THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPEAL NO. 40 OF 2019.

(Arising from Land Appeal No. 53 of 2016, in the District Land and Housing Tribunal for Kyela, at Kyela, Originating from Land Case No. 4 of 2016, before the Bujonde Ward Tribunal).

AGAST GREEN MWAMANDA
(as Administrator of the Estate
of the late ABEL MWAMANDA .....APPELLANT.

VERSUS

JENA MARTIN.....RESPONDENT.

JUDGEMENT

04/06 & 27/08/2020.

UTAMWA, J.

In this second appeal, the appellant, one AGAST GREEN MWAMANDA challenges the judgment (impugned judgement) of the District Land and Housing Tribunal for Kyela, at Kyela (the DLHT) in Land Appeal No. 53 of 2016. The same originated in Land Case No. 4 of 2016 before the Ward Tribunal of Bujonde (the Ward Tribunal). The appeal is based on the following three grounds.

1. That, the DLHT erred in holding that the respondent's father was the lawful owner of the disputed land and the same originally did not belong to the appellant's father.
2. That, the DLHT failed to evaluate the evidence adduced before the tribunal.
3. That, the DLHT erred in law and facts to uphold the judgment delivered by the trial tribunal without identifying the location and proper demarcations of the disputed land.

Owing to these grounds of appeal, the appellant is seeking the following reliefs: the appeal be allowed, the respondent to pay the costs of the suit both in the trial and the appellate court and the decision of the trial tribunal be quashed and set aside. The respondent resisted the appeal.

The appeal was heard by way of written submissions. The appellant was represented by Mr. Jackson Ngonyani, learned counsel while the respondent enjoyed the services of Mr. James Kyando, learned advocate.

In deciding this appeal, I will firstly consider and determine the third ground of appeal. In case it will be overruled, I will test the rest of the grounds. This adjudication plan is based on the fact that, the third ground is, in law, capable of disposing of the entire appeal if it will be upheld. It also touches the jurisdiction of the trial tribunal as it will be demonstrated later.

Arguing in support of the third ground of appeal, the appellant's counsel briefly argued that, it is the law and practice that, in deciding who is a lawful owner of a disputed land, the trial tribunal must satisfy itself,

among other things, that the disputed land had been properly identified. However, the trial tribunal in the matter at hand delivered its judgment in favour of the respondent without properly identifying the disputed land in its judgment.

On his replying submissions, the respondent's counsel contended that, in law, the appellant could not raise the third ground of appeal in this second appeal. This is because, it was not raised before the first appellate court. He supported this position of the law by citing the decision of the Court of Appeal of Tanzania (CAT) in the case of **Simon Godson Macha v. Mary Kimambo, Civil Appeal No. 393 of 2019, CAT, at Tanga** (unreported) which followed its previous decision in **Juma Manjano v. Republic, Criminal Appeal No. 211 of 2009.** He thus, urged this court to strike out the third ground of appeal.

I have considered the arguments by both sides, the record and the law. The issues related to the third ground of appeal are three as follows:

i. *Whether or not the appellant was entitled in law to raise the third ground of appeal in this second appeal.*
ii. *If the answer for the first issue will be affirmative, then whether or not the location of the disputed land was identified through proper demarcations.*
iii. *In case the answer to the second issue will be negative, then what is the legal effect of the omission?*

Regarding the first issue, I am of the view that, the contention by the respondent's counsel that a party is not entitled to raise a fresh ground of

appeal in a second appeal is indeed, a general rule. However, there is an exception to this general rule. The exception applies where the fresh ground of appeal is based on a legal issue, especially on jurisdiction. It is the law that, an issue of this nature can be raised at any stage of the proceedings even at the second appeal; see the decision by the CAT in the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation, CAT, Mza Civil Applicatin No. 3 of 2004, at Mwanza** (Unreported). The rationale of this exception of the rule is that, it is a firm and trite legal stance that, courts of law are enjoined to decide matters before them in accordance with the law and Constitution irrespective of the attitude taken by the parties to court proceedings; see also the holding in **John Magendo v. N.E.Govani (1973) LRT. 60**. This is the very spirit underscored through Article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002.

In my settled opinion, though the appellant's counsel did not cite any law which makes it necessary to properly identify the location of a disputed land in land cases, his argument is supported by the law. Indeed, the omission to cite the law does not mean that it is non-existent. As I hinted earlier, it is the duty of courts of law to decide matter according to law, hence the failure by the appellant's counsel to cite the law is not the reason why this court should abdicate its duty of deciding this appeal according to the law.

It is also notable that, various provisions of law are pertinent to the issue under consideration. Section 3 (1) of the Land Disputes Courts Act,

Cap. 216 for example; provides *inter alia*, that, every dispute or complaint concerning land shall be instituted in the court having jurisdiction to determine land disputes in a given area. A Ward Tribunal, like the trial tribunal in the case at hand, is among the Land Courts envisaged under section 3 (1) of Cap. 216; see section 3 (2) and 10 (1) of the same Act.

Furthermore, according to section 10 (1) of Cap. 216, the territorial jurisdiction of a Ward Tribunal is confined to the area of a District Council in which it is established. Regarding the pecuniary jurisdiction of a Ward Tribunal, section 15 of the same Act guides that, it is limited to the disputed land or property valued at three million shillings only. The powers of a Ward Tribunal include to make orders for the recovery of possession of land and orders in the nature of mandatory and prohibitive injunctions; see section 16 (1) (a) and (c) of Cap. 216 respectively.

Now, the pertinent questions one may ask himself are these: can a Ward Tribunal determine it's above mentioned territorial and pecuniary jurisdiction if the location of the disputed land is not properly identified? Can it exercise its powers to order recovery of possession of a disputed land or make injunction orders mentioned above if such location of the disputed land is not identified? In fact, the answer to both questions is negative. This is because, the Ward Tribunal can only entertain a dispute related to a specific piece of land so that it can give orders related to that specific piece of land as differentiated from other pieces of land surrounding it. It follows thus, that, upon a proper construction of the provisions of law cited above, it is conclusive that, a sufficient identification of the location of the disputed land in land cases before a Ward Tribunal,

especially those related to disputes of ownership or possession, is not an option, but a mandatory legal requirement.

Actually, the legal requirement highlighted above is more express when it comes to land disputes of such nature before District Land and Housing Tribunals and the High Court; see regulation 3 (2) (b) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (GN. No. 174 of 2003) and Order VII rule 3 of the Civil Procedure Code, Cap. 33 R. E. 2019 respectively. All these provisions mandatorily require plaintiffs before a DLHT or the High Court to effectively describe the land in dispute when instituting proceedings by an application or plaint correspondingly.

Owing to the above reasons, and since the third ground of appeal was based on a point of law touching the jurisdiction of the trial tribunal, I answer the first issue affirmatively that, the appellant was entitled to raise the third ground of appeal, though belatedly in this second appeal. This answer calls for the examination of the second issue.

As to the second issue (of *whether or not the location of the disputed land was identified through proper demarcations),* the answer is in the record of the trial tribunal. My perusal to that record shows that, the respondent did not disclose any location of the suit land before the trial tribunal. Her complaint was recorded in Kiswahili as "DAI LA UVAMIZI WA MJI NA MASHAMBA." This meant literally, a claim for trespassing into a house and a farm. As to her statement of the claim (MAELEZO YA MDAI)

she was recorded stating in Kiswahili *inter alia,* thus, and I quote her for a readymade reference:

> "Mtu tuliyekuwa tunashauriana naye Grini Mwamanda amefariki na ndiye niliye mpa huo mji...kwa hiyo naomba huyu mtu ambaye wamemrithisha aniondokee kwenye mji wa baba yangu amevamia mji wa baba yangu kwa sababu sijawahi mukabidhi na niliyo makabidi ni Grini Mwananda..."

In literal English, the quoted passage had the following meaning: the respondent's complaint was that, the appellant had trespassed into her father's house and farm. She had never entrusted that land to him. She had entrusted it to one Grini Mwamanda who is now deceased.

The record of the trial tribunal is silent as far as the location of the suit land is concerned. It does not show anywhere that the respondent had disclosed the location of her father's farm and house at issue. She did not state in which District Council or ward or village the same was situated. She did not even disclose the boundaries surrounding the land itself. According to the judgment of the trial tribunal, it is clear that, it (the trial tribunal) visited the *locus in quo* before it made its verdict. However, it did not also describe the disputed land by its allocation and boundaries surrounding it. If anything, the trial tribunal in its judgment dated 31/8/2016 showed only that, the suit land was comprised of 21 farms. The size of the land was described by only disclosing its measurements. The measurements were taken in footsteps (paces).

However, the exercise of taking the above mentioned measurements of the disputed land without describing its boundaries, did not constitute any proper location or identification of same. This is because, various pieces of land may fetch the same size. Besides, measuring land by

footsteps may not give an exact and authentic size of a piece of land. This is because, the length of a person's footstep may differ from the length of another person's footstep. Again, the same person may not also measure the same size of land if he measures it more than once by his own footsteps. This view is based on the fact that, it all depends on how wide he opens his legs when measuring the land same land each time.

Owing to the reasons shown above, I answer the second issue negatively that, the location of the disputed land was not identified through proper demarcations. This answer triggers the consideration of the third issue.

I now, tackle the third issue on the legal effect of the omission to disclose the location and boundaries of the suit land. In my view, the law cited above, regarding the jurisdiction and powers of ward tribunals were not enacted for cosmetic purposes. The legislative intention was, in my settled opinion, to ensure that, a ward tribunal resolves the controversy between the parties effectively by dealing with a specific and definite piece of land in a given case. The law further intended that, when the ward tribunal or appellate courts pass a decree, the same becomes certain and executable. I underscored the importance of the requirement mentioned above in various cases including the case of **Daniel Dagala Kanunda (as Administrator of the estate of the late Mbalu Kushaba Buluda) v. Masaka Ibeho and 4 others, Land Appeal No. 26 of 2015, High Court of Tanzania (HCT), at Tabora** (unreported). Indeed, it is the law that, court orders must be certain and executable. It follows thus that,

where the description of the land in dispute is uncertain, it will not be possible for the court to make any definite order and execute it.

I also made some remarks relating to the legal requirement discussed above, in another case of **Masincha Nyamhanga v. Magige Ghati Gesabo and two others, HCT Land Appeal No. 20 of 2008, at Mwanza** (unreported), and I will reproduce the pertinent passage for purposes of a swift reference;

> "...land is in fact, a natural immovable solid part of the earth or its surface (and some of its contents) extending globally with some various manmade divisions, sub-divisions, sub-sub divisions etc. such as Continents, States, Countries, Regions, Districts, Villages etc. For purposes of ownership or possession of land, it is the specific demarcations and the location (geographical, political or otherwise) of a piece of land that differentiates it from another piece of the same earth or its surface. Admittedly this may not be the very professional way of describing land, but at least these are the practical and common attributes exemplifying land, and I am entitled to presume them as true under S. 122 of the Evidence Act (Cap. 6 R. E. 2002). It is for this truth I believe, my brother (**Moshi, J.** as he then was) remarked to the effect that land can only be allocated when distinct and determinable; see the case of **Asumwike Kamwela v. Semu Mwazyunga, High Court, Civil Appeal No; 13 of 1997, at Mbeya...**"

Owing to the above reasons, it cannot be argued that the respondent in the matter at hand followed the law when she made the blanket description of the land in dispute by merely referring to it as her father's farm and house as shown earlier, without mentioning the title of the land or the boundaries surrounding it.

Actually, the respondent did not come out clearly to show whether or not the suit land was in a surveyed and registered land. Had the land been surveyed and registered the law would expect her to disclose the plot number and the block number (or the title) on which the disputed land is

located. In case the land was not surveyed and registered, the law would expect her to describe the boundaries surrounding the entire suit land. It could not suffice for her to barely claim that the suit land belonged to her father. The description of the disputed land in the matter at hand was thus, not sufficient enough for purposes of identifying it so that the trial tribunal could effectively resolve the controversy between the parties.

Due to the reasons shown above, the omission under discussion was lethal and went to the root of the matter at hand. It was not thus, a technical matter. The matter before the trial tribunal was therefore, incompetent. Courts of law, including the trial tribunal, do not have jurisdiction to entertain incompetent matters like the one under discussion. This is the reason why I previously observed that the third ground of appeal touches the jurisdiction of the trial tribunal.

In fact, for the reasons shown above, the abnormality at issue cannot be saved by the doctrine of "overriding objective." This doctrine has been recently underlined in our law vide the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). The doctrine/principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice; see section 6 of Act No. 8 of 2018 that amended the CPA. The amendments added new sections 3A and 3B to the statute. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

Nonetheless, the above mentioned principle of overriding objective cannot be applied blindly or mechanically to suppress other significant legal principles, like the one discussed above, the purposes of which are also to promote justice and fair trials. This is the envisaging that was recently articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

Indeed, in the said **Mondorosi case** (supra) the CAT categorically held that, the principle of "overriding objective" cannot be applied blindly against the mandatory provisions of procedural law which go to the very foundation of the case. In so deciding, the CAT followed its previous decision in **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017** (unreported). It thus, distinguished the **Yakobo Magoiga case** (supra) which had applied the Overriding Objective principle. I am therefore, settled in mind that, the principle must work in tandem, and not in friction with such other legal principles like the one under discussion, which are vital for justice dispensation. I consequently, distinguish the said **Yakobo Magoiga Case** (supra) from the case at hand for the reasons shown above.

Owing to the reasons shown above, I am of the view that, the proper order for this court to make is to nullify the proceedings of both tribunals below and set aside their respective judgments. I therefore, allow the third ground of appeal. This particular finding makes it unnecessary, in law, to

test the rest of the grounds of appeal. This is because, it suffices for disposing of the entire matter. I therefore, make the following orders: The appeal is allowed to the extent shown above. The proceedings of both the trial tribunal and the DLHT are hereby nullified and quashed. Their respective judgments are also set aside. If parties still wish, they may approach any competent land court and make a proper disclosure of the allocation and boundaries of the suit land. Each party shall bear his own costs since the two tribunals below also contributed in entertaining the incompetent matter. It is so ordered.

J.H.K. Utamwa
Judge
27/08/2020.

27/08/2020.
CORAM; Hon. JHK. Utamwa, J.
Appellant: present in person and Mr. Felix Kapinga, advocate.
Respondent; present in person and Mr. James Kyando, advocate.
BC; Mr. Patric, RMA.

Court: Judgment delivered in the presence of the parties, Mr. Felix Kapinga, learned counsel for the appellant and Mr. James Kyando, learned advocate for the respondent, in court, this 27th August, 2020.

JHK. UTAMWA.
JUDGE
27/08/2020