IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

MISC. LAND APPEAL NO. 22 OF 2019

(C/f the Decision of the District Land and Housing Tribunal for Arusha at Arusha in Land Appeal No. 1 of 2019, Original Land Application No. 7 of 2018 at Endabash Ward Tribunal)

ISSARA BIFFA ..... APPELLANT

VERSUS

MBARE YAHE ..... RESPONDENT

JUDGMENT

23rd September & 13th November, 2020.

Masara, J

The Respondent, Mbare Yahe, successfully sued the Appellant, Issara Biffa, before Endabash Ward Tribunal (the trial Tribunal) claiming for a piece of land measuring 5½ acres located at Durgeda Hamlet, Qaru village, Endabash ward within Karatu District (the suit land). The trial Tribunal declared the Respondent the lawful owner of the suit land and ordered the Appellant to give vacant possession forthwith. The Appellant was aggrieved, he appealed to the District Land and Housing Tribunal for Karatu (the District Tribunal) where the decision of the trial Tribunal was upheld. The Appellant has preferred this second appeal against the decision of the District Tribunal on the following grounds:

a) *That, the Honourable chairman erred in law and fact for ignoring that the suit land measured 5½ is part of the 33.3 acres which is under the Land Application No. 25/2014 still pending before its (sic) tribunal hence will bar execution;*
b) *That, the honourable chairman erred in law and fact for ignoring the act of visit made in absence of the Appellant;*

c) *That, the honourable chairman erred in law and fact for upholding irregular and incorrect proceedings of the Ward Tribunal; and*
d) *That, the honourable chairman erred in law and fact for relying on purported unlawful/sell (sic) agreement in arriving at its decision.*

The Appellant therefore prays that this Court allows the appeal by setting aside the decisions of both lower Tribunals with costs. In Court, the Appellant was represented by Ms Anna Andrea Ombay, learned advocate, whereas the Respondent was represented by Ms. Fauzia Mustapha and Mustapha Akunaay, learned advocates. The appeal was disposed of by written submissions.

Submitting on the first ground of appeal, Ms Ombay contended that the 5½ acres of land subject of this appeal is part of 33.3 acres of land subject to Land Application No. 25 of 2014, which is still pending in the District Land and Housing Tribunal for Karatu. She added that the 5½ acres were trespassed by the Respondent in 2018. That, in the trial Tribunal the Respondent claimed to have bought the suit land from Matle Dagno, the father of Bahha Matle, Karatu Matle, Hhway Matle who are sued by the Appellant in Land Application No. 25 of 2014. Ms. Ombay prayed that the Respondent be joined in Application No. 25 of 2014 as it has been handed over to the Respondent in Execution No. 12 of 2019, which demands the Appellant to be evicted from the suit land. Ms. Ombay submitted that she is aware that the doctrine of *res subjudice* is inapplicable in this case as determined by the first appellate Tribunal. It was Ms Ombay's argument that when the dispute arose, the Respondent invaded 20 acres out of 33.3 acres, and the Appellant filed Chamber Application No. 87 of 2019 praying to have

the Respondent added in Land Application No. 25 of 2014. It was her prayer that this Court invokes the provisions of section 46 of the Land Disputes Courts Act, Cap 216 [R.E 2002] so that justice can be done to her client.

Submitting on the third ground of appeal, Ms. Ombay contended that the Appellate Tribunal erred in relying on the purported sale Agreement while those who witnessed the sale are not Matle Dagno's neighbours.

Arguing the second and fourth grounds jointly, Ms. Ombay maintained that after Baha Matle (AWII) adduced his evidence in the trial Tribunal, the trial Tribunal ought to have given the Appellant an opportunity to cross examine him, but the same was not done. Further, the Appellant is marked to have attended the tribunal on the date it was arranged for visiting *locus in quo* while he was absent. Therefore, whatever is alleged to be seen at the locus in quo, was a mere fabrication and untrue. She invited the court under section 43(1) of the Land Disputes Courts Act, to call for and examine the records of Land Case No. 25 of 2014, Misc. Application No. 87 of 2019 and Application for execution No. 12 of 2019 and give directions for the trial tribunal to comply without undue delay. The learned advocate prayed that the appeal be allowed by setting aside the decisions of two lower tribunals.

Contesting the appeal, Mr. Akunaay contended that the Appellant did not raise the complaint that the suit is *res subjudice* in the trial Tribunal, rather it was raised in the District Tribunal. That the Respondent is not a party in Land Application No. 25 of 2014 pending in Karatu District Land and Housing

Tribunal since the Appellant sued Baha Matle, Karatu Matle, Hhway Matle, Samwel Barani and Fausta Saqware in that case. The Respondents' advocates were unanimous that this suit is not *res subjudice* as the defined under section 8 of the Civil Procedure Code, Cap 33 [R.E 2019].

Substantiating the second ground of appeal, Mr. Akunaay maintained that visiting *locus in quo* is not a creature of the law but a court's discretion where it appears necessary to verify evidence adduced by the parties during trial. According to the learned counsel, the record of the trial Tribunal says that on 27/11/2018 when the *locus in quo* was visited, the Appellant is marked present, it is therefore not proper to deny his presence at this moment.

Countering the third ground of appeal, Mr. Akunaay fortified that what the District Tribunal upheld is the well-reasoned decision of the trial Tribunal and not the proceedings. The learned advocate contended that missing of cross examination version of Baha Matle (AW2) by the Appellant was an oversight which did not deny the Appellant the right to be heard or occasion any miscarriage of justice warranting the nullification of the two decisions.

On the fourth ground of appeal, the learned advocate stated that the sale agreement admitted in the Ward Tribunal as exhibit MY1 complied with section 63(2) of the Land Act, Cap 113 [R.E 2019]. Mr. Akunaay reiterated that the law does not require every agreement to be witnessed by a Notary Public. On those reasons it is his prayer that the appeal be dismissed with costs.

In a rejoinder submission, Ms. Ombay reiterated her submissions in chief contending that if the lower Tribunals' decisions are left unchanged it will interfere with execution of Land Case No. 25 of 2014. She therefore beseeched the Court to order the Respondent to be joined in Land case No. 25 of 2014 so that he discloses his interest in the land. The learned advocate reiterated that failure to cross examine the witness vitiates the proceedings and judgment therefrom, as it contravenes section 147(1) of the Evidence Act, Cap 6 [R.E 2002].

I have judiciously gone through the lower Tribunals' records, the grounds of appeal and the written submissions of the advocates for the parties in support and against the appeal, I will determine the grounds of appeal as presented.

Starting with the first ground of appeal, it was Ms. Ombay's contention that the suit land is part of 33.3 acres which is the subject of Land Case No. 25 of 2014, therefore its execution will be rendered nugatory in case the instant appeal is dismissed. She was of the view that the doctrine of *res subjudice* is inapplicable in the instant appeal. On their part, the learned advocates for the Respondent resisted the argument stating that the Respondent did not raise that complaint in the trial Tribunal therefore the same cannot be raised at this stage as they consider it an afterthought.

At the outset, the Appellant's complaint is that the doctrine of *res subjudice* is inapplicable in this appeal. The learned advocate for the Appellant has

misdirected herself because what the Appellant needed to prove was his ownership over the suit land. The fact that the suit land is part of the said 33.3 acres which is subject to Land Case No. 25 of 2014, does not qualify him to be the owner of the suit land. In other words, there are no words to justify refusing the Respondent's ownership over the suit land if he managed to prove his ownership of the same to the required standard. By conceding that the doctrine of *res subjudice* is inapplicable in this appeal which could by itself justify stay of the case had it been applicable, the Appellant's counsel appears to shoot herself in the foot. The Respondent's advocates argued that the Respondent is not a party to that case, which is one of the elements of proving the doctrine, and the Appellant's advocate has conceded. I therefore find no convincing reasons to fault the two lower tribunal's decisions on this aspect.

Ms. Ombay prays that the court orders the Respondent to be joined as a party in Land Case No. 25 of 2014. I decline the invitation because I am not privy to the said Land Case No. 25 of 2014, as the records of that case are not before this court. Making that order will be beyond the powers vested in me. The procedure to join a party in a suit is provided by law, particularly Order I Rule 10(2) of the Civil Procedure Code, Cap 33 [R.E 2019]. Joinder of a party is made at the earliest stages of the proceedings by making a formal application as it was held in ***Claude Roman Shikonyi Vs. Estomy A. Baraka and 4 Others***, Civil Revision No. 4 of 2012 (unreported);

> *"The joinder of a necessary party to a suit is procedural in nature and, accordingly, the same ought to have been done at the time of trial, through the application of Order 1 Rule 10 (2)....."*

Thus, the Appellant ought to have asked the District Tribunal to join the Respondent as a Defendant in that case. It is also not clear from the submissions or records why the said case has not been determined to date. In absence of the records pertaining to Land case No. 25 of 2014, it cannot be conclusively stated that the doctrine of *res subjudice* applies in the suit that was determined by the two lower Tribunals. The first ground of appeal fails.

In the second ground of appeal, the Appellant complains that he was recorded present the day when the trial Tribunal visited the *locus in quo*, while in reality he was absent. This complaint has no back up by any evidence. It is noted in both the typed and the handwritten proceedings, that on 2/10/2018 the Appellant gave his defence whereby defence hearing was adjourned. He did not enter appearance on subsequent dates, which are 9/10/2018, 11/10/2018, 25/10/2018, 30/10/2018 and 13/11/2018. On 13/11/2018, the trial Tribunal decided to close the defence hearing for failure of the Appellant to enter appearance. On that day, it was ordered that the tribunal would visit the *locus in quo* on 27/11/2018. On 27/11/2018 while at the *locus in quo*, both Appellant and the Respondent were marked present in the trial Tribunal coram. Apart from the sketch map of the suit land, there is no record of what transpired at the locus in quo. Thus, apart from the coram, which records the Appellant as present, no other evidence is available to substantiate his presence. The Appellant defaulted appearance subsequently until judgment was pronounced in his absence.

The Court of Appeal had the opportunity of outlining the procedure on visiting the *locus in quo* in the case of ***Nizar M. H. Ladak Vs. Gulamali Fazal JanMohamed*** [1980] TLR 29 where it stated:

> *"When a visit to a* ***locus in quo*** *is necessary or appropriate, and as we have said this should only be necessary in exceptional cases,* ***the court should attend with the parties and their advocates, if any, with such witnesses as may have to testify in that particular matter,*** *and for instance if the size of.a room or width of a road is a matter in issue, have the room or road measured in the presence of the parties, and notes made thereof.* ***When the court reassembles in the court room, all such notes should be read out to the parties and their advocates,*** *and comments, amendments or objections called for and if necessary incorporated .."*

This position was reaffirmed by the Court of Appeal in ***Avith Thadeus Massawe Vs. Isdory Assenga***, Civil Appeal No. 7 of 2017 (unreported). I am aware that the law gives powers to Ward Tribunals to regulate their own procedures and they are not bound by technicalities in their endeavours. However, that latitude is not a waiver and should not entail jeopardising the rights of any party. It only extends to relaxing procedural hiccups that would hinder the attainment of a just decision. From the decisions cited above, the proceedings of the *locus in quo* were supposed to show the evidence taken at the locus in quo and from whose information the sketch map was drawn. Failure of the trial Tribunal to read such details to the parties after the visit to the *locus in quo* is also apparent from the record. Thus, I agree with the counsel for the Appellant that there is something wrong with the record of *the locus in quo*. There is therefore merits in the second ground of appeal.

The third ground of appeal is the Appellant's complaint that on 25/9/2018 when SM2 (Baha Matle) testified, he was not afforded the right to cross examine him. This was conceded by the Respondent's advocate who added that it was an oversight that did not prejudice the Appellant. I have carefully gone through the trial Tribunal's records, both in the handwritten and typed records, SM2 was not subjected to cross examination by the Appellant. Failure of the Trial Tribunal to allow the Appellant to cross examine SM2 is fatal as it renders such evidence worthless. I note that the Appellant has raised that issue here for the first time. He did not do so when he preferred his first appeal before the District Tribunal. Ordinarily, only matters which were canvassed and were decided by the lower Tribunals would be considered in second appeal. There is a plethora of authorities to that effect. See for example: ***Hotel Travertine Limited and 2 Others Vs. National Bank of Commerce Limited*** [2006] TLR 133, ***Charles Juma Vs. Republic,*** Criminal Appeal No. 391 of 2016 and ***Richard Majenga Vs. Specioza Sylivester,*** Civil Appeal No. 208 of 2018 (both unreported). In ***Hotel Travertine Limited and 2 Others*** (supra) the Court stated:

> *"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."*

Likewise, in ***Richard Majenga Vs. Specioza Sylivester*** (supra) it was held:

> *"Similarly, in this case, the first appellate court was not supposed to introduce a new issue that was not canvassed by the trial court. In the circumstances, it was improper and a misdirection on the part of the first appellate court to proceed to consider and determine such an issue in the Respondent's favour at an appellate stage."*

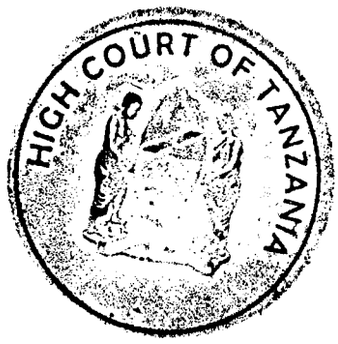
The cited authorities would only apply where an issue raised relates to factual matters. The omission of the trial Tribunal to allow the Appellant to cross examine a material witness falls in the exceptions of improper and misdirection. The third ground is also sustained.

Regarding the fourth ground of appeal, the Respondent's advocate contends that the sale agreement was witnessed by strangers and not the Respondent's neighbours to the suit land. I support the argument by the Respondents' advocates that there is no law which sets mandatory requirement that sale agreements on pieces of unregistered land should be in writing and notarised by a notary public. Under section 64(1)(a) of the Land Act, Cap 113 [R.E 2019] it is mandatory for dispositions involving registered land to be reduced into writing. Section 61(2) and (3) of the Act, require dispositions of land owned customarily to be regulated by customary law. The disputed land is one owned customarily, therefore its disposition does not fall under the strict rules stipulated in the Land Act. SM5, the maker of that agreement also testified to prove its cogency. I therefore dismiss the fourth ground of appeal.

Basing on the above reasons and findings, it is the finding of this Court that there are some irregularities in the trial Tribunal's proceedings that vitiate the findings of the lower Tribunals' decisions. Failure of the trial Tribunal to record evidence at the locus in quo and later read the same to parties, and failure of the trial Tribunal to allow the Appellant to cross examine a material witness for the Respondent both render decisions thereof fatally defective.

Consequently, the appeal is partly allowed to the extent explained above. Both decisions are hereby quashed and set aside. I direct that the trial commences de novo before the trial Tribunal for the interest of justice. Given that the errors in the proceedings of the trial Tribunal are not attributed to any of the parties, each party should bear their own costs.

It is so ordered.



Y. B. Masara

JUDGE

13th November, 2020