THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

LAND APPEAL NO. 52 OF 2023

(Originating from the District Land and Housing Tribunal for Songwe at Mbozi in Land Case No 21 of 2022.)

SALA MWITA .....APPELLANT

VERSUS

1. **FARIDA JOHN MWASENGA**
2. **VENANCE CHARLES NTENGWI.....RESPONDENTS**

JUDGMENT

Date of Last Order: 05/10/2023
Date of Judgement: 15/03/2024

NDUNGURU, J.

Parties to this case are relatives, the appellant, SALA MWITA is the biological mother of Venance Charles Ntengwi (2nd respondent) and was mother in law of Farida John Mwasenga (1st respondent) before the two, that is the 1st and 2nd respondents divorced. It appears that when the decree of divorce was issued by the Primary Court of Vwawa, it also ordered the two to have equal share by selling one house situated at Igwala Street, Ilolo ward within Mbozi District and Songwe Region (to be referred as the disputed premises).

Thereafter, having noticed that there were arrangements to sell the disputed premises, Sala Mwita instituted land case No. 21 of 2022 before the District Land and Housing Tribunal for Songwe at Mbozi against the respondents. In that case, she claimed that the disputed premises is her property which she gave to the respondents to live pending them to build their own house. She thus, sought for orders that; be declared as lawful owner of the disputed premises, injunctive order to the respondents to sell the disputed premises, costs and any other reliefs as the Tribunal deemed fit and just to grant to her.

On the other side, the 2nd respondent supported the appellant's claims in their totality, while the record does not show if the 1st respondent filed any reply to the application. However, she was a witness and contested the appellant's claims.

Having heard parties' evidence, the trial Tribunal dismissed the appellant's claim on the reasons that the evidence adduced by the respondents to the Primary Court regarding construction of the disputed premises proved it to be the respondents' property. And that, the appellant had never pressed any objection to the Primary Court for it to exclude the disputed premises from matrimonial properties of the respondents.

Dissatisfied by the decision, the appellant filed this appeal raising five (5) grounds of appeal of which I will not reproduce for the reasons to be apparent in this judgement. Instead, I will start determining a legal point which is the 5th ground of appeal. I take liberty to start with this legal point since it is a practice that where legal point is raised alongside other factual complaints court will start with legal point and if the same does not finalize the matter, then will revert to the rest. Ground 5 of the appeal is that:

"The trial tribunal grossly erred in law for deciding the dispute which has never passed to the ward tribunal for mediation as a mandatory requirement of the law".

At the hearing of the appeal, the appellant was present and advocated for by Mr. Chingilile, learned advocate while the respondents appeared in person without legal representation. It was orally argued.

Submitting in relation to the point at issue, Mr Chingilile argued that the appellant was unrepresented but the dispute had to be referred to the Ward Tribunal for reconciliation as per the amendments brought by Act No 3 of 2021, as to the effect, he said that the proceedings and judgment be nullified like this court did in the case of **Yasin Willison**

Karumuna vs Imelda John Karumuna, Land Revision No. 9 of 2022 HCT at Bukoba (unreported).

In reply, the 1st respondent said that counsel for the appellant is lying since she was firstly called to the Ward Tribunal then at the trial Tribunal.

In rejoinder, Mr. Chingilile contended that Ward Tribunal is different from the office of Village Executive Officer (VEO) thus that the matter had never passed to the ward tribunal.

I have taken on board the arguments of the parties, the record and the law. The issue to be resolved in the above concerned is whether the dispute of the parties was taken to a ward tribunal for reconciliation before being taken to the trial Tribunal. And if the answer is in negative, what is the effect of the flaw.

I have taken course to resolve the above issue, notwithstanding the fact that the appellant was the one who instituted the application before the trial Tribunal but she is now complaining that the matter did not pass to the ward tribunal for reconciliation. I wonder to whom the blameworthy is pressed to whilst she was the one who put the matter into motion. Obviously, she wants to benefit from her own wrong. As the general rule a person cannot benefit from his/her own wrong.

Nevertheless, for the nature of the complained abnormality it was also the trial Tribunal's duty to firstly check if it was clothed with jurisdiction to entertain the matter. This is because, by the amendment of section 13 of the Land Disputes Courts Act, Cap 216 R.E 2019 through section 45 (4) of the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021. The section provides that:

> *"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 is mine)

In the view of the above provision, the District Land and Housing Tribunal cannot hear any dispute affecting the title or interest on land unless the said dispute is mediated by the ward tribunal and the tribunal issue a certificate that it has failed to mediate the parties.

The foregoing section, by the use of the word "shall", has been couched in mandatory terms. It is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is by virtue of the provisions of section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2019. It reads:

> *"where in a written law the word "shall" is used in conferring a function such word shall be interpreted to mean that the function so conferred must be performed."*

Also, see the case of **Enerico Kukala vs Mohamed Mussa (Administrator of Estate of the late Ahmed Zahoro Ahmed)** Civil Application No 40 of 2011, CAT at Dar es Salaam.

In the matter at hand the parties' pleadings and the trial Tribunal proceedings are silent if the dispute between the parties was firstly referred to the ward tribunal for mediation. I am abreast of the proviso to section which gives a leeway that in case the ward tribunal fails to mediate a land dispute after the expiration of thirty days from the date the dispute was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the ward tribunal. However,

there is no such averment by the parties or on the record that the matter was firstly taken to the ward tribunal but time lapsed without making the needful.

In view of the above law, therefore, the trial Tribunal committed the infraction as it did not indicate if the parties have complied with the law before it assumed the jurisdiction to entertain the matter. And when a court entertains matter without jurisdiction the remedy available is non-other than nullifying the entire process.

Owing to the above reasons, I hereby nullify the trial Tribunal proceedings, quash the judgment and set aside the order. I make no order as to costs since the trial Tribunal contributed to the flaw.

Ordered accordingly.

THE HIGH COURT OF TANZANIA

D.B. NDUNGURU,

JUDGE

15/03/2024