IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE No. 123 OF 2019

1. SARAPHINA MBINGE---------- PLAINTIFF

Versus

1. SALEHE JUMA GADAU
2. ELINAMI WILSON MUSHI
3. SAID MRUMA
4. SIFA MWAKIBINGA
5. JOHN SANGA ---------- **DEFENDANTS**
6. JOSEPH SECHEMI
7. PAULINA SEVELINE
8. BOARD OF TRUSTEES OF PENTECOSTE CHURCH

RULING

29.10.2021 & 02.11.2021
F.H. Mtulya, J.:

In the course of hearing **Land Case No. 123 of 2019** registered in this court (the case), a judgment in **Land Appeal No. 81 of 2007** (the appeal) decided by the **District Land and Housing Tribunal for Kinondoni District at Magomeni** (the Tribunal) on 14th March 2008 was tendered by Saraphina Mbinge (the plaintiff) and was admitted as part of exhibit P.3 collectively. The appeal emanated from a decision of **Mbezi Ward Tribunal** (the Ward Tribunal) in **Complaint**

No. 17 of 2007 (the complaint) between the plaintiff and two (2) other persons, namely: Mtezo S. Mtezo (Mr. Mtezo) and Benedict Lester Sagawala (Mr. Sagawala). Mr. Sagawala also appears as a seller in the disputed land in this case as depicted by the **Hati ya Kununua Shamba la Heka Moja** dated 28th April 1994 admitted in this case as exhibit P.2., which shows that plaintiff bought a farm land sized one acre (70x70) at the tune of Tanzanian Shillings Four Hundred Thousand Only (400,000/=) from Mr. Sagawala.

Record in the present case shows further that sometimes in 2007 a dispute on the farm arose and was filed in the Ward Tribunal in the complaint. The Ward Tribunal decided the complaint in favour of Mr. Sagawala and Mr. Mtezo against the plaintiff hence the plaintiff was dissatisfied with the decision and preferred the appeal in the Tribunal, which was partly allowed without costs. The text of the Tribunal at page 3 of the judgment of the appeal shows that:

> *...I partly allow this appeal by ordering the second respondent to return Tshs. 200,000/= instead of Tshs. 50,000/= he wanted to return to the appellant. The boundaries to remain as it exists. Claims of trespass and easement stand dismissed. Costs to be borne by each party. It is so decided.*

This judgment of the Tribunal in the appeal has never been executed or appealed and determined in this court to complete the record of the Tribunal. It is unfortunate that the Tribunal remained silent on the exact size and location of the total proportion of the land in dispute. It was also silent on exact size and location of the portion of the land to be compensated by Mr. Mtezo for the said Tanzanian Shillings Two Hundred Thousand (200,000/=) in lieu of the land occupied by him.

In the present case, during the hearing, Mama Elizabeth Mwanga (PW1) claimed the land in dispute is 70x70 human steps located at Mbezi, but cannot state with certainty on demarcations and neighbors surrounding the land. Mr. Bashiri Ismail Hassan (PW2) on his part testified that the land in dispute is large about 70x70 human steps located at *Mbezi Kwa Yusuph* (now Mbezi Luis), but cannot remember all neighbors. In her testimony, the plaintiff alleged that the disputed land is one (1) acre located at Mbezi Luis, Mtaa wa Mshikamano, Maduka Tisa, along Mpiji- Magohe Road. The plaint itself described the land in dispute as 3490 square meters located at Mshikamano Street within Mbezi Ward in Ubungo Municipality. In the course of hearing, Mr. Ndanzi for the defendants

has been inquiring the exact size and location of the land from the sale contract in exhibit P.2 to prosecution witnesses.

In my opinion, the decision of the Tribunal, which is uncertain on the total area of the land complained and portion of the land occupied by Mr. Mtezo, *may be contrary* to the enactment in Regulation 3 (2) (b) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations**, 2003 GN. No. 174 of 2003 (the Regulations). There is a large family of precedents interpreting the enactment and the need of certainty of the disputed lands (see: **Daniel D. Kaluga v. Masaka Ibeho & Four Others**, Land Appeal No. 26 of 2015; **Romuald Andrea v. Mbeya City Council & 17 Others**, Land Case No. 13 of 2019; **Rev. Francis Paul v. Bukoba Municipal Director & 17 Others**, Land Case No. 7 of 2014; **Aron Bimbona v. Alex Kamihanda**, Misc. Land Case Appeal No. 63 of 2018; **Ponsian Kadagu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018; **Simeo Rushuku Kabale v. Athonia Simeo Kabale**, Civil Appeal No. 6 of 2019, **Swaibu Hassan v. Serikali ya Kijiji Cha Wanga**, Land Case Appeal No. 28 of 2020, and **Hassani Rashid Kingazi & Another v. Serikali ya Kijiji cha Viti**, Land Case Appeal No. 12 of 2021).

The status of the appeal in the Tribunal, as of now, is silent on the record. All these confusions, moved this court, *suo moto*, to see whether there is a point of law with regard to the jurisdiction of this court that need to be determined before proceedings can continue to take its course. It has been the practice of this court and Court of Appeal that points of law challenging the jurisdiction of the court can be raised at any stage of proceedings and it has to be determined first before determination of the substantive matters (see: **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 and **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai**, Civil Appeal No. 179 of 2016).

The reasoning of our superior court on the subject is found at page 12 in the precedent of and **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai** (supra) that:

> *...the jurisdiction to adjudicate any matter is a creature of statute. An objection in that regard is a point of law and it can be raised at any stage. It was not offensive on part of the respondents to raise it in the final submissions which was after the close of the hearing.*

However, the only condition which is put forward by the Court of Appeal is that before determining the matters on the raised points of law, the parties must be accorded the right to heard. In the present case, in order to cherish the natural, human and constitutional right to be heard enshrined under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] (the Constitution) and precedents in **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44; **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2002; **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018 and **Ponsian Kadangu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018, this court decided to invite the learned minds who appeared for the parties, Mr. Julius Mkirya and Mr. Julius Ndanzi to exercise the right in explaining the status of the present case in this court, considering the land in dispute is the same and the appeal of the Tribunal is yet to be executed.

On his part Mr. Ndanzi for the defendants submitted that the appeal in the Tribunal is still unchallenged and/or unexecuted as of today, but the plaintiff has decided to file another fresh case in this court. In his opinion, Mr. Ndanzi, believed that it is wrong for the

plaintiff to initiate a fresh case which may conflict with the Tribunal's judgment and there will be two (2) decisions emanating from two (2) different courts on the same land hence may cause challenges in enforceability of the decrees.

Mr. Ndanzi submitted further that the Tribunal's judgment has two faults, *viz*: first, it ordered on a piece of land which is less than a acre, but silent on whether it is ½, ¼ or 1/3 of the acre; second, it ordered the boundaries to remain as they existed, but the Tribunal remained silent on which boundaries to remain intact. In his opinion, the plaintiff may apply for extension of time and produce the reason of illegality so that she may get an opportunity to challenge the decision of the Tribunal in the appeal as it is allowed under the precedent of the Court of Appeal in **Hamis Babu Ally v. The Judicial Officers Ethics Committee & Three Others**, Civil Application No. 130/01 of 2020. On the remedy available to the present suit, Mr. Ndanzi submitted that a struck out order will be appropriate.

However, this thinking of Mr. Ndanzi was protested by learned counsel Mr. Mkirya. In his opinion, Mr. Mkirya thinks that the judgment in the appeal at the Tribunal does not affect the present case at any font as the execution cannot be enforceable after expiry of twelve (12) years. In order to bolster his argument, Mr. Mkirya

cited Item 20 in Part III of the Schedule to the **Law of Limitation Act** [Cap. 89 of 2019] (the Law of Limitation) and the precedent of this court in **Mariam John v. Saada Jumanne**, Misc. Land Appeal No. 10 of 2021 but Mr. Mkirya declined to state anything on the remedy of extension of time or points of illegality of the Tribunal's judgment raised by Mr. Ndanzi and during consultations of the parties in the course of the proceedings conducted on 27th October 2021.

The practice extracted from this court and the Court of Appeal has been that failure to state anything on the complained matters may imply acceptance of the truthfulness of the points raised. The courts have, times without number, issued directives on the subject and there is a large family of precedents in favour of the position (see: **William Getari Kagege v. Equity Bank & Ultimate Auction Mart**, Civil Application No. 24/08 of 2019, **Finn Von Wurden Petersen & Milimani Farmers Limited v. Arusha District Council**, Civil Application No. 562/17 of 2017, **Shadrack Balinago v. Fikiri Mohamed v. Tanzania National Roads Agency (TANROADS) & Attorney General**, Civil Appeal No. 223 of 2017, **Paulina Samson Ndawavya v.Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, **Yokobeti Simon Sanga v. Yohana Sanga**, Civil Application No. 1 of 2001, **Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016,

Cyprian Athanas Kibogoy v. Republic, Criminal Appeal No. 88 of 1992, **Sprianus Angelo & Six Others v. Republic**, Criminal Appeal No. 481 of 2019, and **Fabian Dumila v. Republic**, Criminal Appeal No. 136 of 2014).

On the other hand, I have had an opportunity to peruse the two precedents cited by the dual learned minds in the present case, *viz*: **Hamis Babu Ally v. The Judicial Officers Ethics Committee & Three Others** (supra) and **Mariam John v. Saada Jumanne** (supra). For purposes of easy appreciation of the decisions, I will briefly quote their statement and directives.

In the precedent of the Court of Appeal in **Hamis Babu Ally v. The Judicial Officers Ethics Committee & Three Others** (supra), after citing its own decisions in **The Principal Secretary, Ministry of Defense & National Service v. Devram P. Valambhia** [1992] TLR 185 and **VIP Engineer & Marketing Ltd and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 & 8 of 2006, the Court held, at page 18, that:

> *It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time, regardless of whether or not a*

reasonable explanation has been given by the applicant under the rule to account for the delay.

The reasoning of the Court of Appeal can be extracted from its own precedent in **The Principal Secretary, Ministry of Defense & National Service v. Devram P. Valambia** (supra), that:

In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and record straight.

On the other hand, the precedent in **Mariam John v. Saada Jumanne** (supra) displays, at page 6 of the decision, that:

...a decree holder, who, without reasons, slept over his decree over and above the prescribed time, in this case 12 years, he had no right other than an interests on endless litigation.

However, this court has put in place a remedy available for those who are late in executing their decrees. This court at page 4 of the decision states that:

...the execution was carried out thirteen (13) years later that is one year far beyond the prescribed twelve (12) years limitation without extension of time being sought and granted.

Having said so, I do not need to proceed further with hearing of the present case in presence of several faults and in absence of record of the execution status of the appeal decided by the Tribunal. This case must be struck out for want of competence.

I am aware of the Amended Plaint filed in this court on 28th September 2021 and fifth & eighth paragraphs which described the land in disputed in terms of location and size of 3490 square meters. However, the total square meters in the two paragraphs differs. I understand the location and size were mainly based on the Valuation Report tendered in P.3 collectively.

However, the same was prepared on 19th August 2021 before the execution of the appeal of the Tribunal and after filing of the present case, on 24th September 2019. This brings more confusions in the present case. At any rate, the status of the judgment of the Tribunal in the appeal must be clear and certain, before this court decides the case on the same land. The plaintiff has at hand several remedies which she needs to exhaust before filing a fresh and

proper case in this court. I have therefore decided to strike out this case without any orders as to costs. Reasons are obvious. The point of law was raised by this court and the dispute is yet to be settled to the finality to identify the rightful owner of the alleged disputed land.

Ordered accordingly.

F. H. Mtulya

Judge

02.11.2021

This Ruling is delivered in Chambers under the seal of this court in the presence of the plaintiff Saraphina Mbinge and her learned counsel Mr. Julius Mkirya, and in the presence of the fifth defendant, Mr. John Sanga and learned counsel, Mr. Julius Ndanzi for the defendants

THE HIGH COURT OF TANZANIA
LAND DIVISION

F. H. Mtulya

Judge

02.11.2021