

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

LAND APPEAL NO. 36 OF 2023

(C/F Application No. 52 of 2020 in the District Land and Housing Tribunal for Arusha)

BETWEEN

JOSEPH NDUNGURU.....APPELLANT

VERSUS

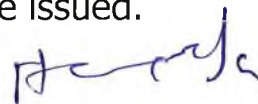
FELEX MTUI.....RESPONDENT

JUDGMENT

30/10/2023 & 25/01/2024

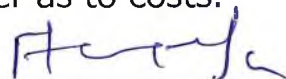
MWASEBA, J.

This appeal arises from the judgment and decree of the District Land and Housing Tribunal for Arusha (herein the tribunal) at Arusha dated 4th May 2023 in Application No. 52 of 2020. In that case, the appellant unsuccessfully sued the respondent claiming that he had trespassed into part of his land measuring 1317 square meters located at Kiria B, Ngusero Street, Osumyai ward within Arusha Region. The appellant prayed to be declared the lawful owner of the suit land and that a permanent injunction against the respondent, her agents, servants, or workmen from trespassing into the suit land be issued.



The material facts gathered from the application are as follows; the appellant alleged to be the owner of a land measuring 7279 Square meters which he claimed to have been bought from one Lengumo Laisi. He alleged that the respondent trespassed on part of it which is 1317 meters in June 2019. On his side, the respondent alleged that he is a legal owner of the disputed land, which is registered under title number 61023, Plot No. 982 Block "DD" Sombetini, within Arusha Council measuring 7287 square meters and not Kiria B as purported. The respondent added that he bought the disputed land from Brigitha Michael and Geromine Michael on the 2nd day of September 1977.

After evaluation of evidence before it, the trial tribunal gave its judgment in favour of the respondent on the reason that there was a need to join the Registrar of Title and the Ministry for Lands, Housing and Human Settlement as they are the one who registered the certificate of occupancy No. 93877 which is the center of the dispute between the parties herein. He ordered further that since by joining the said parties the Attorney General also will be joined, the tribunal will lack jurisdiction to entertain the matter as all the matter involving the Attorney General are determined at the High Court of Tanzania. The application was therefore dismissed with no order as to costs.



Dissatisfied with the above decision of the trial tribunal, the appellant has filed this appeal containing two grounds of appeal reproduced hereunder: -

- 1. That, the learned trial Chaiman grossly erred in law and fact in declining to entertain the Appellant's application on merit for non-joinder of the purported necessary party because that area in dispute is registered.*
- 2. That, the learned trial Chairman grossly erred in law and fact in finding that the Appellant has a cause of action against land Authority under the Ministry for Lands and Human Settlement together with the City Council's Land Authority.*

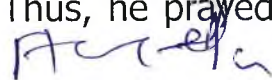
At the hearing of this appeal Messrs John S. Masangwa and Kapimpiti Mgalula, both learned counsels appeared for the appellant and respondent respectively. With the consent of the parties and leave of the court, the hearing proceeded by way of written submission.

Arguing his appeal Mr. Masangwa submitted that the dispute of the parties was based on land ownership and not a land allocation issue by land authorities, therefore the parties were required to establish how they required the disputed land. He argued further that **Section 10 (1)**



and (2) of the Land Registration Act, Cap 334 R.E 2019 requires a person who claimed registered land over unregistered land to submit all his documents showing his title over the land. Thus, to sue a director of the surveyor would be absurd as he is just an invitee to the land owned by the person applying for registration of his land. Therefore, the trial tribunal has jurisdiction to entertain the matter as per **Section 33 (1) of the Land Disputes Courts Act**, cap 216 R.E 2019. He prayed for this ground to be found with merit and for the tribunal to be ordered to proceed with hearing of the Application No. 5 of 2020 before another Chairperson.

Coming to the 2nd ground of appeal, it was Mr. Masangwa's submission that it was the respondent who underwent the procedures stipulated under **Sections 9 (1) (2) and 10 (2)** of Cap 334 R.E 2019. Further to that the trial tribunal failed to identify who is the necessary party that needs to be sued between the Director of Survey, Attorney General, Registrar for Lands, and Commissioner for Lands. He argued that if the land were allocated by the land allocation, then in such circumstances, they could be joined as parties but in our case all the parties are claiming ownership over the disputed land, then the tribunal ought to have determined and prove who is the real owner. Thus, he prayed for



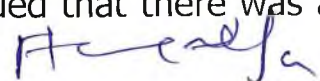
the appeal to be allowed and the tribunal to proceed with the hearing of the application.

Opposing the appeal, Mr. Mgalula started by raising a preliminary objection that:

- i. That, the appeal is improper (incompetent) before the Honourable Court for not being filled in the District Land and Housing Tribunal of Arusha at Arusha thus it contravenes the mandatory provisions of **Section 38 (2) of the Land Disputes Court Act**, Cap 216 R.E 2019.

Supporting the raised PO, Mr. Mgalula argued that the appellant was supposed to file his appeal at the trial tribunal before filing in the High Court. However, the appellant filed directly to the High Court and contravened **Section 38 (2)** of Cap 216 which uses the term "Shall" to mean mandatory. He prayed for the appeal to be struck out for being improperly filed.

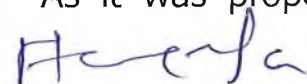
Responding to the merit of the application, on the 1st ground of appeal, he submitted that the appellant pleaded in his application that GPS (Global Positioning System) cannot be installed as the points have been unlawfully registered by the respondent hence the registration failed. Thus, based on the said allegation, Mr. Mgalula argued that there was a



need to include the Commissioner for Lands as well as the Ministry for Lands Housing Human Settlement as they are the ones who installed GPS, registered, and approved the deed plan with registration No. 93877 registered by director of surveyors of mapping. He added that without the necessary parties ordered of the tribunal to be joined, the decree which will be issued will not be executable as the respondent has no mandatory powers to shift those GPS. He supported his arguments with several cases including the case of **Elisha Haji v. Romanus Haule and Another**, Land Appeal No. 105 of 2021.

It was his further submission that even **Section 33 (1) (a)** of Cap 216 does not give the tribunal powers for rectification of the registered title deed nor orders of changing GPS. Those powers remain to the registrar by the orders of the High Court as per **Section 99 (1)** of the Cap 334 R.E 2019. He distinguished **Sections 10 (1), 9 (1), and (2)** of Cap 334 R.E 2019 cited by the appellant as they deal with unregistered land and the disputed land had already been registered.

Regarding the 2nd ground of appeal, Mr. Mgalula replied that it is the appellant who was supposed to be in a better position to understand who needed to be sued, under what cause of action, and which court has a proper jurisdiction to entertain the claim. As it was properly



determined by the trial tribunal that land authorities were supposed to be joined as necessary parties to the case. Thus, he prayed for the appeal to be dismissed with costs.

In a brief rejoinder, Mr. Masangwa started by responding to the PO raised by Mr. Mgalula that he has misconceived the gist of **Section 38 (2)** of Cap 216 R.E 2019. He argued that the application was lodged at the tribunal before **Section 45 of the Written Laws (Miscellaneous Amendments) Act**, No. 3 of 2021 amends **Section 13 of the Land Disputes Court Act** which requires all land disputes to begin at ward tribunal for mediation. He submitted further that as the tribunal exercised original jurisdiction, the proper provision was **Section 41 (1) and (2)** of Cap 216 which did not provide a directives as to where to file an appeal apart from stating that all appeals from the tribunal exercising original jurisdiction lies to the High Court. Thus, he submitted the raised PO has no merit.

Regarding the merit of the application, Mr. Masangwa reiterated what was submitted in his submission in chief and added that the dispute was over the land before any of it was registered. The tribunal was not correct that a necessary party needs to be sued simply because the respondent's land is registered. He added that as the respondent

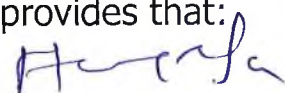


showed the authorities part of the appellant's land for registration, then the land authorities need not be included as a necessary party as they cannot prove or disprove ownership of the land in this situation. It was his submission that once the trespass of the respondent was established it would not be difficult to make changes to the survey. He maintains his prayer for the appeal to be allowed and for the tribunal to proceed with the case on merit without adding a necessary party.

Having carefully considered the rival arguments advanced by the counsel for the parties and after having examined the record of appeal before this court, the main issue to be considered is whether the appeal by the appellant is meritorious.

I wish to begin with the preliminary objection raised by Mr. Mgalula that the appeal is improper for contravening **Section 38 (2)** of Cap 216 R.E 2019. He was of the view that the appeal was supposed to be filed at the trial tribunal prior to be filed at this court. On his side, Mr. Masangwa replied that **Section 41 (1) (2)** of Cap 216 which governed appeals from the tribunal exercising original jurisdiction is silent as to where to file an appeal. Thus, he argued the appeal was properly filed before this court.

It should be noted that **Section 38 (2)** of Cap 216 provides that:



"Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought."

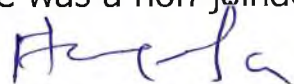
And **Section 41 (1) and (2)** of Cap 216 provides that:

"1. Subject to the provisions of any law for the time being in force, all appeals, revisions, and similar proceedings from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.

(2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order."

Being guided by the cited provisions of the law, **Section 38 (1)** of Cap 216 R.E which relied by Mr. Mgalula deals with cases originating from the Ward tribunal and our case originated from DLHT in its original. As it was well submitted by Mr. Masangwa that as the matter originated from DLHT exercising its original jurisdiction the proper provision was **Section 41 (1)** of Cap 216 and there is no requirement for the appeal to be prior filed at the DLHT. Thus, it is the firm view of this court that the raised PO is misconceived hence it is hereby overruled.

Coming to the merit of the application, on the 1st ground of appeal, Mr. Masangwa complained that it was wrong for the trial tribunal to decline to entertain the matter based on the fact that there was a non-joinder of



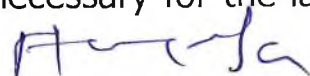
the necessary party because the area is registered. He argued further that, the dispute between the parties arose before part of the disputed land was not registered by the respondent. Thus, there was no need to add land authorities as a necessary part in such circumstances.

On his side, Mr. Mgalula argued that as the land has already been registered there is a need to add the land authorities as necessary parties to soften the execution of the decision to the winning party as the respondent could not be able to vary the decision of the registrar or to change the location of the GPS.

Upon revisitation to the records of the trial tribunal, I have noted that in his defence and his testimony, the respondent alleged that "*there is no act of illegal trespass made to the property located at Kiria B, Ngusero Street, Osumyai Ward, Arusha City as he is the legal owner and the disputed land is registered under Certificate of Title No. 61023, Plot No. 982 Block "DD", Sombetini, Within Arusha City Council, measuring 7287*".

On his side, the appellant via his counsel also admitted that the disputed land had already been registered that is the reason he failed to register it.

Based on the cited evidence, the trial tribunal decided that as the disputed land had already been registered it was necessary for the land



authority to be joined as necessary parties and once joined the tribunal would lack jurisdiction to entertain the matter. On page 9, 2nd paragraph the tribunal held that:

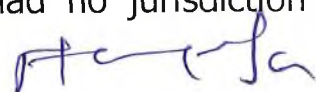
"Kwa maoni yangu, ni haki kwa mamlaka hiyo kupewa nafasi ya kujieleza juu ya upimaji uliofanywa kabla ya uamuzi hasi dhidi ya Upimaji huo kutolewa. Mtazamo wangu huo pia ulikuwa ni maudhui kwenye uamuzi wa Mahakama ya Rufani katika shauri la Shahibu Salimu Hoa niliokwisha rejea hapo awali."

Further, at 4th paragraph of the same page Hon. Chairman stated further that:

"Katika Mazingira ya maombi haya sio tu Kamishna wa Ardhi Msaidizi bali pia Mamlaka ya Serikali za Mitaa husika ambayo ndio mamlaka za upimaji wa ardhi katika eneo lake ilipaswa iungaishe kama mjibu maombi."

Based on the cited paragraphs, that's why the tribunal decided that it has no jurisdiction as when the government official is included in a case, the Attorney General needs to be included too and it is only the High Court that has jurisdiction to entertain the matter which involves the Attorney General.

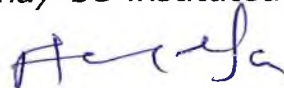
This court upon perusing the evidence adduced at the trial tribunal and its decision, do agree with the tribunal that it had no jurisdiction to



entertain the matter based on the following reasons. **Firstly**, there is no dispute that the disputed land is registered, then as rightly held by the trial tribunal to solve the dispute between the parties which involved the registered land then the Land authorities particularly the Land Registry (the Registrar of Title) must be added as a necessary party. The argument raised by Mr. Massangwa that the dispute involves the land before its registration is baseless as when this case was filed the respondent's land has already been registered. Further to that, since the appellant is claiming that the respondent's land was wrongly registered there is a need to join the registrar of titles to clear the doubts raised. See the case of **Shaibu Salim Hoza v. Helena Mhacha** (Civil Appeal 7 of 2012) [2016] TZCA 776 (4 March 2016) (Tanzlii).

Second, as the registrar of land's office is a government office then there is a need to join the Attorney General as a necessary party. And when the Attorney General is joined to the case, the tribunal lacks jurisdiction to entertain the matter. This is well articulated under **Section 7 of the Government Proceedings Act**, Cap 7 R.E 2019 that:

"Notwithstanding any other written law, no civil proceedings against the Government may be instituted in any court other than the High Court."



Thus, guided by the provision of the law and the testimonies of the parties, this court finds no merit on the 1st ground of appeal and the same is dismissed.

Coming to the 2nd ground of appeal, Mr. Massangwa was of the view that the appellant has no cause of action against the land authority therefore it was wrong to order them to be joined as a necessary party. As it has been explained above, this court do support the argument of Mr. Mgalula, counsel for the respondent that failure to join necessary parties particularly the Registrar of Titles, execution of the decision in case the appellant wins the case it will be difficult. Thus, this ground too is found with no merit.

In the event, the appeal is hereby dismissed with costs for want of merit. Consequently, the judgment and decree of the trial tribunal is left undisturbed.

It is so ordered.

DATED at **ARUSHA** this 25th day of January, 2024.




N.R. MWASEBA

JUDGE