm, reverse, amend or vary any manner **the decision** or order appealed against."* [Emphasis mine]

My understanding of the above cited section is that, unless a tribunal has handed down its decision, this Court has no powers to exercise its appellate jurisdiction. I am supported in this view by the decision of the Court of Appeal in the case of **Truck Freight (T) Ltd v. CRDB Ltd**, Civil Application No. 157 of 2007 (unreported) where the High Court failed to determine a framed issue and as a result, the parties' controversy was left unresolved. Having considered that situation, the Court observed that: -

"If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We cannot step into its shoes. We therefore allow the appeal and quash the decision..."

In the present case, since the applicant/respondent prayed to be declared as the lawful owner of the suit property in his capacity as the administrator and legal representative of the deceased and

since he wanted the appellant/respondent to be declared as a trespasser, it was imperative that the 1st and 2nd issues were resolved. In that the tribunal should have categorically made a finding on whether the applicant/respondent was the legal representative of the deceased and as such the suit property was under his administration. Failure to resolve the two issues was a fundamental error on the part of the tribunal.

In my view the failure to resolve the two key issues raised for determination vitiated the impugned decision as it left crucial issues unresolved. For that reason, it would be inconceivable to consider the other grounds of appeal. As for the way forward, I find guidance in the case of **Mantra Tanzania Ltd vs Joaquim Bonaventure** (Civil Appeal No.145 of 2018) [2020] TZCA 356; (17 July 2020) where the Court of Appeal observed that: -

"On the way forward it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter."

Further to that, in **Truck Freight (T) Ltd v. CRDB Ltd** (supra) the Court stated:

"We therefore, allow the appeal and quash the decision.... We order that he (the trial Judge) either decides the issues which were framed and agreed upon by the parties or, if he is of the firm

opinion that the issue of the governing law on execution of what is crucially important for the just determination of the suit, then he should re-open the hearing and let both learned counsel address him."

That said and done, I am satisfied that the omission done by the trial tribunal rendered the decision of the tribunal fatally defective, I thus quash the judgment of the tribunal in Land Application No. 68 of 2014 and set aside the decree and orders thereto. This alone is sufficient to dispose of the appeal, I will therefore not consider the remaining grounds.

As a way forward, I remit the case file to the tribunal for it to render a decision after having considered and determined all the issues framed for resolution of the dispute between the parties. The appeal succeeds as explained above. In the circumstances, I make no order for costs.

Order accordingly.

DATED at DAR ES SALAAM this 06th day of JULY, 2021.



A handwritten signature in blue ink, appearing to read "S.M. Kalunde".

S.M. KALUNDE

JUDGE