THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 63 OF 2022
(From the District Land and Housing Tribunal for Mbeya at Mbeya (Hon. T. Munzerere, Chairman) in Land Application No. 319 of 2018.)

GEORGE NOAH MBOMA.....APPLICANT

VERSUS

EMMANUEL NOAH MBOMA (Administrator of the Estate of the Late **RAHELI LUENDE MWAWIJI**).....**1ST RESPONDENT**
ESTONI SINDWANA.....**2ND RESPONDENT**
INKUBU MWAMPYATE.....**3RD RESPONDENT**

JUDGEMENT

Date of Last Order: 22/09/2022
Date of Ruling : 22/12/2022

MONGELLA, J.

The matter at hand concerns a farm located at Nsongole Relini area in Mwashi village, Mbeya Rural District. The applicant instituted a suit against the respondents claiming the farm in question. He claimed to be the rightful owner of the suit farm by virtue of gift from his late parents. He sued the respondents for invading the farm in 2018. In the end, the Tribunal was of the finding that the farm belonged to the late Raheli Luende Mwawiji, who was the biological mother of the applicant and the 1st respondent. It therefore ruled that both, the appellant and the 1st

respondent had equal share in the farm that belonged to their mother. The Tribunal in essence took into consideration the decision of the primary court in Probate Cause No. 42 of 2018, which decided that the suit land be divided between the appellant and the 1st respondent equally. It also took into consideration the fact that the applicant appealed to the district court against the decision, but the appeal was dismissed and he never appealed further to the High Court. The Tribunal decision aggrieved the appellant, hence the appeal at hand on eleven grounds being:

1. *That, the learned trial Chairman erred both in law and fact by entertaining and determining the matter by allowing the 1st respondent herein to defend in the case while in the joint written statement of defence he was not among of the respondent who was filed the difence.* (sic)

2. *That, the learned trial Chairman erred both in law and fact by entertaining and determining the matter before him in favour of the 1st respondent without taking into account the issue of time limit on land matters as the assessors were raised.* (sic)

3. *That, the learned trial Chairman erred both in law and fact by entertaining and determining the matter before him without entertaining the exhibit "P1" which was not being disputed by the respondent in their defence.* (sic)

4. *That, the learned trial Chairman erred both in law and fact by entertaining and determining the matter before him without taking into account the weight of the assessors opinion.* (sic)

5. *That, the learned trial Chairman misdirected himself by deciding the suit failing to take into account that the primary court and District Court had no jurisdiction to entertain the land matters/land case.* (sic)

6. *That, the learned trial chairman misdirected himself by deciding the suit failing to take into account that the weight of evidence which was being given by the applicant who is the appellant herein.* (sic)

7. *That, the learned trial chairman misdirected himself by deciding the suit failing to take into account that the land in dispute was allocated by appellant's parents since 1983 to the date of the application.* (sic)

8. *That, the learned trial chairman misdirected himself by deciding the suit failing to take into account that the issue of probate and ownership of land was different issues in law and its jurisdiction.* (sic)

9. *Regardless of sending the preliminary objection against the 1st respondent the Tribunal Chairman was not in the position to register it but he was forced to continue with the hearing of the application even if the 1st respondent did not file the written statement of difence.* (sic)

10. T

hat the learned trial chairman was turned himself as a witness instead of playing its role as an umpire in the judgment in contradiction with the proceedings hence he caused improper evaluation of evidence. (sic)

11. T

hat, the learned trial chairman misdirected himself by deciding the suit failing to take into account that there were two pieces of land in dispute but he decided only on one piece of land.

The appeal was argued by written submissions filed in Court in adherence to the scheduled orders by the Court. For reasons to unfold in due course, I shall entertain only the 1st ground of appeal.

Under the 1st ground, the appellant faults the Tribunal for allowing the 1st respondent to adduce evidence in defence and considering the defence while he defaulted in filing his written statement of defence. His counsel from Right Choice Attorneys and Company, who found it unnecessary to state his name, argued that the Tribunal erroneously remarked that the respondents filed a joint written statement of defence (WSD) while in reality the 1st respondent never featured in the WSD filed by the 2nd and 3rd respondents. He thus prayed for the Court to expunge the 1st respondent's defence from the record.

All the respondents replied jointly. They disputed the claim saying that they filed a joint WSD and served the same to the appellant in person.

They found that the appellant was to blame if he did not avail the copy to his advocate. They challenged the appellant on his argument that if they really filed a joint WSD they should provide the copy as proof. On this, they argued that that would be contrary to the legal requirement as the law prohibits attachment of exhibits in written submissions.

Having considered the arguments by the parties in this ground of appeal, I am of the following observation. The record reveals that there was an amendment of pleading, to wit, the applicant's Application, which was filed on 29.03.2019. This is in terms of the documents filed in the Tribunal file and also argued by the appellant's counsel. The law is trite that after amendment of plaint (Application in case of matters filed in the Tribunal) all pleadings filed prior to the amendment are rendered redundant. This was held in the case of ***Ashraf Akber Khan vs. Ravji Govind Varsan***, Civil Appeal No. 5 of 2017 (CAT at Arusha, found at Tanzlii). In this case, the Court of Appeal revisited its previous decision in the case of ***Tanga Hardware and Autopart Ltd. & 6 Others vs. CRDB Bank Ltd.***, Civil Application No. 144 of 2005 (CAT, unreported) in which it held:

> "... once pleadings are amended, that which stood before amendment is no longer material before the court."

From the above authority, the respondents were to file a WSD to the amended application. It is this WSD that the appellant is referring to. The respondents argued that the same was filed and served to the appellant accordingly. I, in fact agree with the respondents' point that exhibits cannot be attached on written submissions as proof in evidence. This is because for exhibits to be considered as proof in evidence, they must be

tendered and cleared for admission by a witness and read out after being admitted. This can certainly not be done in written submissions on appeal. See: ***Rashidi Sarufu vs. The Republic***, Criminal Appeal No. 467 of 2019 (CAT at Iringa, found at Tanzlii).

In the circumstances, I had to thoroughly go through the Tribunal records to ascertain if the record contained the joint WSD as claimed by the respondents. I however, did not find any joint WSD. The record contains a WSD by the 1st respondent prior to the purported amendment to the Application. However, the record also shows that there was no any prayer and or leave granted to the appellant to file the amended WSD.

The record of 10.12.2018, as seen at page 1 of the proceedings, shows that the Tribunal ordered for summons to be served upon payment of Tribunal fees by the applicant. The matter was then fixed for mention on 20.12.2018. On 20.12.2018 the proceedings show that the appellant's counsel, Mr. Shaba, informed the Tribunal that the respondent was not served. I take it that he meant the 1st respondent as the initial application had only one respondent, that is, the 1st respondent herein. The Tribunal ordered for the respondent to be served and scheduled the matter for mention on 17.01.2019. On 17.01.2019 both parties were present and the Tribunal scheduled the matter for hearing on 19.02.2019.

On 19.02.2019 both parties were again present and the appellant prayed for adjournment on reason that his advocate was sick. The hearing was then scheduled to come on 10.03.2019. On this date, as seen at page 5 of the typed proceedings, the appellant's counsel informed the Tribunal that

they have not yet been served with the WSD and counter affidavit. The Tribunal remarked that there was no proof of service. It thus ordered for the counter affidavit and WSD to be filed on 14.02.2019. It further scheduled the matter for mention on 04.04.2019. On this date, both parties were present and the Tribunal scheduled the matter for hearing on 20.05.2019. On this date, the appellant's counsel appears to have prayed for a date of hearing of a preliminary objection. So it supposes that a preliminary objection was filed, but the record does not reveal who filed the notice of preliminary objection and against which matter as there was an application for temporary injunction and the main suit before the Tribunal.

The Tribunal set the date for hearing of the preliminary objection on 05.06.2019. The record however, does not show what transpired there between as the matter appears to have come for hearing on 10.07.2019. This is seen at page 7 of the typed proceedings. On this date the record shows that the appellant and the 1st respondent were present. The 2nd and 3rd respondents were absent. The appellant informed the Tribunal that his advocate was attending a matter in the High Court and thus prayed for adjournment. The hearing of the matter was therefore scheduled to come on 07.08.2019. On this date, the appellant's advocate informed the Tribunal that the matter was for hearing of the preliminary objection filed by the 2nd and 3rd respondents. He however appears to have also raised a preliminary objection orally challenging the 2nd and 3rd respondents' WSD for being filed out of time and the power of attorney filed by the 3rd respondent to represent the 2nd respondent who never entered appearance.

It appears that the Tribunal entertained the appellant's counsel's preliminary objection as the arguments submitted by him and by the 3rd respondent in reply centred on the issues related to filing the WSD out of time and on the validity of the power of attorney. The Tribunal then fixed the matter for ruling on 05.09.2019. On this date, the matter was re-scheduled for ruling on 18.09.2019. On this date, it is not shown whether the ruling was delivered or not. The Tribunal appears to have only scheduled the matter for hearing on 06.07.2019. I suppose the Tribunal incorrectly noted the date as the month of July had already passed by this date. I also suppose that the Tribunal meant to schedule for hearing of the main case on 06.11.2019 because indeed on this date, that is, on 06.11.2019, the hearing of the main case took off. The hearing appears to have ended on 11.12.2019 when the Tribunal Chairman ordered for filing of the assessors' opinion and for the same to be read out to the parties on 27.01.2020. On this date the assessors' opinion was not ready and the Tribunal re-scheduled the matter for opinion of assessors on 04.02.2020. The opinions were read on this date and the judgement was scheduled to be delivered on 11.03.2020. The judgement was however, delivered on 31.03.2020.

I found it pertinent to give an account of what actually transpired in the Tribunal as it appears in the Tribunal proceedings so as to ascertain the appellant's contentions. The appellant's counsel complained that the 1st respondent never filed his WSD to the amended Application. However, as I pointed out earlier, the purported amendment appears to have been filed without leave of the Tribunal. There is nowhere showing that the appellant made any prayer to amend the pleading and whether the

prayer was granted. In my considered view, this is an incurable defect as no amendment to the already filed pleadings can be done without leave of the court. See: ***Jovent Clavery Rushaka & Devotha Yipyana Mponzi vs. Bibiana Chacha***, Civil Appeal No. 236 of 2020 (CAT at DSM, found at Tanzlii).

The appellant's counsel further contended that he raised an objection to 1st respondent defending the case without filing his WSD. His contention is however not supported by the record. There is nowhere shown that he raised such objection. The objection he raised, as revealed on record, is against the 2nd and 3rd respondents' WSD for being filed out of time and against the power of attorney to the 3rd respondent to represent the 2nd respondent for being invalid.

Further, considering the proceedings as a whole, it cannot be ascertained as to which Application the matter proceeded on. It is not clear as to whether the matter proceeded on the initially filed Application or on the Amended Application. As such I cannot succumb to the appellant's claim that the 1st respondent never filed his WSD to the amended application as the same appears to have been filed without leave of the Tribunal. The law is trite that the record must speak for itself. See: ***Uniliver Tea Tanzania Limited vs. Godfrey Oyema***, Civil Appeal No. 416 of 2020 (CAT at Iringa, found at Tanzlii); and ***Gabriel Boniface Nkakatisi vs. The Board of Trustees of the National Social Security Fund (NSSF)***, Civil Appeal No. 237 of 2021 (CAT at Dodoma, found at Tanzlii).

Considering what transpired in the Tribunal, I find that a serious flaw on the part of the Tribunal was occasioned. The right of both parties to a fair trial was prejudiced. In the premises, I nullify the Tribunal proceedings and judgment and order the matter to be tried afresh from the stage the initial application was filed. The appellant is at liberty to file an amended application as he deems fit upon leave of the Tribunal whereby the respondents shall be accorded the right to file their defence. Considering the fact that the irregularities were occasioned partly by the Tribunal, I make no orders for costs.

Dated at Mbeya on this 22nd day of December 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 22nd day of December 2022 in the presence of the appellant and the 1st respondent.

L. M. MONGELLA

JUDGE