IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 14 OF 2021

(From the Decision of the District Land and Housing Tribunal for Morogoro, at Morogoro in Application No. 133 of 2009 before Hon. E. Mogassa, Chairman)

JAMHURI LIBAWA (Administrator of the Estate of the Late Otilia Lyapembile) ..... APPELLANT

VERSUS

ANORLD LAWRENCE MATEMBA ..... 1st RESPONDENT

JOACHIM HUGO MWAKATIKA (Administrator of the Estate of the late Andrea Titus Libawa) ..... 2nd RESPONDENT

JUDGMENT

26th May, 2023

CHABA, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro in respect of Land Application No. 133 of 2009 where, being the administrator of the estate of the late Otilia Lyapembile, the appellant sued the 1st and 2nd respondents. The trial tribunal's records show that the DLHT made decision in favour of the 1st respondent declaring that: -

(i) That, the 1st respondent is the lawful owner of the suit land which was sold to him by the 2nd respondent.

(ii) That, the appellant is permanently restrained from entering into the suit land without the permission of the 1st respondent.

(iii) That, the application be dismissed with costs.

Being aggrieved by the decision of the trial tribunal, the appellant lodged the instant appeal before this court, faulting the decision of the trial tribunal by presenting a memorandum of appeal comprising of the following eight (8) grounds as follows: -

1. *THAT, the trial tribunal chairman erred in law and facts for assuming that the location of the dispute premises in trial tribunal which was located at RUAHA VILLAGE in MIKUMI PROVINCE in KILOSA DISTRICT is the same to the location on sales contract between 1st and 2nd respondent which was in TARAFA YA KIDATU as per evidence in records.*
2. *THAT, the trial district land and housing tribunal erred in law and facts for not considering that the sales contract tendered by the 1st respondent is null and void according to the law.*
3. *THAT, the trial DLHT erred in law and in fact for failure to analyse and evaluate the evidence adduced before the tribunal.*

4. *THAT, the trial tribunal chairman erred in law and facts for dismissing application and pronouncing the judgment in favour of the 1st respondent by considering the sale contract of land between the 1st respondent and Andrea Titus Libawa which has no spouse consent; hence the sale contract is null and void*
5. *THAT, the trial tribunal chairman erred in law and facts for dismissing the application and pronounced judgment in favour of the 1st respondent without considering the evidence obtained on locus in quo.*
6. *THAT, the trial tribunal chairman erred in law and facts for dismissing the application and pronounced judgment in favour of the 1st respondent without considering that the 1st and 2nd respondent are bound by their own pleadings filed on the trial tribunal that the disputed land claimed by the appellant is different to the land in sales contract between the 1st respondent and ANDREA TITUS LIBAWA.*
7. *THAT, the trial tribunal chairman erred in law and facts for dismissing the application and pronounced judgment in favour of the 1st respondent without considering that the 1st respondent failed to call material witness to prove his defence on the sales contract and location of suit land in the trial tribunal.*
8. *THAT, the trial tribunal chairman erred in law and in facts for not considering that the 2nd respondent's wife (OTILIYA LYAPEMBILE) objected the sale of the disputed land hence the 1st respondent filed*

the Civil Case No. 1 of 2009 at Morogoro Resident Magistrate's Court and claim refund of his money which was used in sale contract and not ownership of the suit property and the same claim of money was blessed by Hon. ABOOD, J., in Civil Revision No. 58/2009 between the 1st and the 2nd respondent.

Both the 1st and 2nd respondents resisted the appeal by filing a separate reply to the memorandum of appeal, hence the matter proceeded for hearing.

At the hearing of the appeal, by consensus parties agreed to dispose of the appeal by way of written submissions. The appellant appeared in person, and unrepresented, Mr. Benjamin Jonas, learned advocate entered appearance for the 1st respondent whereas the 2nd respondent had the services of Mr Bageni Elijah, also learned advocate. It is however noted that neither the 2nd respondent nor his advocate opted to file reply to the appellant's submission in chief.

In his written submission, the appellant submitted at lengthy and cited a number of authorities to persuade this Court side with him. He stated that, while grounds 1 and 6 will be argued jointly, grounds 2, 3, 4, 5, 7 and 8 respectively, will also be argued collectively. In reply to the written submission in chief, Mr. Benjamin also submitted at lengthy and cited as well, a number of cases in support of their stances. I will not

reproduce the submissions of the parties in wholesome, but I appreciate and commend for their arguments for and against the present appeal. I will be referring to them in the course of determining this appeal.

Having gone through the rivalry submissions from both sides, the issue for determination is whether this appeal is meritorious.

Before venturing into the determination of the above posed issue, I have found it prudent to firstly, resolve the issue of jurisdictional clash that was raised by the learned counsel for the first respondent in his reply submission to the appellant's submission in chief.

I have the courage to do so, since there is a litany of authorities by the Court of Appeal of Tanzania that jurisdiction of a Court can be raised at any stage even on appeal stage. Among those authorities, there are cases of **Shahida Abdul Hassanal Kassam Vs. Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999 (unreported) and **R.S.A Limited Vs. Hanspaul Automechs Limited and Another,** Civil Appeal No. 179 of 2016. In the **R.S.A Limited's** case the CAT held: -

> *"It is settled law that, an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, it cannot be gainsaid that it has to be determined first before proceeding to determine the substantive matter... Thus, since the jurisdiction to adjudicate any matter is a creature of statute, an objection in that regard is a point of*

law and it can be raised at any stage. In our considered opinion, it was not offensive on the part of the respondents to raise it in the final submissions which was after the dose of the hearing."

Essentially, what has been insisted by the CAT is that, once jurisdictional issue is raised, parties have to be afforded with the rights to be heard. Guided by the above principle, Mr. Benjamini Jonas, in his reply submission to the appellant's submission in chief substantiated that, it was not proper for this matter to be filed in the District Land and Housing Tribunal since the 1st respondent is currently in occupation and use of the suit property after the same was handed over to him following successfully execution of orders of the Morogoro Resident Magistrate's Court in Civil Case No. 1 of 2009 and Misc. Application Number 10 of 2014.

According to him, the appellant was supposed to challenge the execution orders in the Resident Magistrate's Court as it was decided in the case of **Kangaulu Mussa Vs. Mpunghati Mchodo (1984) TLR 348** on page 349.

The learned counsel added that, the effect of abandoning the above route is to render the entire application bad and untenable as it was underscored by the Court of Appeal of Tanzania in the case of **Thomas Mbando Vs. LART and Liquidator MWATEX,** Civil Appeal No. 30 of 2001 (Unreported).

In view of the above, the learned counsel prayed this Court to make a finding that this appeal is incompetent as it stemmed from incompetent proceedings, and hence it should be dismissed with costs.

The appellant opposed Mr. Benjamini's complaint through his rejoinder submission where he elaborated that the matter before the trial tribunal was purely a land matter and the trial tribunal had all jurisdiction to entertain the matter before it. He added that, the respondent didn't object on the issue of jurisdiction during the hearing at the trial tribunal, hence his complaints regarding jurisdiction of the trial tribunal are unwarranted and have taken the appellant by surprise at this appellate stage.

He averred further that, the arguments by the first respondent that the suit was required to be filed at the Resident Magistrate's Court under the auspice of objection proceedings, hold no water considering the fact that the matter before it was not a land matter but a contract civil matter. The appellant submitted further that, the appellant in the trial tribunal filed objection proceedings at Morogoro Resident Magistrate's Court through Miscellaneous Case No. 10 of 2014 before Hon. Nassari, which was dismissed and left the appellant with no other option other than continuing with Land Application Case No. 133 of 2019 before the DLHT for Morogoro as directed by this Court in the case of **Jamhuri Libawa**

(Administrator of the Estate of Otilia Lyapembile) Vs. Anorld Lawrence Temba, Civil Appeal No. 79 of 2014 before Hon. Winfrida Koroso, J., (As she then was).

The appellant concluded his submission as regards to the issue of jurisdiction by emphasizing that, the Morogoro District Land and Housing Tribunal had jurisdiction to entertain the matter under section 62 (2) of the Village Land Act [CAP. 14 R. E, 2002] Act No. 5 of 1999.

Having carefully gone through the rival arguments in support and against the raised issue of jurisdiction, the issue for determination is whether or not the DLHT of Morogoro had jurisdiction to entertain the Land Application No. 133 of 2009 between parties herein.

To answers the above issue, I have found it pertinent to revisit the law governing applications for objection proceedings under **Order XXI, Rules 57, 58 and 59 of the Civil Procedure Code, [CAP. 33 R. E, 2019]**. For ease of reference, the same is clearly reproduced hereunder:

> *"57. - (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all or other respects, as if he was a party to the suit: Provided that, no such*

investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.

58. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

59. Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment."

In deliberating the above legal position, this Court in the case of **Dorice Keneth Rwakatare Vs. Nurdin Abdallah Mushi and 5 Others,** Miscellaneous Application No. 300 of 2019, HCT - Land Division (unreported), it was observed that: -

"In an objection proceeding the executing court has an obligation of investigating the claims to see the objector has proved to have possession or interest in the attached property."

Basically, any person, even if he or she was not a party to the case, but aggrieved with the attachment of property in execution of a decree, for any reasonable ground like having an interest on it, or the property is solely owned by him and not the Judgment Debtor, has to file the Objection Proceedings in the Court which has been empowered to execute the decree under Section 38 (1) of the CPC which provides that: -

"All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit".

From the thread of authorities above, clearly it is the duty of the applicant to file the objection proceedings, then adduce evidence before the executing Court to prove that he or she has interest in the attached property. It is a duty of the said executing Court to investigate such a claim. It is from the said investigation of facts and evidence where the executing Court will be in a position to determine the matter.

It follows therefore that, if at all the appellant, was aggrieved with the attachment of the house in question for having an interest on it, had to file the Objection Proceedings before the executing Court which is the Resident Magistrate's Court of Morogoro.

Upon perusing the lower Courts records, I have found out that, the 1st respondent lodged execution proceedings against the 2nd respondent through Civil Case No. 1 of 2009 at the Resident Magistrate's Court of Morogoro before Hon. P. R. Kahyoza, RM who ordered the 2nd respondent to hand over the disputed house to the 1st respondent.

It is on record that, the 2nd respondent herein reacted by filing a civil matter registered as Civil Revision No. 58 of 2009 at the High Court of Dar Es Salam before Hon. I. D. Abood, J., praying for the Court to revise and quash the proceedings, judgment and orders made by Hon. P. r. Kahyoza, RM which was however, decided in favour of the first respondent as the order of the RM's Court requiring the 2nd respondent to hand over the house in dispute to the 1st respondent was not faulted.

It is depicted further from the Court records that, the appellant herein decided to come back to the Resident Magistrate's Courts of Morogoro, at Morogoro vide Misc. Application No. 10 of 2009 where he filed Objection Proceedings against the 1st respondent and Property International Limited, a Court brokers who were given the orders for

attachment and sale of the house in dispute which was by then subject of the Land Application No. 133 of 2009 before Morogoro District Land and Housing Tribunal. Unfortunately, the application was dismissed by Hon. Nassari, RM, for being res judicata, as there was the main application (Land Application Case No. 133 of 2009), which was pending at the DLHT for Morogoro.

Hence, as gleaned from the Court records of the trial tribunal, on 4th January, 2010 the appellant knocked the doors of the DLHT for Morogoro, at Morogoro praying among many other things that, he be declared the lawful owner of the house in dispute.

After going through the records as shown above and the thread of authorities previously listed in this appeal on objection proceedings, I am of the considered view that, the appellant herein ought not to file this application before the DHLT.

From the submission of the appellant, he averred that he filed objection proceedings vide Misc. Application No. 10 of 2009, which was dismissed for being res judicata as there was Land Application No. 133 of 2009 in progress before the DHLT. In other words, the appellant knocked first the doors of the DHLT instead of the Resident Magistrate's Court of Morogoro. It is good and settled practice as laid down in the case of **Kangaulu Mussa Vs. Mpunghati Mchodo [1984] TLR 348),** that the

objector should not knock on the doors of another judicial forum for trial before the executing Court has received such objection for investigation.

When faced with similar situation, the CAT in **Sosthenes Bruno and Dianarose Bruno Vs. Flora Shauri,** Civil Appeal No. 249 of 2020 (CAT – DSM) (unreported), the Court applied the provisions of the **Civil Procedure Code, [CAP. 33 R. E, 2019],** which are *in pari-materia* with the **MCA Rules,** and laid down a precise and elaborate procedure in objection proceedings. Part of the relevant holding is quoted below: -

> *"Under rule 62 of that Order, the decisions of the court under rules 59 and 60 are final and not appealable, as per the decision in* ***Thomas Joseph Kimaro v. Apaisaria Martin Carl Mkumbo and Another [2002] T.L.R. 369*** *and many others. However, a party aggrieved by the decision, under rule 62 of Order XXI, may lodge a suit in the court of competent jurisdiction as per this Court's decisions in the* ***Bank of Tanzania v. Devram P. Valambhia,*** *Civil Reference No. 4 of2003 and* ***Kezia Violet Mato v. the National Bank of Commerce and Three Others,*** *Civil Appeal No. 127 of 2005 (both unreported). Obviously, where one loses in a subordinate court in a suit filed pursuant to Order XXI, rule 62, has a right to challenge such a decision to the High Court according to law."*

Reverting to matter at hand, if at all the appellant was aggrieved with the attachment of the house in question for having an interest thereon, he had to file the Objection Proceedings before the executing Court which is the Resident Magistrate's Court of Morogoro and if it appears that the lodged objection, particularly was not sustained, that is when he could have filed a fresh suit at the District Land and Housing for Morogoro.

For the above reasons, and to the extent of my finding, the appeal before me is defective. It is summarily dismissed with no order as to costs. If the appellant is still interested in pursuing of his rights in the identified property, he is at liberty to lodge the Objection Proceedings before the executing Court which is the Resident Magistrate's Court of Morogoro, at Morogoro subject to the requirement of the Law of Limitation Act [CAP. 89 R. E, 2019]. **Order accordingly.**

DATED at **MOROGORO** this 26th day of May, 2023.

M. J. CHABA

JUDGE

26/05/2023