IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 121 OF 2004

(Appeal from Civil Case No. 89 of 2003 Temeke District Court)

ANDERSON CHALE.....APPELLANT

VERSUS

ABUBAKARI SAKAPARA.....RESPONDENT

JUDGMENT

Date of Last Order: 6/11/2007
Date of Judgment: 7/11/2007

Mlay, J.

The Appellant being aggrieved by a default judgment entered against him by the District Court of Temeke, has appealed to this court, on the following grounds:-

1. The trial court grossly erred in law in entertaining a civil matter involving land disputes while jurisdiction there to has been expressly excluding from that court by virtue of the provisions of the Land Disputes Courts Act, 2002 No. 2 of 2002.

2. That the trial court grossly erred in law and fact in entering judgment against the Appellant in person while whatever was alleged against him was done in performance of his official duties as Diwani (Councilors) of Mbagala Kuu, Mtoni Kijichi Ward.

At the hearing of the appeal, the Appellant was represented by Mr. Msafiri advocate, while Mr. Ntonge who also represented the Respondent as the plaintiff in the trial court, appeared for the Respondent.

The counsels were allowed to argue the appeal by filing written submissions.

On the first ground of appeal, Mr. Msafiri submitted that the Respondent's suit was filed in the District Court on 7/12/2003 alleging trespass and damage to the Respondent's property, namely a house along a road at Mtoni Kijichi. He further submitted that by that date, the District Court of Temeke like all other district courts in Tanzania Mainland had ceased to have civil jurisdiction on matters relating to or

concerning land upon the Land Disputes Courts Act, 2002 [Cap 216 R.E 2002] coming into force. He contended that the Land Disputes Courts Act, 2002 came in to force on 1st October, 2003 by GN No. 225 (223) of 2003. Mr. Msafiri quoted section 4 (1) of the said Act, which provides as follows:-

> *"4-1 Unless otherwise provided by the Land Act, no magistrates' court established by the Magistrates' Courts Act shall have jurisdiction in any matter under the Land Act and the Village Land Act.*
>
> *(2) Magistrates' courts under the Magistrates' Courts Act shall have and exercise jurisdiction in all proceedings of a criminal nature under the Land Act and the Village Land Act".*

Mr. Msafiri contended that the Respondent's suit was a proceeding of a civil nature whose jurisdiction has been excluded from the Magistrates' court such as the District Court of Temeke and submitted that the District court wrongly

admitted the Respondent's plaint and grossly erred in law in entertaining the suit while that court has no jurisdiction over land disputes. He prayed that the first ground be upheld and the default judgement be set aside and the proceedings quashed.

On the second ground, Mr. Msafiri submitted that the Respondent was aware that the Appellant was a Diwani (councilor) of Mbagala Kuu Mtoni Kijichi Ward as stated in paragraph 2 of the plaint. He quoted paragraph 2 of the said plaint where it is avared:-

> *2.THAT, the first defendant is a natural person, working for gain in Dar es Salaam as Diwani of Mbagala Kuu Mtoni Kijichi and his address for services for the purpose of the suit is Mbagala Kuu Ward Office Mbagala Kuu, Temeke, Dar es Salaa".*

Mr. Msafiri invited this court to take judicial notice that Udiwani (Councillorship) is a public office and as such a

constituent part of the local government authority, in this case the urban authority of Temeke Municipality. Mr. Msafiri refered to section 3 (1) of the local Government (Urban Authorities) Act, Cap 188 RE 2000, which defines an urban authority to mean "*a town council, a Municipal council or a City Council*" and also to section 14 (1) of the Act, which provides that an urban authority shall be a body corporate, capable of suing and being sued. Mr. Msafiri further quoted the provision of sub section (2) (a) of section 24 of the same Act, which provides that, "*Every Municipal council shall consist of one member elected from each ward within the Municipality*". He submitted that the Appellant is the "***one member elected from each of the wards within the Municipality***". He contended that the Appellant was acting in his capacity as a Councilor (Diwani) and therefore it was lightly irregular for the Respondent to sue the Appellant in his name and personal capacity. He further submitted that the office of the Councilor is part and parcel and component of the urban authority which is a body corporate capable of suing and being sued and the councilor cannot be sued or sue as he is not a body

corporate. He contended that the respondent ought to have sued Temeke Municipal Council and if there was legal justification and necessity to include his Councilor, then the Ward Councilor was the one to be included as an office, as opposed to the natural person holding that office.

For the reasons given in the submissions, Mr. Msafiri prayed that the appeal be allowed with costs.

Mr. Ntonge advocate for the Respondent contended that judgment was entered under Order VIII Rule 14(1) of the Civil Procedure Code 1966 after the appellants failed to file his defence in court. He submitted that the said order justifies to enter default judgment in case the defendant fails to file a written Statement of defence.

On the first ground of appeal, Mr. Ntonge submitted that the District Court had jurisdiction to try the matter, as the respondent was claiming compensations for damage/loss caused by the appellant due to unlawful act of trespassing into

the respondent's property and causing severe damage to development on the said property. He argued that the claim against the appellant was based on tort of trespass and not under land law as seems to be suggested by the Appellant. He argued without prejudice to the earlier submission, that even if the respondents claim was based on the land law as suggested by the Appellant, a matter which is disputed, the Respondent was still justified to file the suit in the District Court because the District Land and Housing Tribunals had not yet been constituted. He cited the case of **MALI MAREALLE UN IBRAHIM KATEMBO, CIVIL REVISION No. 122 of 2001** (Unreported) and quoted Kimaro, J (as she then was) as having stated as follows;

> *"I will allow the application, the District Court has jurisdiction, its jurisdiction will cease once the institution .conferred with exclusive jurisdiction on land matters became operative"*

Mr. Ntonge argued that based on this decision, the District court was correct in entertaining the suit.

On the second ground of appeal Mr. Ntonge argued that it does not hold water. He contended that the appellant was properly sued in his personal capacity, because when he committed the acts he was not performing his duty as Diwani (Councilor) of Mbagala Kuu Mtoni Kijichi Ward. He further argued that even if he was, it was for the appellant to establish this fact in court and if possible, to apply for a third party notice against his employer who assigned him to commit such for tortous acts.

The appellants advocate filed a rejoinder to Mr. Ntonges submission. Mr. Msafiri reiterated his submission that the district court lacked jurisdiction to entertain the suit. However, he also argued that it was improper for the trial district court to enter a default judgment pursuant to the provisions of Order VIII Rule 14 (1) of the Civil Procedure Code 1966 while the summons that was issued, was a

summons to file a written statement of Defence. He submitted that the Court could only enter judgment if the summons issued was a summons to appear or a counter-claim. He cited the case of Consolidated. Holding Corporation vs SUDI SAIF Works Ltd Mis. Civil Appeal No. 3 of 2001 (High court Mtwara) (Unreported) He argued that failure to file a defence cannot ipso **facto** entitle the Respondent/Plaintiff to get a default judgment, unless the summons issued was summons to appear as opposed to summons to file a defence. He submitted that the Respondent was required as a matter of law and procedure, to proceed under the provisions of Rule 14 (2) of order VIII of the Civil Procedure Code by proving his case exparte. On the without prejudice submission that the district court could entertain the suit by reason of the decision in the case of MALI MAREALLE VS IBRAHIM KAJEMBO, Mr. Msafiri submitted that the decision was made ***per incurium***_and in contravention of the Land Disputes Act 2002 which epressly excludes the jurisdiction of ordinary courts. He contended that the Land disputes Court. Act did not make any distinction between tortuous and now-tortuous claims but that the Act

merely prescribes that all disputes concerning or relating land are excluded. He submitted that an action for trespass on land is nothing but a claim concerning or relating to land. On the second ground of appeal he submitted that if the Appellant was not acting in his official capacity as a Councilor of Mbagala Kuu, Mtoni Kijichi Ward, it was naïve for the Respondent/Plaintiff to state in the plaint that the Appellant was a Diwani (Councilor) and also to join Temeke Municipal Council in the suit. He argued that by inference there is no dispute that the Appellant was acting as such and therefore it was improper for him to be sued in his personal capacity name (sic).

I will start with the second ground of appeal, which alleges that ***"the trial court grossly erred in law and fact in entering judgement against the Appellant in person while whatever was alleged against him was done in performance of his of social duties as Diwani (Councilor) of Mbagala Kuu, Mtoni Kijichi ward."*** The appellant ANDERSON CHALE was the 1st Defendant named in the plaint

filed by the Respondent/Plaintiff, in the District Court of Temeke. In paragraph 2 of the plaint, as quoted in the appellants' submissions, it is avared that "***the first defendant is a natural person, working for gain in Dar es Salaam as Diwani of Mbagala Kuu Mtoni Kijichi Ward***". In paragraph 4 it is averred "*that the plaintiff claims from the defendants jointly and severally for compensation of Tsh 1,560,000.00 being specific damages and Tsh. 20,000.00 being general damages suffered by the plaintiff* ***for defendants act*** *of trespassing and damaged to the plaintiff's property*".

The second named defendant, is the Temeke Municipal Court. From what has been averred in the plaint, the respondent/plaintiffs claim is against the defendants "***jointly and severally*** for their act of "*trespassing and damaged*" (sic) to the plaintiffs property. The Respondent did not claim or avare that the trespass or damage was committed by the Respondent in his capacity as a Ward Councilor. In paragraph 2 of the plaint, the avarement is that ***"the 1st defendant is a natural person, working for gain in Dar es salaam as***

Diwani of Mbagala Kuu Mtoni.. It is only in the written submissions that the appellant through his advocate, has suggested that he committed the acts in his capacity as a councilor. Assuming that the Appellant had acted as a councilor as he is suggesting, would it be wrong to sue him in his personal capacity? It has been argued on behalf of the appellant that as a Councilor he is part and parcel of the urban authority and as such he cannot be sued in his personal capacity. Reference and reliance was made to section 24 (i) (a) of Cap 288 RE 2002, on the composition of an Urban Council.

Section 24 deals with the membership of urban authorities but not with the liability of members of an urban authority. The relevant provision on liability of members of the urban authority are contained in section 65 of Cap 288 R.E. 2002. Subsections (1) and (2) of section 65, provide as follows:

"65 – (1) without prejudice to the provisions of section 284A of the Penal

Code or the Public Officers (Recovery of Debt) Act, no act or thing done or omitted to be done by any member of an urban authority shall, ***if done or omitted bona fide*** *in the execution or purported execution his duties as* ***a member*** *or officer, servant or agent subject any such person to any action, liability or demand of any kind, subject to subsection (2).*

(2)Where in any proceeding a question arises respecting the bonafides of any act done in the purported pursuance of the functions of the urban authority, ***the burden of proving that the act in question was done bonafide shall he on the person alleging that it was so done"***

The import of subsection (1) of section 65 is that members of an urban authorities such as councilors, are only

protected from liability, for bonafide acts or omissions, in the execution or purported execution of their duties as such members. In other words members of an urban authority such as Councilor are liable for their acts or omissions which have not been done or omitted ***bonafide*** in the execution or purported execution of their duties as such members. Sub section (2) of that section places the burden of proof on the person alleging the act was done or omitted bonafide, in this case, on the appellant. In paragraph 8 of the plaint the Respondent/Plaintiff has avared as follows:

> *"THAT, according to the plaintiffs investigation, it was discovered that there was no any lawfully (sic) meeting of the Municipal, Ward or village which decided on the issue of trespassing and damage to the plaintiffs property....."*

By the avarement in paragraph 8 of the plaint, the Respondent is alleging that the trespass and damage was not on act or omission done **bona fide**, as their was no meeting which authorized the act. It was for the Appellant/Plaintiff to

show that the act or omission was bonafide and in the execution or purported execution of his duty as a councilor.

On the clear wording of section 65 (1) and (2) Cap 288 set out above, there is no doubt in my mind that the Appellant as a Councilor could properly be sued and was properly sued by the respondent in his name. It was for the Appellant to prove that he was acting bonafide in the execution or purported execution of his duties as a member of the urban authority, which he was unable to do as no written statement of defence was filed.

The second ground of appeal is therefore without merit and it is accordingly dismissed.

The first ground alleged lack of jurisdiction by Temeke District Court as the matter involves a land dispute. The appellants advocate referred us to section 4 (1) of the Land Disputes Courts Act, Cap. 216 R.E 2002. On the other side of the coin, the Respondent has forcefully argued that the suit is

based on the tort of trespass and alternatively, as the District Land Tribunal had not been institutionalized at the material time, the Respondent was right to institute his suit in the District Court of Temeke. The decision of Kimaro J (as she then was) in Civil Revision No. 127 of 2001, **MALI MAREALLE VS IBAHIM KAJEMBO, (supra)** was cited in support of this submission. On the other hand, the Appellant's advocate has submitted that this case was decided **per incuria.**

It is not seriously disputed that section 3 of the Land Disputes Court Act, Cap 216 R.E. 2002 and section 167 of the Land Act Cap 113 R.E. 2002, vest jurisdiction in disputes or complaints concerning land in the Village Land Council, the Ward Tribunal, the District Land and Housing Tribunal, the High Court (Land Division) and the Court of Appeal of Tanzania. It is not further in dispute that subsection 4 of the Land Disputes Courts Act, as quoted earlier on in the judgment, outs the jurisdiction of Magistrates Courts established by the Magistrates Courts Act, (Cap 11 R.E. 2002) in any matter under the Land Act [Cap 113 R.E. 2002] and the

Village Land Act. It is not further in dispute that the Land Act came into operation on 1st may 2001 (GN .No 485 of 2002) and that the Land Disputes Courts Act came into force on 1/10/2003 G.N 223 of 2003. When the Respondent filed the suit in Temeke District Court on 12/12/2003, The Land Courts Disputes Act, had already come into operation. By reason of section 54 of the same Act, for the ordinary courts and particularly the District Courts, only matters which were pending in the court and in the Housing Tribunals were saved, including powers to enforce decisions of those courts and tribunals. I have not seen the text of the ruling of Kimaro J is she then was, in the Civil Revision No. 127 of 2001, but if the decision was that after the commencement of the Land Disputes Court Act Cap 216 R.E. 2002, the ordinary court still had jurisdiction in land disputes because the court and tribunals envisaged to exercise jurisdiction had not been put in place, I would gladly feel free to depart from that decision. In my considered opinion from 1st October 2003 when Cap 216 R.E 2002 came into operation, the District Court of Temeke ceased to have jurisdiction in land disputes.

The question is whether the suit filed by the Respondent against the Appellant in the District Court of Temeke, is "**a dispute or complaint concerning land,**" within the meaning of section 3 (1) of Cap 216 or is "**any matter under the land Act**, within the meaning of section 4 of the same Act.

As avared in paragraph 4 of the plaint and argued by the Respondent, the Respondents claim is for **"defendants act of trespassing and damaged to the plaintiffs property**". Throughout the plaint the plaintiff has not used the word land, but only trespass and damage to property. The reliefs sought are specific and general damages as compensation for the alleged trespass and damage to property. It is however apparent from the letter attached to the plaint that the alleged trespass is to land and the damage to property, refers to the damage of the respondents house. The issue therefore is whether trespass to land and damage caused as the result or in the course of the trespass, makes such a dispute a matter under the Land Act or a "*dispute concerning land*".

IN WINFIELD AND JOLOWIC ON TORT

Thirteenth Edition [International Student Edition] at page 360, trespass to land is defined as follows:

> *"Trespass to land, like the tort of trespass to goods consists of interference with possession"*

At page 361 the Learned author states, *"..... It is not necessary that the plaintiff should have some lawful estate or interest in the land so that there is no doubt, for example, that a squatter occupying the land without any claim of right may have sufficient possession to bring trespass and, generally speeking a stranger who enters the land without the squatter's consent rely in his defence another persons superior right...."*.

From the about definition of the tort of trespass to land, with which I entirely agree, the tort is not on some lawful interest in land, other then possession. The Land Act on the other land, deals with rights and interests in land and the Land Disputes Settlements Act, deals with how disputes arising for the interest in land, will be settled and the

institutions having jurisdiction to settle them. There is nothing in the Land Act or in the Land Disputes Settlements Act, which ousts the jurisdiction of the ordinary courts in suits based on tort and in particular, the tort of trespass to land. I would therefore disagree with the appellant and his counsel that the District Court of Temeke lacked jurisdiction to entertain the suit based on trespass, by virtue of the Land Disputes Courts Act Cap 216 R.E. 2002.

An issue was raised by the Appellant's Counsel in his submission that default judgment was properly entered by the court against the Appellant under Order VIII Rule 14 (1) of the Civil Procedure Code, (Cap 23 R.E. 2002]. This matter had not been raised by the Appellant as a ground of appeal. In his rejoinder submission the Appellants counsel argued that the default judgment was improperly entered under Order VIII Rule 14(1) and that the Respondent should have proceeded under Order VIII Rule 14 (2) by exparte proof, because the summons issued were for filing a Written Statement of Defence. Since the matter has been raised and argued by both

parties to the appeal this court has the right and duty to resolve it.

The record of the proceedings show that when the suit came up for the first time on 17/12/2003 Hon B.R. Mutungi S.R.M made the following order:

> *"Order (1) Mention on 8th day of January 2004.*
>
> *(2) Parties to be notified to appear".*

On 8/1/2004 the matter came up before M. Chande DM and the proceedings are as follows:

> ***Mbamba*** *– the matter comes for mention the defendants were served.*
>
> ***Paulo – Mbamba:*** *We pray for 14 days to make a reply to the plaintiff*

On this day Mbamba is recoded to have held brief for Ntonge for the Plaintiff and Paulo Makani is recoded to

represent the "*respondent*" It is not known who the "*respondent*" was and the record did not show if there were two defendants. The District Magistrate then recorded the following order:

> *"It prayer granted to file WSD by 21/1/2004 and mention 31/1/2004 and leave to file reply if any".*

Instead of 31/1/2004 as ordered by the District Magistrate, the suit came up again before M. Chande DM on 31/1/2004. There is no record if any if the defendant was represented and the proceedings were or follows:

> ***"Mr. Ntonge** : I pray the matter be fixed on 20/2/2004 for Mention.*
>
> ***Court:** granted on 20/2/2004"*

There was no order made for notification or for summoning of any of the defendants. On 20/2/2004, the following proceedings took place.

"20/2/2004

Coram M. Chande – District Magistrate

***Plaintiff**: Ntonge for Plaintiff*

1st Defendant

***2nd Defendant:** Makani for*

***Mr. Ntonge** - since on 20/1/2004 the 1st defendant did not file the written Statement of defence and one month have passed therefore I pray for default judgment against the 1st defendant.*

***Order**- application granted this court enters a default (sic) Judgment against the 1st defendant"*

***Mr. Ntonge** – I pray to file a reply to the 2nd Defendant WSD by 3rd March and mention on 4thMarch.*

***Order** - application granted let the plaintiff file WSD by 3rd March and M. on 4th March".*

It is the default judgment entered on 20/2/2004 which is the subject of the appeal and of the issue argued by both counsels on whether the default judgment was properly entered or entered under the right provision.

It is clear from the order of the District Magistrate that the District Magistrate did not state under which provision of the law the default judgment was entered. Clearly, the provisions of Order VIII Rule 14 (1) was not mentioned. Secondly, there is no record whatsoever made on 30/1/2004 or on any previous occasion when the suit came up, that either a Summons to file a Written Statement of Defence was issued or served upon the Appellant/Defendant. The only record relating to any process to issue which includes the Appellant/1st Defendant, is the order made on 17/12/2003 to the effect that, ***"Parties to be Notified to appear"*** The Notification was parties to appear on 8/1/2004. On that day Mr. Mbamba held brief for Ntonge for the Plaintiff, and stated orally that "***the defendant were served***". There is no record in the court file of any notice to appear or summons directed

to any of the defendants and in particular to the 1st Defendant and more importantly, if the 1st Defendant had been served with a notice to appear, there was no proof of service. On that date Mr. Mbamba did not pray for default judgment to be entered against the 1st Defendant. Since there is no evidence to show that "***Summons to appear***" or ***"a summons to file a defence***" had been issued to the 1st Defendant/Appellant and also that the District Magistrate did not indicate that he acted under Order VIII Rule 1 (1) of the Civil Procedure Code Cap 33 R.E. 2002, there is no justification for the Respondent Counsels submission that default judgment was entered under Rule 14(1) of that Order. I agree with the Appellants Counsel that in the absence of any evidence that the Appellant/1st Defendant was served to appear or to file a defence and failed to present a written statement of Defence under Rule 14 subrule (1), the matter should have proceeded under Rule 14 (2) (b) of Order VIII, by Plaintiff applying to prove the case exparte. For this reason I agree with the Appellants Counsel that default judgment was entered in contravention of Order VIII Rule 14 (1) as the conditions in

Rule 1 of that Order VIII, had not been complied with. For this reason the appeal is allowed.

In the final analysis the 1st and 2nd ground of appeal have no merit and they are dismissed but since the default judgment was entered in contravention of the law, a point which was raised by the Respondent and argued by both parties in this appeal, the appeal is allowed and the proceedings and the default judgment entered on 20/2/2004, are set aside. Each party to bear own costs in the appeal and the record is remitted to the trial court for proceedings to commerce ***de nove*** before another Magistrate.

J.I. Mlay

JUDGE

Delivered in the presence of the Appellant in person and in the absence of the Respondents advocate being aware, this 7th day of November, 2007. Right of Appeal is explained.

J.I. Mlay

JUDGE

7/11/2007.