IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 386 OF 2023

(Arising from the District Land and Housing Tribunal
for Bagamoyo in Application No. 65/2021)

FRANK JOACHIM MTUI.....APPELLANT

VERSUS

JOYCE NTANDU.....RESPONDENT

JUDGMENT

6th to 14th November, 2023

E.B. LUVANDA, J

The Appellant named above is unhappy with the decision of the trial Tribunal which dismissed his application (suit) instead of striking out and disallowed his prayer to amend the application (plaint), for reasons raised by the Tribunal own accord, that the application (claim) offend the law for lack of a clear and sufficient description of the suit property.

In the petition of appeal, the Appellant grounded that: One, the Honourable Chairman erred in law and in fact for dismissing the applicant's application while it ought to be struck out; Two, the Honourable Chairman erred in law and in fact for failure to grant the applicant an order for amendment of the application

for reasons that to allow amendment was to pre empty the concern raised by the Tribunal.

Mr. Raymond Jimmy Uiso learned advocate for the Appellant, submitted that after noting the defect of lack of description of the suit property, it was no proper for the chairman to dismiss the application, argued the only remedy was to struck out the application so that the Applicant could have another chance to amend the application and refile it. He submitted that by dismissing the application, the Applicant (sic, Appellant) was denied the right to be heard as his application was not heard on merit. He cited the case of **Fereji Said Fereji vs. Jaluma General Supplies Limited,** Land Case No. 81/2020 Land Division Dar es Salaam; **Yahaya Khamis vs. Hamida Haji Ido & Two Others,** Civil Appeal No. 225/2018 CAT.

Ground number two, the learned Counsel for the Appellant submitted that it was an error for the denial by the Tribunal to allow amendment of the application for reasons that by doing so was to pre empt the concern raised by the tribunal, arguing that by denying the Applicant (sic, Appellant) right to amend the application is denial of the Applicant's (sic, Appellant's) right to be heard.

In reply, Mr. Habraham J. Shamumoyo learned Advocate for the Respondent submitted that the decision was based on the fact that the Appellant advocate

had already started presenting evidence from witnesses. He distinguished the cited cases for reasons that were based on the technical aspect and therefore in applicable.

For ground number two, the learned Counsel submitted that allowing amendment could be a fishing expedition, for reason that the sale agreement do not identify the boundaries of the land in dispute, argued could not only pre empt the concern raised by the Tribunal but was prejudicial to the Respondent.

On rejoinder, the learned Counsel for Appellant submitted that the Tribunal dismissed the application basing on technical issues as the application was not heard on merit.

It is common ground that lack of clear and sufficient description of the suit property in the plaint or application for this matter, merely renders the suit or application incompetent, for which the only available and appropriate remedy is to struck out the offending pleading or application. Had it be the omission revealed at the admission stage, the proper cause could be to reject the plaint or application for the anomaly to be rectified.

Therefore, it was a material error for the Tribunal to dismiss the application for ground that it does not disclose clear and sufficient description of the suit property.

Order VI rule 16, Civil Procedure Code, Cap 33 R.E. 2019, with marginal note striking our pleadings, provide, I quote,

> *"The court may, at any stage of proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which tend to prejudice, embarrass or delay the fair trial of the suit"*

Therefore the grounds by the Tribunal that failure to provide description of the suit property could render execution of decree to be difficult in future, invariably fall under the ambit of the category of pleadings which are prejudicial, which the appropriate remedy was to struck out. I other words by dismissing the application, it means the Appellant were disabled and precluded from presenting a fresh plaint or application in respect of the same cause of action, in that way the order for dismissal was detrimental to the Appellant.

May be there is a confusion of wordings between wordings in usual practice or English legal terms and Swahili version. In **English – Swahili Dictionary,** 3rd Edition TUKI, at page 236 define a phrase dismissal (in legal term) to mean *"futa" tupilia mbali".*

At page 855, TUKI (supra) define the word strike (off/out) to mean *"ondoa"* Therefore, the learned Chairman by making a verdict that *"madai*

ya mdai hayana mashiko na yanatupiliwa mbali" infact had the effect of dismissing the Appellant's suit. Therefore a proper phrase ought to be "yanaondoshwa" which mean to strike out. To my view, ondoa or ondoshwa is analogous when someone make a withdrawal of his/her suit or claim, where is not precluded to refile if was embedded with leave for refiling. Unlike dismissal which cannot termination or bringing something to an end without a recourse for continuation **Black's Law Dictionary,** 9th Edition, at page 537, define dismissal to mean:

> *"Termination of an action or claim without further hearing, especially before the trial of the issues involved"*

For ground number two. It is true that the law allow amendment of pleadings at any stage of the proceedings, see Order VI rule 17 Cap 33 (supra). Herein, apart from a fact that a prayer for amendment was staged to circumvent the concern raised by the Tribunal, but there was another serious question as to the nature and scope of the intended amendment. For appreciation, I reproduce what the learned Counsel for Appellant had submitted,

> *"Wakili Raymond kwa kuwa sikujua na mipaka ya eneo la mgogoro halijaainishwa naomba baraza hili linipe ruhusa ya kupima ukubwa wa eneo na mipaka yake na kumekisisha maombi*

hayo na ushahidi huo ulioletwa na mashahidi na kuomba ubaki ili baadae aendelee na ushahidi wake baada ya marekebisho".

To my view the extent, scope and modality of the intended amendment was prejudicial, because was geared to rebuild up a case for the Appellant after he had already testified. In fact the extent of amendment was meant or entail overhauling the application. Therefore this ground is without merit, it is dismissed.

I therefore, alter the verdict of Tribunal dismissing the application and substitute it with the verdict of striking out the same.

The appeal is partly allowed. No order for costs.

E. B. LUVANDA

JUDGE

14/11/2023

Judgment delivered through virtual court neither attended by Mr. Christopher Sai Mbuya learned Counsel for Appellant nor Mr. Habraham J. Shamumoyo learned Counsel for Respondent.

E. B. LUVANDA

JUDGE

14/11/2023