

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

AT DAR ES SALAAM

LAND CASE NO. 59 OF 2021

BERNARD KASIMILA.....PLAINTIFF

VERSUS

JANET URIO..... DEFENDANT

RULING

22/03/2022 & 15/06/2022

Masoud, J.

The plaintiff is seeking among other things a declaration of this court that he is a lawful owner of suit property described as Plot No. 44 and 45 Bock H Bigwa Barabarani in Morogoro Municipality with certificate of title no. 37195-DLR and No. 36315 DLR respectively.

The defendant disputes the claim, and has in addition raised a point of law hinged on the statement of principle emerging from **Karori Chogoro v Waithache Merengo**, Civil Appeal No. 164 of 2018 following the amendment of the Land Disputes Courts Act, cap. 216 R.E 2019 as per sections 43-50 of the Written Laws (Miscellaneous Amendment)(No.3) Act, 2021. The amendment left the ward tribunal with the power of

mediating parties and issuing a certificate that mediation has failed. The point of objection raised is the subject matter of this ruling.

The statement of principle emerging from the above authority is to the effect that where there is an order of retrial before the ward tribunal, the order must be complied with notwithstanding the recent amendment relinquishing adjudicatory jurisdiction of the ward tribunal and notwithstanding the claim that the subject matter is beyond the pecuniary jurisdiction of the ward tribunal. Accordingly, the compliance envisaged in the said statement of principle may simply entail going to the ward tribunal for mediation, and once it fails and a certificate is issued by the relevant ward tribunal, parties can file their case in a tribunal or court, seized with jurisdiction.

The defendant's counsel, namely, Mr Mwanga'nza Mapembe, in his submission, impressed the court that the subject matter of the present suit was a subject matter of the matter involving the same parties in the Land Dispute No. 17 of 2010 in Bigwa Ward Tribunal, Land Appeal No. 89 of 2010 before the District Land and Housing Tribunal of Morogoro whose judgment ordering a retrial was delivered on 21/08/2011, and a Land

Revision No. 104 of 2015 before the above mentioned district tribunal which ended up being struck out.

Subsequent to the above matter in the ward and district tribunals involving the same parties and the same subject matter, there was an appeal by the defendant herein (i.e Land Appeal No. 46 of 2016 challenging the decision which struck out the revision. As a result of the decision of this court in the said Land Appeal No. 46 of 2016, the district tribunal heard Land revision No. 104 of 2015 on its merit and ordered a retrial de novo having quashed the decision and proceedings of Bigwa Ward Tribunal.

The learned counsel for the defendant insisted that the case of **Karori Chogoro v Waithache Merengo**, applies squarely to the present case.

In so doing, the counsel underlined the pending order for a retrial given by the district tribunal in the Land Revision No. 104 of 2015 following the decision of this court in the Land Appeal No. 46 of 2016, which order was not challenged by the plaintiff, and the stance by the plaintiff that the subject matter exceeded the pecuniary jurisdiction of the ward tribunal as was the stance in the authority referred herein above.

The learned counsel for the plaintiff, namely, Mr Omar Msemu, vigorously contested the objection. He was of the view that since the objection was earlier withdrawn without leave to refile the notice of the preliminary objection, it cannot be raised once again as the court is functus officio.

He relied on the authority of **Karori Chogoro v Waithache Merengo** and in particular at page 9 of the typed ruling of the said authority. He was further of the argument that the objection is not founded on the pleadings.

It was also submitted by Mr Msemu that the cited cases and decisions related to the order of retrial have not been referred in the pleadings although they were originally reflected in the written statement of defence. He also distinguished **Karori Chogoro v Waithache Merengo** from the present case arguing that it was not relevant. Unlike the present case where the suit is in the High Court, the above authority concerned the same district tribunal presided by the same Chairman, which reopened the matter once again in a fresh application notwithstanding its previous order for a retrial and hence reviewing his own decision. He added that if anything, the remedy is pursuant to section 8 of the Civil Procedure Code, cap. 33 R.E 2019 staying the suit as opposed to striking it out.

Mr Mapembe's rejoinder submission was brief and focused. He had it that the court is not functus officio as the present suit has not been determined and disposed of. Likewise, the cases earlier on annexed in the written statement of defence have legal effect, which means that this court can pursuant to section 59(a) of the Evidence Act, cap. 6 R.E 2002 take judicial notice of the existence of the re-trial order and cases in relation to which the order was granted. He added that the plaintiff's counsel did not dispute the existence of the retrial order as is also for the case relating to the said order. Rather, his concern was that the said cases were not reflected in the pleadings.

In relation to the statement of principle in the case of **Karori Chogoro v Waithache Merengo** , the court was told in rejoinder that where there is an order of retrial, the same has to be complied with. As such, it was argued that it does not matter whether or not the court or tribunal in which a suit is filed has jurisdiction if there is a pending order of a retrial to be complied with as is in the present matter.

On my part, I do not think that the court is functus officio because of the withdrawal of the preliminary points of objection raised. I say so because the points were not heard and determined. More so, the defendant's advocate raised the point having come across the most recent Court of

Appeal decision in **Karori Chogoro v Waithache Merengo** which was delivered on 22/03/2022 after the withdrawal of the objections on 01/02/2021.

Thus, when the preliminary objections were withdrawn, the decision of the Court of Appeal was not yet delivered. Since what was raised is a point of law hinged on the recent development of the law, and which, as a point of law, can be raised at any time, I find the argument on this court being *functus officio* misplaced.

Considering the rival arguments of the learned counsel, I find that there is no dispute as to the existence of the pending order of the re-trial which was made in Land Revision No. 104 of 2015. The argument of the plaintiff's advocate was that the said decision in relation to which the order was given was not reflected in the amended written statement of defence, which means that the preliminary objection raised does not have any basis in the pleadings if at all.

The argument of the learned counsel implied that unlike the original written statement of defence of the defendant, the amended written statement of defence did not make any reference to the decision of the

district tribunal in Application No. 104 of 2015 which ordered retrial denovo before Bigwa Ward Tribunal. While the defendant was clear that the matter involved the same parties and the same subject matter]as is the present, there was nothing on the contrary from the counsel for the plaintiff. While he did not dispute existence of the matter that led to the issuance of the pending order of the retrial before Bigwa Ward Tribunal, he did not say anything as to whether or not the same involved the parties and the same subject matter as is the present suit.

Looking at the pleading and the decision I was referred to there was no doubt that the subject matter of the suit is at Bigwa, Morogoro. The decision in respect of which the pending order for re-trial was made was also undoubtedly in relation to a subject matter within Bigwa Ward, in Morogoro and involved the same parties as in the present suit.

There is indeed nothing in the plaint about what transpired amongst the parties herein in respect of the disputed land prior to filing of the present suit. It is only the amended written statement of defence that had reference to what transpired earlier having made reference to among others the decisions of 3/10/2016 and 07/10/2010 of Bigwa Ward Tribunal involving the parties herein, and Appeal No. 89 of 2009 of the District

tribunal for Morogoro involving the parties herein which ordered for the retrial before Bigwa Ward Tribunal.

Although the amended written statement of defence did not go as far as disclosing the decision in Application No. 104 of 2015 which ordered the pending retrial before the said ward tribunal, the decision of the District tribunal in the said Application No. 104 of 2015 as per Hon. Khasim took into account the previous decisions in arriving at the pending order of the retrial before Bigwa Ward Tribunal. To be clear on this, the Honourable Chairman had this to say and I quote as thus:

I went through the applicants' application, parties counsel written submissions and the original records from the ward tribunal. I am of the view that, the ward tribunal contravened with the retrial order which was entered by this tribunal on 11/8/2009 in a Land Appeal No. 89 of 2009 which ordered and I hereby quote:

I hereby quash and set aside the proceedings and orders of the ward tribunal and order for retrial of the case at the ward land tribunal. No order as to costs.

In relying to the above quoted order, the ward tribunal had to restart a case afresh, hear it, and conclusively determine it, but as per the records, the ward tribunal did not rehear the case at hand afresh, they just entered in a judgment without giving a chance for the parties to be heard, cross-examine each other.....

What the ward tribunal did is like adding additional evidence without showing if the procedure required in cross-examining a witness were followed and they entered in a decision.

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As from the foregoing, I hereby declare the whole proceedings and judgment of the ward tribunal in a case No. 71/2010 a nullity. The same is hereby quashed and set aside. I order for a retrial denovo, this case to be heard and determined afresh.....Parties are warned to maintain present status quo.....

The original written statement of defence had detailed account of such decisions as it was accompanied with all decisions which were given by Bigwa Ward Tribunal, and the decisions which were made by the District

Land and Housing Tribunal of Morogoro including the decision that ordered for the re-trial before the ward tribunal.

I am in agreement with the counsel for the plaintiff that with the filing of the amended written statement of defence upon obtaining the leave of the court reliance could no longer be made on the original written statement of defence as it is no longer part of the record.

Having regard to the record before me and the issue at stake which entails compliance with orders of the court or tribunal and thus the sanctity of the court or tribunal orders, I would agree with the counsel for the defendant that I am in the circumstances entitled to take judicial notice of the existence of the decisions in relation to which the pending order for the retrial was made.

Indeed, all such decisions involved the parties herein. In particular, the decision of the district tribunal in Application No. 104 of 2015 was between the defendant as the applicant and the plaintiff as the respondent in Application No. 104 of 2015. As already shown, it is based on a matter that originated from the decision of Bigwa Ward Tribunal which went all the way to the High Court in Misc Land Appeal No. 46 of 2016. Pursuant

to the decision by Hon. Maige J (as he then was) in the said Misc. Land Appeal No. 46 of 2016, the matter was remitted to the district tribunal for determination of Application No. 104 of 2015 involving revision of the decision and proceedings of Bigwa Ward Tribunal.

It was upon such determination by the district tribunal which was pursuant to the decision of this court (as per Maige J.) that the pending order for a retrial before Bigwa Ward Tribunal was made on 14/12/2020 by Hon. Khasim, Chairman. As such, the decision, restated the position which was made by the district tribunal way back on 11/8/2009 in a Land Appeal No. 89 of 2009 as shown herein above.

In view of the foregoing, I think the circumstances of the present matter are indeed at par with the circumstances pertaining to the case of **Karori Chogoro v Waithache Merengo** relied on by the counsel for the defendant. The argument by the counsel for the plaintiff that the case is distinguishable from the circumstances of the present suit because the present suit is in the High Court while in the cited case the fresh suit was entertained by the same district tribunal presided over by the same Chairman who ordered re-trial de novo in the first place, is without substance.

I say so because, what underlines the statement of principle emerging from the cited case is the existence of a pending order for a retrial before a ward tribunal which must be complied with, notwithstanding the amendment relinquishing the adjudicatory jurisdiction of the ward tribunal. Of significance to the principle also is the sanctity of pending orders of the court or tribunal which demand such orders to be mandatorily complied with.

As was in the case of **Karori Chogoro v Waithache Merengo**, it may in this case simply pertain to going to the Ward Tribunal of Bigwa for mediation, which could still be compliance. Once that has failed or cannot be achieved for one reason or the other, then with certificate issued by the ward tribunal, parties can still file their case in a district tribunal or a court having competent jurisdiction.

In the upshot of the above findings on the raised point of objection, I am of a settled conclusion that the suit is not competent before the court given the pending order for retrial that is in existence as explained above. The suit is thus struck out with costs, as I am convinced that such outcome is in the circumstances the most appropriate than otherwise.

It is so ordered.

Dated at Dar es Salaam this 15th day of June 2022.


B. S. Masoud
Judge



