IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 59 OF 2016

(Originating from the decision of the District Land and Housing Tribunal of Babati District at Babati in Land Case No. 89 of 2006)

ADAM SHABANI (as Administrator of the

Estate of the late **SHABANI KWAANGW**).....**1ST APPELLANT**

GWAATEMA NIILO.....**2ND APPELLANT**

AND

PAULO DAGNO.....**RESPONDENT**

JUDGMENT

DR. M. OPIYO, J

The appellants named above being aggrieved and dissatisfied by the decision and order of the District Land and Housing Tribunal of Babati dated 9th day of November, 2016 appealed before this court basing on the following grounds;

1. That the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and fact in allowing preliminary objection which was not based on ascertained point of law.

2. That the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact in holding that the Appellant's amended application was contrary to the directives issued by Mwaimu, J in Land Appeal No. 5 of 2015.

3. That the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact in finding the Appellants' amendment improper while the order of the tribunal allowing amendment imposed no conditions.

4. That the Hounourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact in holding that the Appellant's amended application ought to be brought against six (6) respondents while Application No. 199 of 2014 and High Court Land Appeal No. 5 of 2015 were preferred by the respondent alone.

5. That the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact in holding that the Appellants' amended application ought to be brought against (6) respondents while other respondents appealed before the High Court in Land

Appeal No. 9 of 2008 and lost the same in favour of the Appellants' favour.

Brief facts emanating to this appeal are as follows; the 2nd appellant **GWAATEMA NIILO** and the late **SHABANI KWAANGW** instituted at Manyara District Land and Housing Tribunal Application No. 89 of 2006 against six respondents whereby they claimed 35 acres of land allegedly trespassed upon by the said respondents. The application was heard and determined *ex parte* against all the respondents. *Ex parte* judgment was entered in favour of the applicants against all respondents except the 5th respondent. Attempts by the 1st, 3rd, 4th and 6th respondents to set aside the *ex parte* judgment were unsuccessful. The respondent in this appeal PAULO DAGNO (alone) instituted Misc. Land Application No. 199 of 2014 before Manyara District Land and Housing Tribunal seeking to set aside the *ex parte* judgment in Manyara District Land and Housing Tribunal, Application No. 89 of 2006. The said application was dismissed with costs. Dissatisfied with the order of dismissal the respondent instituted High Court Land Appeal No. 5 of 2015. Judgment in the said Appeal was delivered on the 18th September 2015 whereby the appeal was allowed with costs, and the following orders made at page 7 of the typed judgment;

"*In light of foregoing reasons the appeal is allowed as having merit.The tribunal was wrong in dismissing the application for*

setting aside the ex parte order, judgment and decree. The ruling in application No. 199 of 2014 is quashed and the ex parte judgment and decree in respect of Application No. 89 of 2006 are set aside. The appellant was not properly and effectively served. Application No. 89 of 2006 should be heard on its merits and before anotherChairman of the tribunal with competent jurisdiction."

Following that order the original record was remitted to the Manyara District Land and Housing Tribunal for re-trial. Before hearing date, counsel for the applicants informed the tribunal that the first applicant had died as such he sought leave of the tribunal to amend the application. Leave was granted as prayed and theAmended Application was filed. Being served with a copy of the Amended Application, counsel for the respondent raised a preliminary objection on a point of law to the effect that the Amended Application did not comply with the Order of the Judge in Land Appeal No. 5/2015. The objection was upheld and the amended application was struck out with costs. It is upon the above background that this appeal has been preferred.

Before this court, the appellants are represented by Qamara learned Advocate while the respondent is represented by Kinabo learned counsel. This court ordered the hearing of this appeal to be disposed

or submission that the parties bound by contract giving rise to the suit to refer the dispute to arbitration"

He further referred this court at page 701 where it was stated that;

"A preliminary objection is in the nature of what used to be demurer. It raises a pure point of law which is argued on the assumption that ail the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or what is sought is the exercise of judicial discretion"

He therefore contended that, the Chairman of the District Land and Housing Tribunal erred in law and fact in allowing a preliminary objection which was not based on ascertained point of law and prayed the first ground of appeal be allowed with costs and consequently the decision of the District Land and Housing Tribunal be quashed and set aside.

On the second ground of appeal, he submitted that the decision of Mwaimu, J (as he then was) in Land Appeal No. 05 of 2015 quashed the ruling in Application No 199 of 2014 and the ex parte Judgment and decree in respect of Application No 89 of 2006 set aside. Consequently it ordered Application No. 89 of 2006 to be heard on merits and before another Chairman as the appellant was not properly and effectively served. That, the appeal no Appeal No. 05 of

2015 was the result of ruling in Misc. Application No. 199 of 2014 which originated from Misc. Application No. 71 of 2009. In both applications and Appeal the person involved was only one person Paul Dagno. He stated that, the other six has never been part of the Misc. Application No. 71 of 2009 or Misc. Application No. 199 of 2014. Paul Dagno has been the sole Appellant in Appeal No. 05 of 2015 and the judgment was issue in favour of only one person and not in respect of any other persons.To support his argument, he referred this court to the case of **Mariam Nduguru vs Bukoli and Others(2002) TLR 417** where it was held that;

> *"(i) this was a judgment in personam, described more accurately as judgment inter parties, not a judgment in rem; it was judgment against defendants in the suit;*
>
> *(ii) As this was judgment in personam (or inter parties) it cannot be enforced against a person who was not a party to the proceeding leading to the judgment."*

Onthe 4th and 5th grounds of appeal, he submitted thatLand Appeal No. 05 of 2015 was preferred by only one person, Paulo Dagnoand the appeal was done in respect of Misc. Application No. 199 of 2014 the Application was also preferred by only the respondent Paulo Dagno. The respondent herein **Paulo Dagno** by his letter dated 16/7/2009 excluded himself from Appeal No. 9/2009 before this court preferred by other respondents in Application No. 89 of 2006.

In regard to the third ground of appeal, he submitted that besides that Misc. Application No 199/2014 and Appeal No. 05 of 2015 which was preferred by only respondent Paulo Dagno; first, the 5th respondent in Application No. 89 of 2006 was declared to have not cultivated or invaded the land as reflected in *ex parte* Judgment dated 27/5/2007 at page 3 which states that;

> *"That the suit land is invaded and cultivated by only five respondents who are 1st, 2nd, 3rd , 4th, and 6th respondents only. The 5th respondent has neither invaded nor cultivated the suitland".*

Secondly, after the *ex parte* Judgment, 1st, 2nd, 3rd, 4th and 6th respondents filed Misc. Land Application No. 85 and 87 of 2007 and the ruling was delivered in favour of the Appellants' herein. Then thereafter the appellants filed a Land Appeal No.9 of 2009 before this Courtwhich was dismissed and judgment was delivered for only 3 Appellants. The appellant in Misc. Appeal No 199 of 2009 and Land Appeal No. 05 of 2015 excluded himself from the Appeal by his letter as explained above. Thirdly,the three Appellants in Land Appeal No. 9 of 2008 filed Misc. Land Appeal No 75 of 2010, the application which was withdrawn with costs on 12/7/2011. He therefore contended that, it is apparent that out of the six (6) respondents in Application No. 89 of 2006, the 5th respondent was declared not to have invaded

the land in dispute in *ex parte* Judgment. Other respondents excluding Paulo Dagno has followed their right by instituting Applications before the Tribunal in Application No. 85/2007 and 87/2007 and Land Appeal No. 9 of 2008 and Misc. Land Application No. 75 of 2010 before this Court. Therefore, through Misc. Land Application No. 71/2009, Misc. Land Application No. 199 of 2014 and Land Appeal No. 05 of 2015 the Appellant Paulo Dagno was granted the leave to be heard before the Tribunal by another Chairman. Therefore, he prayed the 4th and 5thgrounds of appeal be allowed with costs and consequently the decision of the District Land and Housing Tribunal be quashed and set aside.

In regard to the third ground of appeal, he submitted that because the application to amend application/pleading was done as per Land Dispute Courts(The District land and Housing Tribunal) Rule 16 of GN 174 which states;

> *"16. the Chairman may, on his own motion or on application by either party order amendment of pleadings"*

The applicants, when asked for the amendment of the application there was no place where it was indicated that there was a specification/conditions in amendment to be made. The amendment was granted without any conditions.Hence the trial Chairman misdirected itself by stating that both respondents appealed to the High Court Vide Land Appeal No. 5 of 2015 while Land Appeal No. 5

of 2015 was preferred by only one person (the respondent). The Appeal was in respect of Misc. Land Applications No. 71 of 2009 and Misc. Land Application No. 199 of 2014. He stated that, the Chairman also misdirected himself for failure to consider Misc. Land Application No. 85 of 2007 and Misc. Land Application No. 87 of 2007 before the tribunal and Land Appeal No. 9 of 2008 and Misc. Land Application No 75 of 2010 which were preferred by other respondents in Application No. 89 of 2006. He further contended that, the Chairman also misdirected himself for failure to realize that the 5th respondent had been excluded in Application No. 89 of 2006. He thus contended that, since the other 5 respondents in Application No. 89 of 2006 fate has been decided in other applications before the tribunal and this court; then the applicant has the right to sue a party who has interest in the case and the applicant may join any party. He is not forced to sue a party whom he has no right of relief or claims against. Based on the above submissions, he prayed this court to allow the appeal with costs and consequently the decision of the District Land and Housing Tribunal be quashed and set aside.

In reply submissions, the respondent's counsel responding to the first ground of appeal submitted that the preliminary point of objection raised by counsel for the respondent before the trial tribunal is to the effect that the intended amended application as presented did not comply with order of Mwaimu J. (as he then was) in Land Appeal No. 5 of 2015. He contended that, the order of the Judge is a point of

law which if argued as a preliminary point will dispose of the suit. He said, there are no facts to be ascertained regarding the order of the Honourable Judge. The same is specific and does not seek the exercise of judicial discretion. He further submitted that, after the death of the 1st applicant, and before commencement of the retrial by the District Land and Housing Tribunal, counsel for the applicants was granted leave to file an amended application by substituting the name of the administrator of the estate for that of the said applicant. The said tribunal did not grant leave to file a fresh application. He further stated that, Application No. 89 of 2006 was between the two applicants against six respondents. The applicants claimed land measuring 35 acres from the six respondents jointly. However the intended amended application was between the applicants and one defendant, namely the respondent herein. The claim was for land measuring 5 acres only. The changes effected in the intended amended application contravened the order of re-trial made in Land Appeal No. 5 of 2015 before the High Court. He stated that, the whole of the *exparte* judgment in Manyara District Land and Housing Tribunal Application No. 89 of 2006 was set aside by the honourable Judge and re-trial ordered. The said order of the High Court neither set aside only part of the ex parte judgment, nor did it order retrial of only part of the application. Hence he stated that, the intended amended application was properly struck out by the trial tribunal. He said the above submission covers also the second ground of appeal.

On the third ground of appeal, he submitted that the record of the District Land and Housing Tribunal subsequent tothe decision and order of re-trial by the High Court, clearly reflects thatcounsel for the applicants informed the tribunal that the first applicant in Application No. 89 of 2006 was deceased, and prayed for leave to substitute the name of the administrator of his estate for his name. Leave was granted. The leave to amend was limited to the substitution of namesand not more. He contended that, the tribunal had no jurisdiction to orderamendment of the decision of the High Court ordering retrial of the wholeapplication.

On thefourth and fifth grounds of appeal, he submitted that the fact that it was the respondent who filed Application No. 199 of 2014 and High Court Land Appeal No. 5 of 2015, does not bar theHigh Court from making a decision touching on the whole of the *exparte* judgment in Application No. 89 of 2006. Equally the fact that Land Appeal No. 9 of 2008 was filed by the other respondents seeking to set aside the*exparte* judgment in Application No. 89 of 2006 was dismissed, was not abar to setting aside the same *exparte* judgment. Therefore, he stated that this appeal is misplaced and prayed the same be dismissed with costs.

In rejoinder, the appellants' counsel reiterated what he stated in the submission in chief and maintained his prayer that this appeal beallowed and the decision of the District land and Housing Tribunal be quashed and set aside.

In disposal of this suit, I will start with the first ground of appeal that the District Land and Housing Tribunal erred in law and fact in allowing preliminary objection which was not based on ascertained point of law. The preliminary objection which was raised before the District Land and Housing Tribunal was to the effect that the amended application is not properly before the tribunal for contravening the order issued by the High Court in Appeal No. 5 of 2015. In my considered view, the said preliminary objection did not call for evidence as there were no facts to be ascertained regarding the order of the High Court in Appeal No. 5/2015 as that order as it appeared was not disputed by any party. The issue emerged on interpretation of the order and not its contents. As such, I therefore find that the first ground of appeal has no merits and accordingly dismissed.

Proceeding to the second and the third grounds of appeal, which I prefer to determine jointly. I will start by referring to the order of the Mwaimu J. (as he then was) in Land Appeal No. 5 of 2015 which stated that;

> *"The tribunal was wrong in dismissing the application for setting aside the ex parte order, judgment and decree. The ruling in Application No. 199 of 2014 is quashed and the ex parte judgment and decree in respect of Application No. 89 of 2006 are set aside. The appellant was not properly and effectively served. Application No. 89 of 2006 should be heard*

on its merits and before another Chairman of the tribunal with competent jurisdiction."

In Land Appeal No. 5/2015 in which the order referred to above was issued, the parties were Paulo Dagno (respondent) and Gwaatema Niilo (2nd appellant) and Shaban Kwaang (deceased- whose estate were administered by Adam Shabani – (1st appellant). The records, indisputably reveals that an order issued by Mwaimu, J. in Land Appeal No. 5/2015 bound only the parties to that appeal, referred to above. It was not in respect ofall respondents in the original Application No. 89 of 2002. It was only Paulo Dagno who convinced High Court in Land appeal no 5/2015 that he was not properly served and given a chance to be heard at the tribunal. His success could not work for all others who never proved their positions in that appeal as they were not parties thereto. Considering that, an amendment by the appellants in Amended Application No. 89 of 2006, although it was instigated by the death of one of the plaintiffs, but also amendment reflecting only one respondent (Paulo Dagno) for the purpose of rehearing application as ordered by High Court in Appeal no 5/2015 was inevitable, thus, effecting that was not contrary to what Hon. Justice Mwaimu (as he then was) had held as argued by the counsel for the respondent. consequently, it was right for the applicant to remove all other 5 respondents against whom the rehearing was not ordered. Hence amendment in regards to the

parties was proper as long as those other 5 respondents were not parties in Land Appeal No. 5/2015.

On top of that, it also conspicuously noted from records thatthe other 5 respondentswho are 1st, 2nd, 3rd, 4th and 6threspondents,after the *ex parte* Judgment in original Application No. 89/2006 which was issued by the tribunal, they filed Misc. Land Application No. 85 and 87 both of 2007 before the tribunal and the ruling was delivered in favour of the Appellants' herein. Then the respondents filed a Land Appeal No.9 of 2009 before the High Court which was dismissed as well. Therefore, it is very clear that Land Appeal No. 5/2005 was decided in favour of the respondent herein alone and not all respondents in the original application No. 89/2006. As such,it was proper for the appellants to amend the application and retain the name of the respondent herein only.

In regard to amendment of the size of piece of land; since the original Application which was against 6 respondents was for piece of land measuring 35 acres; then consequent to Land Appeal No. 5/2015 which was preferred by the respondent alone, then it was proper for the applicants in their amended application to reduce a portion to cover the particular portion of land which was supposedly trespassed by respondent herein only leaving those allegedly trespassed by all other respondents. I therefore find that the Amendment which was filed by the applicants was proper basing on the reason that in Land Appeal No. 5/2015 all the other 5

respondents were excluded. That means the amendment which had to be effected had to cover only the respondent herein and not all other respondents. Based on that, it is my finding that the trial Chairman was wrong in striking out the Amended Application No. 89/2006. I therefore allow this appeal. I quash and set aside the decision and order of the Babati District land at Housing Tribunal dated 9/11/2006 striking out the. I order that the Amended Application No. 89/2006 be heard by another Chairman.

I make no order as to costs.

Order accordingly.

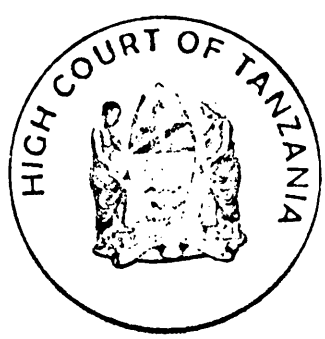
(SGD)

DR. M. OPIYO,

JUDGE

24/4/2018

I hereby certify this to be a true copy of the original.



A.K. RUMISHA

DEPUTY REGISTRAR

ARUSHA