

TANZANIA / JUDGMENT

JAMES

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13 March 2025

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THE JUDICIARY OF TANZANIA IN THE H IGH COURT OF TANZANIA AT MANYARA LAND
APPEAL NO. 000025586 OF 2024 JAMES MUNA M U M W E.....COMPLAINANT /
APPELLANT / APPLICANT / PLAINTIFF VERSUS JULIANA SAIDIABDALLAH.....
RESPONDENT / DEFENDANT

JUDGMENT

KAMUZORA, J, 20th Feb & 13th March, 2025 Before the district land and housing tribunal for Babati, the respondent herein one Juliana Said Abdallah instituted a suit against the appellant herein one James Muna Mumwe. The respondent's claim against the appellant was the land measuring 49x45 paces located at Mogitu A hamlet within Mogitu village in Babati District, Manyara region (herein referred as the suit land). The respondent claimed that, in 1975, the village council allocated 4 acres of land to her and her husband. That, in 1980, one Mzee Muna requested from them for a parcel of land for temporary use and they allocated him the land measuring 40X30 paces. That, from 1985, Mzee Muna left the land unattended and the respondent decided to reclaim it back. That, in 2018, the appellant trespassed into the suit land claiming that it belongs to his father one Mzee Muna. The Appellant filed a defence pleading that the suit land was legally owned by his father Mzee Muna before his demise. That, his father has been using the suit land since 1975 and the appellant inherited it after his father passed on, in 1996. He claimed that, the respondent invaded the suit land in 04/12/2021 which she never claimed it when the appellant's father was still alive. He refuted the respondent's claim that the suit land was given to his father temporarily and that he abandoned it. The appellant claimed that, his father was using the suit land until when he died in 1996 and the appellant continued to use it until when the respondent trespassed into the suit land on 04/12/2021. After hearing evidence from the parties, the trial tribunal decided in favour of the respondent. The appellant was displeased with the trial tribunal's decision and preferred the instant appeal with three (3) grounds of appeal which I will not reproduce here for the reasons that will be apparent shortly. After hearing the parties in this appeal and in course of perusing the record, I came across some pertinent legal issues which necessitated the opening up of the proceedings of this appeal thus, I invited the counsel for the parties to address the court on the following issues; 1. There was an amendment of the application without leave of the trial tribunal; 2. There was change of assessors without assigning the reasons; 3. There was an order for ex-parte hearing without explanation and the proceedings continued without setting aside the ex-parte order; 4. There was

a prayer for an interpreter but the hearing proceeded without indicating if the prayer for interpreter was allowed or not. In addressing the points raised by the court, the appellant's counsel Mr. Abdallah Kilobwa, learned advocate and the respondent's counsel Ms. Asha Lusewa learned advocate both conceded to the existence of the above legal issues. Addressing the 1st issue, Mr. Kilobwa pointed out that, the proceedings do not show if there was a prayer or order to amend the application. He argued that, since there was no prayer for amendment, the amendment was wrong and the proceedings after the amendment of the application were a nullity. He was of the view that the remedy available is to quash the proceedings and expunge the amended application. On the 2nd issue, Mr. Kilobwa submitted that, there was a change of assessor as seen at page 9 of the typed proceedings but no reason was assigned for such change. He argued that, it is the legal requirement that the assessor who heard the case from the beginning should be the one to give opinion over the matter. He was of the view that, the change of assessors in the matter at hand vitiated the whole proceedings of the case and the remedy is to quash and set aside the proceedings and the judgment of the trial tribunal. On the 3rd issue, the learned advocate for the appellant submitted that, there was an order for ex-parte hearing against the appellant but the record does not show the reason for such order or if the tribunal vacated such order before proceeding with the hearing which also allowed the appellant to present his defence. He was of the view that, this error vitiated the whole proceedings before the trial tribunal as well as the judgment arising therefrom. On the 4th issue, Mr. Kilobwa submitted that, the record shows that the respondent testified partly and prayed to be allowed to use an interpreter and the matter was adjourned. That, on the date scheduled for continuation of hearing, there is no explanation regarding the interpreter and the case proceeded without an interpreter. He pointed out that, there is no evidence if the respondent's evidence was given in the language she understood or if it was given with the help of the interpreter. Mr. Kilobwa was of the view that, this error vitiated the proceedings of the case because the respondent was the main witness in the applicant's case. He therefore urged this court to quash the proceedings the judgment resulting therefrom and remit the record for the case to be heard by another chairman and a new set of assessors. On her part, Ms. Asha Lusewa readily joined the counsel for the appellant and adopted his arguments on all four issues. She added that, the errors pointed out render the whole proceedings and judgment a nullity. She also conceded to the prayer for this court to quash and set aside the proceedings and judgment of the trial tribunal. As to the way forward, Ms. Lusewa urged this court to remit the case file to the trial tribunal to be heard afresh by another chairman and another set of assessors. Having gone through the parties' arguments on the above issues, I am inclined to agree with both counsel that the errors pointed out vitiate the proceedings and the judgment arising therefrom. On the 1st issue regarding the amendment of the application, it is not in dispute that, the respondent filed an amended application. The record is silent as to whether the respondent made a prayer for amendment of the application before the trial tribunal. This means that, the respondent amended the application without leave of the trial tribunal. Although the law allows amendment of the pleadings, such amendment should be done with the leave of the court which will also direct the extent of the amendment. I have compared the original application and the amended one, the amendments touched on substantive part of the claim which ended up bringing a new case. In the case of Jovent Clavery

Rushaka & another vs Bibiana Chacha Civil Appeal No. 236 of 2020 Court of Appeal of Tanzania at Dar es Salaam (unreported) the Court of Appeal observed that; "...once a pleading is filed it cannot be amended or altered without leave of the court and that generally a party should not be allowed to travel beyond their pleadings..." See also, Salum Abdallah Chande t/a Rahma Tailors vs the loans and Advances Realization Trust (LART) and 2 others Civil Appeal No. 49 of 1997 (unreported). I therefore agree with the counsel for the parties that, since the amendment was made without the order of the trial tribunal, the proceedings subsequent to the amendment and the judgment arising therefrom were a nullity. On the 2nd issue, it is on record that hearing of the matter before the trial tribunal commenced on 26/03/2024. In the handwritten proceedings, the coram shows that the assessors present were Mr. Mduma and Ms. Mkuti. But the name of Ms. Mkuti was cancelled and replaced by the name of Ms. Ngomuo. The proceedings however reveal that, when SMI was testifying, Ms. Ngomuo and Ms. Mkuti were recorded as assessors who asked questions. Unfortunately, the proceedings on the questioning by Ms. Mkuti was omitted in the typed proceedings of the trial tribunal. On 04/07/2024 the coram shows that, the assessors present were Mr. Mduma and Ms. Ngomuo for the name of Ms. Mkuti was again cancelled. The proceedings however show that Ms. Mkuti was given time to ask questions but she responded that she had none. This means that, despite her name being cancelled in the coram, she was present during hearing of the case. At the end of the hearing Mr. Mduma and Ms. Ngomuo gave their opinion as assessors who were present during hearing of the case. With the above record, it is clear that the tribunal used three assessors interchangeably meaning that the assessors who gave opinion did not participate in the trial from the beginning to the end. It is settled law under section 23(1) of the Land Disputes Courts Act [Cap 216 R.E 2019], (hereinafter referred to as the LDCA) that, the District Land and Housing Tribunal shall be composed by a chairman and with at least two assessors. Under section 23(3) of the LDCA, where one or both of the assessor is unable to proceed with the matter, the chairman is required to proceed with the remaining assessor or alone in case both assessors are unable to proceed with the matter. However, the reason must be recorded justifying the absence or change of assessors. In this matter, the record vividly shows that, Ms. Mkuti was present at the commencement of the hearing and she participated in the trial by asking questions to the witnesses but she then disappeared from the record without any explanation. The record is silent as to her whereabouts and instead a new assessor was introduced. This went contrary to the requirement of the law. Therefore, there was unclear involvement of assessors in the matter before the trial tribunal as shown above. The consequence of unclear involvement of assessors was well set out in the case of Ameir Mbarak and Another v Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported), where the Court of Appeal succinctly pointed out that; "The consequences of unclear involvement of assessors in the trial renders such trial a nullity." On the 3rd issue, it is on record that, the trial tribunal had on 03/11/2023 ordered the matter to proceed ex parte against the appellant after he had informed the trial tribunal that he did not intend to file a defence but was ready to defend himself. Later on, the record shows that, the appellant filed written statement of defence and the matter proceeded inter parte. The record is silent on whether the order to proceed ex parte was vacated by the trial tribunal. Since there was no such order vacating ex parte hearing, the trial tribunal wrongly received and acted on the appellant's evidence. On the 4th issue, it is on record that the hearing of the matter before

the trial tribunal commenced on 26/03/2024 in which the respondent partly testified. She then asked the trial tribunal for an interpreter. The matter was adjourned and hearing resumed on 03/07/2024 in which, the respondent proceeded with her testimony but the record is silent as to whether there was an interpreter as earlier on requested by the respondent. Since the record is silent as to whether there was an interpreter and taking into account the respondent was unrepresented, it is doubtful if the respondent was aware of what was transpiring at the trial tribunal. From the above discussion, I agree with the counsel for the parties that, the omissions and irregularities pointed above renders the amended application, subsequent pleadings, proceedings subsequent to the amended application and the resultant judgment and decree, a nullity. I therefore proceed to order the amended application to be expunged from the record for being filed without the leave of the trial tribunal and this affects the subsequent pleadings as well. I consequently quash and set aside the proceedings subsequent to the amended application and the resultant judgment and decree. On the way forward, both learned counsel for the parties urged this court to remit back the case file to the trial tribunal for retrial before another chairperson and new set of assessors. I accede to such Page. 3 invitation and order the record to be remitted back to the trial tribunal for completion of the pleadings and retrial before another chairperson and a new set of assessors. Since the points leading to the nullification of the proceedings and the judgment were raised by the court suo motu, I will not make any order as to costs. Dated at THE HIGH COURT OF TANZANIA AT MANYARA this 13th of March 2025 JUDGE OF THE HIGH COURT Page. 4

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Prepared on 13 October 2026 · Esheria