IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 304 OF 2021

(Arising from the judgment of the District Land and Housing Tribunal for Kibaha at Kibaha in Land Application No. 63 of 2011 Hon. J. M. Bigambo-Chairperson)

MWANAISHA KIDODI.....APPELLANT

VERSUS

YAHAYA ABDALLAH SALEHE.....1ST RESPONDENT

NASSOR ABDALLAH SALEH & YAHYA ABDALLAH SALEH (the administrators of the estate of the late

ABDALLAH SALEH ABOUD..... 2ND RESPONDENT

Date of last order: 27/6/2022

Date of Judgment: 21/7/2022

JUDGMENT

A. MSAFIRI, J.

For the past **twenty four (24) years,** parties to the present appeal have been in courts over a dispute of land on Plot No. 39 situated at Old Town Bagamoyo (disputed premises). This is the second appeal lodged before this Court by the parties over the disputed premises. The dispute begun by Civil Case No. 36 of 1998 which was instituted at Mwambao Primary Court (the Primary Court) by the 2nd respondent herein against the

appellant in which the 2nd respondent was claiming to be a lawful owner of the disputed premises. The matter proceeded *ex parte* against the appellant and at the end, the 2nd respondent was declared a lawful owner of the disputed premises. The appellant being aggrieved with the said decision, she lodged appeal No. 39 of 1998 at Bagamoyo District Court (the District Court). After hearing the parties the District Court dismissed the said appeal on 3/12/1998.

That was not the end. The appellant instituted Civil Case No. 13 of 2001 at the District Court, against both respondents. The appellant was claiming to be declared the lawful owner of the disputed premises. In the judgment delivered on 30/8/2005, the District Court declared the appellant as a lawful owner of the disputed premises and the respondents were ordered not only to vacate the disputed premises but also to pay general damages at the tune of Tsh 6,000,000/=.

The respondents were aggrieved with the judgment of the District Court declaring the appellant the lawful owner of the disputed premises hence they lodged Civil Appeal No. 233 of 2005 before the High Court. After hearing the parties this Court (Hon. Nyerere J, as she then was),

quashed and set aside the judgment of the District Court for want of jurisdiction. That was on 20/8/2010.

On 16th June 2011, the appellant lodged Application No. 63 of 2011 before the District Land and Housing Tribunal for Kibaha at Kibaha (the DLHT) claiming for reliefs *inter alia* she be declared a lawful owner of the disputed premises. The matter was heard but at the end, the DLHT struck out the said application for being *res judicata.* The reason advanced by the DLHT was that the matter had already been determined in Civil Case No. 36 of 1998 before the Primary Court. The DLHT stated further that if the appellant was still interested to claim the disputed premises she has to challenge the decision in Civil Case No. 36 of 1998.

The appellant was aggrieved by the decision of the DLHT hence she lodged the present appeal after having obtained leave of this Court to lodge the appeal out of time. The appellant has raised four grounds of appeal in her petition of appeal as follows;

1. That, the trial tribunal erred in law and facts by disregarding the watertight evidence of the Appellant

which no doubt shows the appellant is a lawful owner of the disputed land.

2. *That, the trial tribunal erred in law when it hold this matter res judicata while there is an order for retrial issued by the High Court of Tanzania at Dar es Salaam in Civil Appeal No. 233 of 2005, in which the court ordered this dispute to be tried de-novo in a competent court.*
3. *That, the judgment and decision of the trial tribunal in Application No. 63 of 2011 is tainted with illegalities and incurable irregularities apparent on face of the records.*
4. *That, the illegalities and irregularities in Application No. 63 of 2011 was much contributed by respondents and/or their advocates' foul plays and unfair litigation practices in Civil Case No. 30 of 1998 before Bagamoyo Primary Court, Civil Case No. 13 of 2001 before Bagamoyo District Court and Civil Appeal No.*

233 of 2005 before the High Court of Tanzania at Dar es Salaam.

In her prayers the appellant prays the judgment of the DLHT to be "dismissed", similarly this court should invoke its powers under section 95 of the Civil Procedure Code [CAP 33 R.E 2019] to "dismiss" the judgment of the Primary Court in Civil Case No. 36 of 1998.

While filing their reply to the Memorandum of Appeal, the respondents also raised a preliminary point of objection to the effect that;

1. The Appeal is time barred and is brought without leave of the Court and hence it ought to be dismissed with costs.
2. That the appeal is untenable for want of decree in respect of Land Application No. 63 of 2011 at the District Land and Housing Tribunal, at Kibaha.

By leave of the Court, the preliminary objections and the appeal on merit were heard simultaneously by way of written submissions. At the hearing, the appellant was represented by Mr. Said Seif learned advocate whereas the respondents appeared in person, they had no legal representation. All parties complied with the hearing schedule.

The determination of the preliminary objections need not take much time of the Court. I say so because the records are clear that the appellant sought and was granted leave of this Court to lodge the appeal out of time. This was through Misc. Land Case Application No. 172 of 2021, whereby Hon. Mansoor, J on a ruling dated 13/12/2021, granted extension of time to the appellant and ordered the intended appeal to be filed within 45 days. The present appeal was filed on 28/12/2021 which was within the prescribed time. The first preliminary objection is overruled.

On the second preliminary objection, that the decree of Land Application No. 63 of 2011 at the DLHT Kibaha was not attached, the provisions of section 41 of the Land Disputes Act are not couched in mandatory terms in regard to the requirement of attachment of the decree of the impugned judgment. In addition, the omission is not fatal and can be cured under the principle of overriding objective which I hereby invoke and overrule the second preliminary objection.

Having dispensed with the preliminary objections, the appeal proceeded on merit. However, I wish to address one important legal aspect before going to the appeal itself. As clearly seen on the judgment of DLHT, Application No. 63 of 2011 the subject of this appeal, was struck out for Adle.

being *res judicata* and the appellant was therefore advised if she still has interest over the disputed premises she should challenge the decision of Civil Case No. 36 of 1998 of the Primary Court.

It follows therefore that the matter before the DLHT was not determined to finality as it was struck out for what it appears to me to be an objection raised *suo motu* by the learned trial Chairperson in the course of composing the judgment. Hence because the said objection did not finalize the matter no appeal could lie against that decision. Where a matter has been struck out one cannot appeal against the said decision unlike where the matter has been dismissed. In the former, one can still re-institute the matter after having rectified the defects if any but in the latter where a matter is dismissed on an objection that finally disposes of the matter, an appeal can be preferred against the said decision. [See the decision of the Court of Appeal of Tanzania where the Court held so in **PAUL JOHN MHOZYA v REPUBLIC** Criminal Appeal No 225 of 2006 CAT at Dar es Salaam (unreported)].

It follows therefore that, as the matter before the DLHT was struck out, it can be said that the same was not finally determined, therefore, I

would have not hesitated to strike out this appeal but for the interests of justice I will not do so.

In this appeal after having carefully gone through the entire record I pose to raise an issue whether the matter before the DLHT was *res judicata* as held by the learned Chairperson. I have noted further that the point of *res judicata* was raised by the learned Chairperson in the course of composing the judgment. It is unfortunate that parties herein were not given a chance to address the Tribunal on whether the matter was *res judicata.*

It has been the stance of the Court of Appeal that courts should avoid raising issues *suo motu* in the course of composing judgments and proceed to determine them without affording the parties chance of being heard. In the present matter as parties were not afforded right to be heard on whether the matter before the DLHT was *res judicata,* the findings by the learned Chairperson cannot be allowed to stand.

Right to be heard is a fundamental principle in the administration of justice. This was underscored by the Court of Appeal of Tanzania in the

case of **Mbeya – Rukwa Auto Parts and Transport Ltd v Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 it was observed that;

> *"In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law and stipulates in part;*
>
> ***(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na haki ya kupewa nafasi kikamilifu."***

Hence basing on the clear facts that the parties were condemned unheard, in the exercise of powers of revision vested on this Court under Section 43 (1) (b) of the Land Disputes Courts Act [CAP 216 R.E 2019] (the Act), I hereby quash and set aside the decision of the DLHT because the decision was arrived at without giving parties right to address it on the issue of the matter being *res judicata.*

Now this brings me to the issue whether the matter before the DLHT was *res judicata.* The appellant has forcefully submitted that the matter

was not *res judicata* because in Civil Appeal No. 233 of 2005 referred above, this Court ordered a retrial before the competent court. I have keenly read the judgment but I could not see where this Court had ordered a retrial. Rather the Court stated that the remedy available to the appellant was to withdraw the matter which was still pending before the District Court after coming into force of the Act and file it before a competent Court vested with jurisdiction to adjudicate over land matters.

However on the other hand the appellant has availed this Court with previous decisions by the District Court over the matter at hand in which I came across the decision in Civil Appeal No. 39 of 1998 before the District Court, essentially the appellant was challenging the decision of the Primary Court. In the judgment by the District Court it is plainly stated that the proceedings and judgment of the Primary Court in Civil Case No. 36 of 1998 were null and void as per Section 18 of the Magistrates' Courts Act [CAP 11 R.E 2019]. Be it that way, the matter before the DLHT could not be *res judicata* by Civil Case No 36 of 1998 because that decision was annulled on appeal.

Hence that said and done and for the reasons stated above, I need not consider other grounds touching the evidence because the matter was not determined to finality.

The issue that follows is what the way forward is. I hereby set aside the judgment of the DLHT, as the matter was not determined to finality, I hereby remit the record to the DLHT with direction that a fresh judgment be composed basing on the evidence on record. Taking into account this matter has been pending before the DLHT since 2011 I direct that the same be given a priority. I will make no order as to costs.

Order accordingly.

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A. MSAFIRI,

JUDGE

21/7/2022