

TANZANIA / JUDGMENT

MARTIN MOSHI SCANNED

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 11789 OF 2024 f/l/7 Appeal from the ruling and order of the District Land and Housing Tribunal for Temeke in Land Application No. 147 of 2023 (L.R. Rugarabamu) dated 3rd April 2024) MARTIN MOSHI..... APPELLANT VERSUS BENNY MBIRO..... 1st RESPONDENT IBRAHIM MALIK MBENA (As personal Legal Representative Of Maliki Abdallah Mbena..... .2nd RESPONDENT

JUDGMENT

11th & 2nd September, 2024 L. HEMED, J. Martin Moshi, the Appellant herein, is the one who instituted a suit at the District Land and Housing Tribunal, in the name of Application No. 147 of 2023. The Appellant was claiming against the respondents herein, Benny Mbiro and Ibrahim Maliki Mbena (Administrator of the estate of Maliki Abdallah Mbena) to be owner of the land measured 70m x 70m located at Malela in Toangoma ward, Temeke District in Dar es Salaam. In response to the said suit, the respondents raised two point of objection in /imine /itis. - i "1- That, the application is bad in law as the same proceeds from the matter which is res-subjudice.

2. That, the application is incurably defective for lacking the mediation certificate of the 2nd respondent from the ward tribunal." The said objections were heard interpartiesaxxti the trial tribunal found that the Appellant was precluded from refiling it following the withdraw of the counter claim in Application No. 93 of 2023. The trial chairman also found that there was wanting of the ward Tribunal's certificate of mediation in respect of the 2nd Respondent. Eventually, the entire suit ended up being struck out with costs. The Appellant was maimed by such decision hence the instant appeal on the following grounds: - '7 . That the Honourable trial chairman erred in law and fact to hold as he did that the appellant filed application No. 147 of 2023 without first attempting mediation in Ward tribunal when a copy of certificate from ward tribunal was attached to the application.
2. That the Honourable trial Chairman erred in law and fact to hold as he did that the appellant was precluded from instituting an application on account of withdrawing a counter claim in application No. 39 of 2 2023 when in fact the first respondent was not a party to that application.

3. That the Honourable trial Chairman erred in Law and fact to hold as he did by introducing and issue and decide the same without affording the Appellant an opportunity to be heard on the issue so suo motto introduced.
4. That the Honourable trial Chairman erred in law to bind himself on legal technicalities on the expense of substantive justice." Hearing of the appeal was done by way of written submissions. Advocate, Jethro Turyamwesiga acted for the Appellant. Mr. Justine Kalebi, learned advocate represented the 1st Respondent while the 2nd Respondent enjoyed the legal service of Mr. Godfrey Alfred, learned counsel. I have thoroughly gone through the rival submissions together with the records of the trial tribunal. It is now pertinent to determine the merits of each ground of appeal. In the first ground, the Appellant is faulting the ruling of the trial Tribunal for holding that the Appellant did not attempt to mediate the matter 3 with the 2nd Respondent. Submitting in respect of the 1st ground, Mr. Turyamwesiga, learned advocate averred that mediation was conducted by the Ward Tribunal for Toangoma and the certificate of mediation was attached to Application No. 147 of 2023. It is without doubts that before lodging any land dispute in the District Land and Housing Tribunal, a person must have attempted mediation before the Ward tribunal. This requirement is provided under section 13(4) of the Land Dispute Courts Act Cap 216, which provides thus: "(4) Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceeding affecting the title to or any interest in land unless the ward tribunal has certified that it has failed to settle the matter amicably: Provided that, where the ward tribunal fails to settle a land dispute within thirty days from the date the matter was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the ward tribunal." [Emphasis added] 4 The way I understand the above cited provision, it is mandatory for any proceedings affecting the title to or any interest on land to be referred to mediation in the ward tribunal before being instituted in the District Land and Housing Tribunal. The section is couched with mandatory terms by the use of the word "shall" conferring mandatory adherence. This was emphatically stated by the Court of Appeal of Tanzania in Enerico Kukala vs. Mohamed Mussa (Administrator of Estate of the late Ahmed Zahoro Ahmed) Civil Application No. 40 of 2021. The records of the Application No. 147 of 2022 clearly show that parties were Martin Mosha (the Applicant) and Benny Mbiro and Ibrahim Maliki Mbena (Administrator of the Estate of Maliki Abdallah Mbena) - the respondents. In the application which was used to initiate the said suit before the trial Tribunal, the Appellant herein attached the certificate of the ward tribunal on the failure of settlement. According to the certificate, the matter which was reported before the ward Tribunal for Toangoma was registered as "MALALAMIKO YA ARDHI NO. 143 YA MWAKA 2023." Parties thereto were:-
 1. MARTIN JOSEPH MOSHI..... Complainant
 2. BENNY MBILO..... Respondent 5 In light of the said certificate of the ward Tribunal, the 2nd Respondent herein, was never a party to the mediation proceedings, nor was he called to participate. The question is whether it was fatal. It should be noted that the

requirement to go for mediation to the ward tribunal prior to filing land dispute in the District Land and Housing Tribunal was not made as cosmetic thing or a mere formality. In fact, it was intended to encourage and enhance amicable settlement in land matters. Therefore, whenever a land dispute arises, before instituting it in the District Land and Housing Tribunal, all parties concerned must be mediated by the ward tribunal. In Application No. 147 of 2023, the Appellant preferred his complaint before the mediating tribunal against only one person, the 1st Respondent herein. In my firm view, failure to involve in mediation proceedings all parties concerned in the dispute, amounts to defiling the sacred objective of section 13(4) of the Land Disputes Courts Act, [Cap 216] of enhancing alternative dispute settlement in land disputes. Therefore, failure to call all parties in mediation proceedings before the ward Tribunal is as good as having failed to refer the matter for mediation. 6 The fact that the 2nd Respondent in Application No. 147 of 2023 did not participate in the mediation proceedings at the ward tribunal, the suit before the trial Tribunal was incompetent for want of proper certificate of the ward tribunal having failed to settle the matter amicably. This being the case the finding of the trial chairman was proper. The 1st ground of appeal has no merit. In the 2nd ground of appeal, the Appellant is faulting the decision of the trial Tribunal for having ruled that the Appellant was precluded from instituting application No. 147 of 2023 against the 2nd Respondent. It was the argument of the counsel for the Appellant that after having found the suit incompetent before it, the trial tribunal was precluded from holding that the Appellant was precluded from instituting fresh application. It was also contended that the Appellant did withdraw the counter claim because the lower tribunal did not have jurisdiction to try it. In the opinion of the counsel for the Appellant, withdraw of a suit does not preclude one from instituting the fresh one. In response thereto, the learned counsel for the 1st Respondent contended that since the Appellant withdrew his counter claim in Application No. 39 of 2023 without the leave to refile, he is precluded from filing it 7 against the 2nd Respondent. Reliance was put on the decisions of this court in Equity for Tanzania Limited (EFTA) vs. Salimu Kasimu Msangi, Civil Appeal No. 21 of 2022 and in Samwel Amos Gekura vs Sofia Said and Gerald Mugumira, Misc. Land Application No. 574 of 2021. I have revisited the proceedings of Application No. 39 of 2023 in which the 2nd Respondent herein was suing the 1st Respondent and the Appellant. The Appellant had raised a counter claim against the 2nd Respondent herein, claiming ownership of the same suit property. However, on 11th October, 2023, he opted to withdraw the said counter claim. I have noted from the order, that the withdraw was without liberty to refile it. I have also gone through the provisions of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN No. 174 of 2003 and found it being silent as to the effect of withdrawing a suit without leave or liberty to refile. Nonetheless, I am aware of section 51(2) of the Land Disputes Courts Act [Cap. 216 RE 2019] which provides thus: - "... The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code [Emphasis added]. 8 In the light of the provision aforecited, the issue of withdrawing suits and or refileing them can only be addressed by the Civil Procedure Code, [Cap 33 R.E 2019]. Order XXII Rule 1(3) of the Code provides for the effect of withdrawing a

suit without permission to refile it. It provides thus: - "Where the Plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim/7 [Emphasis added]. The above provision applies to any suit filed in the District Land and Housing Tribunal. It is elementary knowledge that a counter claim is a cross suit and therefore, a person who withdraws it with the intention of refiling in future, must do so with the permission of the court or tribunal. In the instant matter the Appellant was found to have withdrawn the counter claim against the 2nd Respondent in Application No. 39 of 2023 without leave of refiling. This being the case the Appellant was precluded from raising the same claims against the 2nd Respondent. In that regard, I find no merits in the 2nd ground of Appeal. 9 In regard to the 3rd ground of appeal. The counsel for the Appellant is levelling brames against the trial tribunal for raising issues suo motto and determining them without affording the parties with the right to be heard. The learned counsel for the Appellant submitted that in the course of composing ruling, the trial chairman raised the issue of difference of names in the certificate of failure of mediation from the ward tribunal, but parties were not given the opportunity to address it. He prayed the court to quash the ruling of the trial tribunal, referring to the decision of the Court of Appeal of Tanzania in Raza Soniji vs Amina Salum [1993] TLR 208, where it was held to be wrong for a judge or magistrate to raise an issue suo moto without affording parties with the right to be heard. In reply, the counsel for the 1st Respondent contended that the trial tribunal never stated anywhere in the ruling that, there was difference in names in the certificate from the Ward tribunal. In essence what the trial tribunal stated is that, the parties were different between those who were sued at the District Land and Housing Tribunal and those to whom the Appellant instituted the mediation proceedings against at the Toangoma Ward Tribunal. io I have keenly read the ruling together with the records of the trial tribunal in order to find out if the trial chairman invented his own issues suo motored determined them without giving parties and opportunity to address him. I have noted that no issue which was raised suo moto by the trial tribunal, what the trial chairman did was a mere observation on the annexed certificate of the ward tribunal which seemed to have names of different persons other than those in Application No. 147 of 2023. Nevertheless, such observation was not used in deciding the preliminary objection. From the foregoing, I find the ground to have no merits. With regard to the last ground, it was the submission of the counsel for the Appellant that the trial chairman erred to bind himself to strict rules of civil procedure when the tribunal is not bound by such rules of procedure. He relied on the decision of the Court of Appeal of Tanzania in Fatuma S. Bassebe vs Jason Mutagulwa Rwiza, Civil Appeal No. 4 of 2021 where it was held that Courts should endeavour to basically focus on substantive justice. I am at one with the learned counsel for the Appellant that with the advent of the overriding objective principle enshrined in our Civil Procedure Code, in section 3A and 3B, courts are not supposed to strictly li be bound by rules of procedures. However, there are ruled of procedures which are fundamental that must be observed strictly. For instance, the court cannot just close its eyes on rules that determines the jurisdiction of the court. In the

matter at hand, the trial tribunal was called to determine two points of law. The 1st one was on the mandatory requirement of certification of failure of mediation before the ward tribunal. As aforesaid, section 13(4) of the Land Disputes Court Act (supra) is couched in mandatory terms. Failure to comply with the said requirement cripples the jurisdiction of the District Land and Housing Tribunal to try the matter. The point on withdraw of the suit without permission to refile also goes to jurisdiction issue. This is because under Order XXII Rule 1(3) of the Civil Procedure Code (supra), the court cannot have jurisdiction to entertain any matter that was withdrawn without leave to refile. In my view, the points raised before the trial Tribunal were fundamental as they touched the jurisdiction of the trial Tribunal. In the final analysis, I find no merits in the Appeal, it deserves to be dismissed. I have noted that the trial Chairman in his ruling ended up striking 12 out the suit. In my firm view, since the trial Tribunal found merits in both points of objection it ought to have made the corresponding consequential orders for each point. The finding that the Appellant was precluded from filing a fresh suit against the 2nd Respondent following the withdraw of the counter claim, the appropriate order was dismissal. In respect of the non-compliance of section 13(4) of the Land Disputes Courts Act (supra) the Order ought to be to strike out the suit. Having found so, I proceed to dismiss the entire appeal with costs and make the variation of orders of the trial Tribunal as follows: -

1. The suit, Application No. 147 of 2021 is dismissed to the extent of claims against the 2nd respondent; and
2. The suit is struck out to the extent of the claims against the 1st Respondent. Order accordingly. DATED at DAR ES SALAAM this 13 September, 2024. Zshv? 13

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