

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 128 OF 2015

FOSTERS AUCTIONEER AND DEBT COLLECTORS.....APPELLANT

AND

IDDI MALEGERI KOWE.....RESPONDENT

CIVIL APPEAL NO 149 OF 2015

BETWEEN

IDDI MALEGERI KOWE..... APPELLANT

AND

1. WILLIAM MCHOPA

2. FOSTERS AUCTIONEER

AND DEBT COLLECTOR.....RESPONDENTS

(Appeals from a judgment and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu (Hon. H. S. Riwa, SRM.) given on the 29th day of June, 2015 in Civil Case No. 293 of 2012)

22 February & 9 March, 2018.

DYANSOBERA, J:

These are consolidated appeals in which the appellants and respondents are different; the appellant in Civil Appeal No. 128 of 2015 is Fosters Auctioneer and Debt Collectors and the respondent is Iddi Malegeri Kowe while in Civil Appeal No.149 of

2015 the appellant is Iddi Malegeri Kowe and the respondents are William Mchopa and Fosters Auctioneer and Debt Collectors.

The two appeal owe their origin in Civil Case No. 293 of 2012 filed in the Resident Magistrate's Court of Dar es Salaam at Kisutu.

In the first appeal that is Civil Appeal No. 128 of 2015 the appellant has raised a total of eight (8) grounds of appeal as follows:

1. That the learned trial Senior Resident Magistrate grossly erred in law in holding that the Resident Magistrate's 'court was seized with jurisdiction to entertain a suit or proceedings whose cause of action purportedly arose in the course of execution of a decree in the District Land and Housing Tribunal
2. That the learned trial Senior Resident Magistrate grossly erred in law in entertaining the suit against the appellant whose cause of action purportedly arose in the course of the execution of duties as a Tribunal Broker duly assigned by a Chairman of the District Land and Housing Tribunal to execute orders by and from the Tribunal
3. That the learned trial Senior Resident Magistrate grossly erred in law in not finding that any complaint against the appellant alleging improper or illegal execution of her duties as a Tribunal Broker had special procedure of dealing with them thus the respondent ought to have pursued the procedure laid down in the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2002, GN No. 174 of 2003 instead of instituting a suit as he did.
4. That the learned trial Senior Resident Magistrate having found that the respondent had failed to prove presence of Tshs. 20,000,000/= in the

structures that were demolished grossly erred in fact and in law in not finding that the respondent had failed to prove existence of 100 pigs and the alleged value of Tshs. 40,00,000/=.

5. That the learned trial Senior Resident Magistrate having properly found that the appellant was duly assigned to and in the course of executing orders of the District Land and Housing Tribunal erred in law in not finding that the Appellant was under the circumstances justified or acted reasonably in taking possession of pigs that were found in the stalls/pigpens.
6. That the learned trial Senior Resident Magistrate grossly erred in law in and fact in not properly analyzing and applying the evidence on record leading to mis-directions, non-direction thus reaching into wrong conclusions and decision despite of contradictory and conflicting evidence in the respondent's case.
7. That the learned trial Senior Resident Magistrate grossly erred in law in and fact finding that the respondent had proved the claim of the value of pigs sold out as amounting to Tshs. 40,000,000/=
8. That the learned trial Senior Resident Magistrate grossly erred in law in and fact in not acting upon the appellant's evidence as regards the pigs actually found in the stalls/pigpens despite of cogent and reliable evidence readily available on record.

The grounds set out by the appellant in the second appeal, i.e. Civil Appeal No. 149 of 2015 are the following:

1. The trial Magistrate erred in law and fact by ordering the appellant to obey the order of the District Land and Housing Tribunal for Ilala District while the said order was neither among the relief(s) sought by the appellant nor did any of the respondents ask the same.
2. The trial Magistrate erred in law and fact by holding that there was no sufficient evidence adduced by the appellant to prove the loss of Tshs.20,000,000/= being the money obtained from the sale of pigs and got lost during the illegal execution.

For the sake of convenience and to maintain their identities as were at the trial court, I shall refer Iddi Malegeri Kowe as the plaintiff, William Mchopa as the 1st defendant and Fosters Auctioneer and Debt Collectors as the 2nd defendant.

Briefly stated, the factual background of matter is as follows. The 1st defendant filed Application No. M/42/2006 at Kitunda Ward Tribunal claiming a right of way through the plaintiff's plot No. ILA/KTD/KTK/25/4 in Kitunda area, Dar es Salaam. The plaintiff resisted the application but the 1st defendant carried the day. The plaintiff was aggrieved by the decision of the Ward Tribunal and appealed at Ilala District Land and Housing Tribunal vide Land Appeal No. 21 of 2006 but he lost. He then gave a notice to appeal to the High Court against the decision of the said Tribunal. Meanwhile, the 1st defendant applied to the District Land and Housing Tribunal to execute the decree and a notice of fourteen (14) days was issued to the plaintiff. The plaintiff then filed an application to the District Land and Housing Tribunal for stay of execution. The application was granted and the execution stayed pending the determination of the intended appeal to the High Court.

The plaintiff filed the appeal to the High Court which was registered as Misc. Land Appeal No. 74 of 2007. The appeal was, however, dismissed on 10th February, 2009 and the execution of the decree which had been stayed pending the determination of the appeal was effected by the order of the District Land and Housing Tribunal dated 13th day of July, 2009. Following the dismissal of the appeal, the plaintiff gave a notice of intention to appeal to the Court of Appeal and wrote a letter applying for copies of judgment, decree and proceedings for purpose of lodging an appeal.

While waiting for the said copies of proceedings, judgment and decree, the plaintiff learnt that the 2nd defendant was demolishing his premises in execution of the decree. The plaintiff and his advocate inquired into whether the proper procedure of execution was followed and on 24th day of August, 2009 the plaintiff and his advocate managed to peruse the file of the District Land and Housing Tribunal and found that the Chairman had issued summons to the parties so that the application for execution which had been stayed was determined and on 25th August, 2009 the plaintiff's advocate wrote a letter to the Tribunal to be supplied with a copy of proceedings of from 27th May, 2009 onwards for record purposes. The proceedings were typed and supplied to the plaintiff's advocate. The record to the Tribunal showed that on 3rd June, 2009 an order for execution was made in the presence of the parties.

Believing that the record of the Tribunal was not correct and that the execution was done in violation of the plaintiff's basic rights, the plaintiff went again to the High Court and applied for revision against the Ilala District Land and Housing Tribunal Land Appeal No. 21 of 2006 vide Land Case Revision No. 44 of 2009. While the said revisional proceedings was pending before the High Court, the same plaintiff filed a

Land Case No. 239 of 2009 in same court. I say that the plaintiff filed Land Case No. 239 of 2009 in court while of the proceedings in Land Case Revision was still pending in the same court because of what the Mediator in the Land Case No. 239 of 2009 remarked that **‘the unresolved legal issues involved in the issues in this suit and Land Revision (Revision No. 44 of 2009) should be settled down first before mediation stage’**. However, as the record reveals, Land Case No. 239 of 2009 was determined on 26th June, 2012 before Land Case Revision was determined as the decision in the latter case was given on 28th day of February, 2013. Nonetheless, in Land Case No. 239 of 2009 the plaintiff’s claims were thrown overboard by striking out the suit for want of jurisdiction. The same court, however, in Land Case Revision No. 44 of 2009 did, on 28th day of February, 2013 declare the execution proceedings of the Tribunal starting from 3.6.2009 to be unlawful and void, holding that the procedure for execution was not properly applied by the chairman and that parties were not heard. It made an order that costs to be paid by the respondents and the case on the unlawful execution must be remitted to the Registrar who shall make a proper assessment as to the properties lost during the execution process and/or refer to a court of competent jurisdiction if the parties so desire. Further that care should be taken to follow the relevant laws and procedure.

The plaintiff then instituted Civil Case No. 293 of 2012 in the Resident Magistrate’s Court of Dar es Salaam at Kisutu against the two defendants claiming various reliefs. At the end of the day, the learned trial Senior Resident Magistrate gave her judgment on 29th day of June, 2015 ordering as follows:

- *The court broker who was not properly prepared to execute the orders pay Tshs. 40,000,000/= being the loss of pigs*
- *Pay the interest of the decretal sum from the date of judgment to the full payment of 7%*
- *Pay costs of the case*
- *The plaintiff also is ordered to obey the order of the Tribunal by providing the road or path as he was ordered by the Tribunal of the District Land Tribunal*
- *It is so ordered accordingly.*

It is from this decision that the above appellants have preferred their appeals which, as said before, have been consolidated.

On 8th day of June, 2017 when these appeals came up for hearing parties, were duly represented by advocates and with the leave of the court and consent of learned advocates, the appeal was argued by way of written submissions.

I propose to start discussing the first ground of appeal, in Civil Appeal No. 128 of 2015 and then will revert to others, if circumstances allow. My choice of discussing this first ground of appeal has been necessitated by the fact that the ground touches the jurisdiction of the trial court which gave the impugned decision.

The first ground of appeal in Civil Appeal No. 128 of 2015 is that:

- 1. That the learned trial Senior Resident Magistrate grossly erred in law in holding that the Resident Magistrate's 'court was seized with jurisdiction to entertain a suit or proceedings whose cause of action purportedly arose in the course of execution of a decree in the District Land and Housing Tribunal**

It is submitted by Mr. Dennis Michael Msafiri, learned counsel for the defendants (appellant in the first appeal) that the Resident Magistrate's Court at Kisumu was not seized with jurisdiction to entertain the suit or proceedings whose cause of action arose in the course of execution of a decree in the District Land and Housing Tribunal. It is contended on this ground that this point was raised at the trial as a preliminary objection but was dismissed by the trial court that it had jurisdiction and proceeded to hear the suit and determine it on merit. Learned counsel argues that this was erroneous because the suit at the trial court was founded on execution of the proceedings that were held and conducted in the District Land and Housing Tribunal for Ilala District in Land Appeal No. 21 of 2006; the appeal proceedings having arisen from the decision of Kitunda Ward Tribunal Application No. M/42/2006 and that this was clear from the plaintiff's plaint under paragraphs 12 and 13 in particular. To buttress this point, Mr. Msafiri relied on Sections 38 (1) of the Civil Procedure Act [Cap. 33 R.E.2002] and 16 (3) of the Land Dispute Courts Act [Cap. 216 R.E.2002]. Counsel for the defendants stressed that the Resident Magistrate's Court had no jurisdiction to even entertain a separate suit and that the judgment of the High Court (Hon. Ngwala, J.) was wrongly interpreted.

In reply to this ground of appeal, Mr. F.M. Mgare, learned counsel for the plaintiff submitted that the suit between the parties at the trial was about payment of Tshs. 40,000,000/= being value of 100 pigs which were illegally taken and sold by the appellant, the 1st defendant for that matter. That it was not an order of Ilala District Land and Housing Tribunal to illegally sell the pigs. Further that the District Land and Housing Tribunal could only entertain the suit under section 38 (1) of the CPC if and

only if it had ordered the appellant to sell the pigs. It was learned counsel's further contention that the appellant that is the 1st defendant was not a party to the suit nor was he a representative and that third parties like court brokers are not covered by the section. He pointed out that there was no legal decree passed by the District Land and Housing Tribunal to bring into the application of section 38 (1) of the CPC. Counsel concluded that the trial court was right to overrule the preliminary objection by the 1st defendant on the issue of jurisdiction. He distinguished the case of TANESCO from the present case.

I think Mr. Dennis Michael Msafiri is right in this ground of appeal on the question of the jurisdiction of the Resident Magistrate's Court at Kisumu. The reasons for this are clear. First, section 38 (1) of the Civil Procedure Code [Cap. 33 R.E.2002] in clear and unambiguous terms provides that '**all questions** arising between the parties to the suit in which the decree was passed...and **relating to the execution**, discharge or satisfaction **of the decree shall be determined by the court executing the decree and not by a separate suit**. There is no dispute that the attachment and sale of pigs was one of the question arising between the plaintiff and the 1st defendant who, before the Ward Tribunal, the District Land and Housing Tribunal and the High Court (Land Division as it then was), were parties respectively, as a decree holder and a judgment debtor and the 2nd defendant was only legally involved to execute the court's decree between the said parties. It is, therefore, not correct to say that section 38 (1) of the Code was not applicable in the circumstances of this case. As the law forbade instituting a separate suit and since the Resident Magistrate's court at Kisumu was not the court executing the decree of the District Land and Housing Tribunal, it lacked

jurisdiction to try the suit, the subject of this appeal. That leads me to the second reason. Section 16 (1) of the Land Dispute Courts Act clearly states that ‘ where a party to the dispute fails to comply with the order of the Ward Tribunal under subsection 1, the Ward Tribunal shall refer the matter to the District Land and Housing Tribunal for enforcement.’ This means that it is this court that is the District Land and Housing Tribunal and not the Resident Magistrate’s Court which was mandated to apply the provisions of section 38 (1) of the Code.

Third, I have no doubt that both the plaintiff and the trial RM’s Court at Kisumu wrongly misinterpreted and implemented the judgment of the High Court (Land Division as then was, (Hon. Ngwala, J.)) who in her ruling delivered onin Land Case Revision No. 44 of 2009, after finding that the execution proceedings were unlawful and a nullity, ordered the case on unlawful execution to be remitted to the Registrar who had to make a proper assessment as to the properties lost during the execution process and/or refer to a court of competent jurisdiction if the parties so desired and that care should be taken to follow the relevant laws and procedure. The meaning of this order in the said ruling is that the High court was satisfied that the execution was unlawful. It nullified the proceedings of execution signed on 3. 6. 2009 up to 9.9.2009 with costs to be paid by the respondents. It then ordered the case on unlawful execution to be remitted to the Registrar either for himself/herself to make a proper assessment s to the properties lost during the execution process or refer to a court of competent jurisdiction to do assessment if parties so desired. She went further and directed that care should be taken to follow the relevant laws and procedure. In other words, Her Ladyship Justice Ngwala made an order to the Registrar to do the

assessment himself or herself on the properties lost during the execution process and at the same time gave an option to the parties to refer the issue of assessment to a court of competent jurisdiction but warned parties in exercising their option to take care to follow the relevant laws and procedure. I have no doubt that Her Ladyship did not mean that a fresh suit be opened at Kisutu. This is partly because she did not indicate so in her order and partly because she was aware of the provisions of section 38 (1) of the Civil Procedure Code and section 16 (3) of the Land Disputes Courts Act.

In that premise, the learned trial Senior Resident Magistrate erred in law and in fact in dismissing the preliminary objection which insisted that the court had no jurisdiction and instead, entertained the suit, the subject of this appeals without jurisdiction. Admittedly, jurisdiction either exists or does **not ab initio** and it is trite law that jurisdiction cannot be conferred by the consent of the parties. The first ground of appeal is sustained.

Since the first ground of appeal in Civil Appeal No. 128 of 2015 sufficiently disposes of both appeals, I find it unnecessary to determine the other grounds of appeals.

The appeals are, therefore, allowed. The proceedings of the trial Resident Magistrate Court at Kisutu in Civil Case No. 293 of 2012 are declared a nullity and set aside. Each part should bear its own costs.




W.P. Dyansobera

JUDGE

9.3.2018

Delivered this 9th day of March, 2018 in the presence of Mr. Mgare, learned counsel for the plaintiff (respondent in the first appeal and appellant in the 2nd appeal), Ms Agma Haule holding brief for Mr. Dennis Msafiri, learned counsel for the 2nd defendant (appellant in the first appeal and 2nd respondent in the second appeal) and in the presence of the 1st defendant (the 1st respondent in the second appeal) in person.




W.P. Dyansobera

JUDGE