

IN THE HIGH COURT OF TANZANIA
SUB-REGISTRY OF GEITA
AT GEITA

LAND APPEAL NO. HC/GTA/LND/APP/2855/2024

*(Originating from the Judgment and Decree in Land Application No. 05 of 2023
at District Land Housing Tribunal for Chato delivered on 15 November 2023,
Hon. M. F Kapinga, Chairman)*

DISMAS KANYEMELAAPPELLANT

VERSUS

KAROLIUS MISUNGWI (An Administrator of the

Late CONSTANTINE MISUNGWI)1st RESPONDENT

ESTHER CONSTANTINE MISUNGWI.....2nd RESPONDENT

LAURENCIA CONSTANTINE MISUNGWI.....3rd RESPONDENT

LUCAS CONSTANTINE MISUNGWI.....4th RESPONDENT

SCHOLASTICA CONSTANTINE MISUNGWI.....5th RESPONDENT

MAGRETH CONSTANTINE MISUNGWI.....6th RESPONDENT

SUZAN CONSTANTINE MISUNGWI.....7th RESPONDENT

JUDGMENT

Date of last Order: 15/03/2024

Date of Judgment: 18/03/2024

K. D. MHINA, J.

This is the first Appeal. It arose from the proceedings commenced in the District Land and Housing Tribunal ("the DLHT") for Chato, where the 1st respondent, vide Land Application No. 05 of 2023, sued the appellants together with the 2nd, 3rd, 4th, 5th, 6th and 7th

Respondents for recovery of eight (8) plots of surveyed land located at Chato town which were allegedly trespassed by the appellant.

The brief facts that led to the institution of Land Application 05 of 2023 before the DLHT are that the 1st respondent claimed that the appellant was a trespasser to the suit land, which was under his administratrix, after the passing away of his late father, Constantine Misungwi, who died intestate in 2012.

He further alleged that the sale of that land by the 2nd, 3rd, 4th, 5th, 6th and 7th to the appellant was unlawful for the reason that they were neither the administrators of the estate of the late Constantine Misungwi nor did he authorize that sale.

Therefore, this background prompted the appellant, as the administrator of the estate of the late Constantine Misungwi, to rush and seek redress at the DLHT for Chato, whereas *inter alia*, he claimed to be declared as the lawful owner of the suit plots, an order to return the suit plots under him, general damages of TZS. 10,000,000/= and permanent injunction to restrain the appellant and the 2nd to 7th respondents from interfering with the suit land.

At the trial, the appellant claimed that he purchased the disputed plots from the seven (7) children of the late Misungwi, whom

he did not remember their names, in 2016 for TZS. 2,150,000/=. Therefore, he claimed to be the lawful owner of the disputed land.

In the end, the trial Tribunal adjudged in favour of the 1st respondent and declared the appellant as the trespasser and that the sale of the suit land by the 2nd, 3rd, 4th, 5th, 6th and 7th to the appellant was unlawful were not the administrators of the estate of the late Constantine Misungwi.

Undaunted, the appellant appealed to this court and preferred the

following grounds to fault the decision of the DLHT;

1. *That the trial chairperson erred in law and, in fact, to hear and determine the Land Application No. 5/2023, which has been filed prematurely, hence incompetent for want of ward tribunal's certificate that has failed to settle the matter amicably.*
2. *The trial chairperson erred in law and, in fact, by improperly evaluating the facts, which led to an erroneous decision.*

At the hearing of the appeal, the appellant had the services of Mr. Ernest Makene, learned counsel, while the 1st respondent had Mr. Christian Byamungu, also learned counsel.

The 2nd to the 7th respondents were absent. The 2nd, 3rd, 4th, 5th and 7th respondents were duly served and received the notices of hearing, but they did not enter appearance.

For the 6th respondent, efforts to secure her attendance proved futile even after service by substituting by publication in Nipashe Newspaper dated 09 March 2024.

Therefore, the hearing of the appeal proceeded ex parte against the 2nd to the 7th respondents.

At the hearing, Mr. Makene abandoned the second ground of appeal and argued only the first ground of appeal.

Arguing in support of the only ground of appeal, Mr. Makene “kick start the ball” by quoting Section 45 (4) of the **Written Laws (Misc Amendment No. 3 Act of 2021)**, which amends Section 13 of the Land Disputes Courts Act, Cap 216 RE 2019.

Then he argued that the amendment directs that the DLHT cannot hear any proceeding affecting the title to or any interest in land unless the Ward Tribunal (WT) has certified that it has failed to settle the matter amicably and issued a certificate that it has failed to resolve the dispute.

He elaborated that when Application No. 05 of 2023 was lodged before the DLHT for Chato, that requirement was not complied with,

and no certificate was issued to indicate that the dispute between the parties was referred to the WT prior to being lodged at the DLHT.

For that reason, Mr. Makene submitted that the Application at Chato DLHT was filed prematurely. To support this argument, he cited the decision of this Court in Land Appeal No. 8 of 202 between **Issa Iddi Kauzu vs. Ally Abdallah Mkoko and another**, HC-Mwanza (Tanzlii), at page 10, where it was held that;-

"In the final result, I agree with the chairman of the trial tribunal that the Land Application No. 05 of 2022 was supposed to be first referred to the ward tribunal for mediation before the same being instituted in DLHT"

In response, Mr. Byamungu agreed with Mr. Makene regarding the directives of Section 45 (4) of the Written Laws (Misc Amendment No. 3 Act of 2021) with amends Section 13 of the Land Disputes Courts Act, Cap 216 RE 2019.

However, he disagreed with the allegation that Land Application No. 5 of 2023 at Chato DLHT was not accompanied by the certificate from the Ward Tribunal.

He elaborated that in the application lodged at Chato DLHT, paragraph 6 (a) (vii) clearly stated that the copy of the certificate

from the Ward Tribunal of Muungano dated 23rd November 2021 proving that mediation had failed was attached as annexure KM6.

Furthermore, he argued that after lodging that application, the appellant was served with that application and he attached the copy of the certificate from the WT. The appellant duly received it on 19th January 2023, as per the summons, which he signed.

In his written statement of defence (WSD), dated 21st March 2023, the appellant agreed on the content of paragraph 6 (a) (vii) of the application, as indicated in paragraph 8 of his WSD.

Mr. Byamungu further argued that parties are bound by their pleadings. To cement his position, he cited **James Funke Gwagilo vs. AG 2001 TLR 455** and **Yara (T) Ltd vs Ikuwo General Enterprises Ltd**, Civil Appeal No 309 of 2019 (Tanzlii).

Therefore, he explained that the appellant knew there was a certificate from Muungano Ward Tribunal, which he acknowledged in his WSD. Thus, it was not proper to depart from his earlier admission in his pleading and claim that Land Application No. 5 of 2023 at Chato DLHT was filed without a certificate from the Ward Tribunal.

In a brief rejoinder, Mr. Makene agreed with the argument that the certificate from the WT was mentioned in para 6(a) (vii) of the

application filed at Chato DLHT; however, he stated that it was not attached to the application.

He insisted that it was against the provisions of section 45 (4) of the Written Laws (Misc Amendment No. 3 Act of 2021) and that the anomaly automatically ousted the DLHT from the jurisdiction to hear and determine the application.

He concluded by commenting on the cited cases of **Gwagilo** and **Yara (T) Ltd (Both supra)**, stating that the cases were misplaced because the pleadings could not give the DLHT jurisdiction, while jurisdiction is provided by the law.

After the submissions from both parties, I am now tasked to determine whether or not Land Application No. 5 of 2023 at Chato DLHT was filed without a certificate from the ward tribunal indicating that it had failed to settle the dispute between the parties amicably.

On this, the entry point is the cited **section 45 (4) of the Written Laws (Misc Amendment No. 3 Act of 2021)**, which is the instructive law on the matter. The section reads;

"(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”.

The following can be gleaned from the above provision of law;

First, in the event of a failure to settle the matter amicably, there must be a certificate from the Ward Tribunal indicating that it has failed to settle the dispute.

Second, the District and Housing Land Tribunals should not hear the dispute unless the Ward Tribunal has issued a certificate.

Third, the period for the Ward Tribunal to settle the matter is 30 days from the date the matter is instituted before it and;

Fourth, a party may file an application at the DLHT without a certificate if the 30 days to settle the matter at the Ward Tribunal lapse.

The question is whether the 1st respondent lodged his application at the DLHT with a certificate from the Ward Tribunal.

In deliberation and determination of the matter, I have the following;

One, the pleadings filed at the DLHT indicated as follows; In paragraph 6 (a) (vii) of the Application, it was stated that, I quote;

"Kwamba, Mgogoro huu ulipelekwa na Mleta Maombi katika Baraza la Kata la Muungano na baada ya usuluhishi wake kushindikana nilitumwa kufungua shauri hili katika Baraza hili.

(Nakala ya Hati kutoka Baraza la Kata Muungano ya tarehe

23/11/2021 kuthibitisha kuwa usuluhishi ulishindikana imeambatanishwa kama kielelezo na kupewa alama "KM"6 tunaomba kiwe sehemu ya maombi haya)".

In response (written statement of defence) filed by the appellant in paragraph 8, he stated that;

"Kwamba, maelezo yaliyomo katika hoja ya 6 (a) (vii)ya Maombi yanakubaliwa kuwa Baraza hili lina mamlaka ya kusikiliza shauri hili, isipokuwa madai ya hoja zote za Muombaji zinakataliwa na atatakiwa kudhibitisha hoja hizo pia mbali na hapo Muombaji hatostahili kupewa nafuu yeyote ikiwemo malipo ya fidia".

Further, one of the annexures attached to the application from the Ward Tribunal of Muungano dated 23rd November 2021, addressed to the Chairman of Chato DLHT. In that certificate, the Ward Tribunal clearly stated that it had filed to reconcile the parties to settle the dispute.

Therefore, contrary to what Mr. Makene stated in his submission, the pleadings and annexure indicate that the matter was first referred to the Ward Tribunal prior to the lodging at the DLHT. Further, it was indicated that the WT issued a certificate on 23rd November 2023, attached to the application.

Two, as per the DLHT record, this matter was not raised during the trial. It is raised for the first time in this appeal; therefore, there

is no evidence adduced by the parties on that issue. Equal, there is no deliberation and determination by the DLHT on the matter.

I am aware that the question touches on jurisdictional issues could be raised at any stage, even at the appellate stage. However, the issue must be placed on record, and parties must be given the right to be heard.

This position was pronounced by the Court of Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdalla**, Civil Appeal No. 25 of 2020 (Tanzlii), where it was held that;

"Of course, we are alive with the settled position of law that time limitation goes to the jurisdictional issue of the court and that it can be raised at any time, even at the appellate stage by the court, but in order for it to be noted and raised it would require material evidence be placed before the court".

And it is common ground that the law applicable here is the law of evidence on the mode of proving facts. The relevant provision is section 110 (1) of the Evidence Act which reads that;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Further, in **Hemedi Said vs. Mohamedi Mbilu** (1984) TLR 113, where the Court put it simply that;

"He who alleged must prove the allegations."

In this appeal, the submissions by the counsel for the appellant failed to substantiate the ground of appeal that there was no certificate from the WT; there is no material evidence apart from mere words in his submission. Nothing was stated on what the appellant received as annexures to the Application, which made him to respond to the allegation, specifically paragraph 8 of his defence.

Since the burden of proof is on the one who alleges, in this appeal, the appellant has failed to discharge that duty for an issue he raised at this stage of the appeal.

Three, I agree with Mr. Makene that pleadings could not confer jurisdiction to the DLHT. However, looking at para 6 (a) (vii) of the Application, the certificate issued by the WT attached to the Application and what was responded to in paragraph 8 of the defence, the appellant not only admitted that the dispute was referred first to the WT which issued a certificate but also was attached to the application which he was served and received.

Therefore, from that angle, Mr. Byamungu was right that in the circumstances of the instant appeal, the appellant was bound by his pleading, and he cannot now depart from what he admitted in his WSD as per the cited cases of **Gwagilo** and **Yara (T) Ltd (Both supra)**.

Therefore, it was not the pleadings that conferred jurisdiction to the DLHT, but it was the fact that the certificate from the WT, which was pleaded at para 6 (a) (vii) and attached to the Application as admitted by the appellant in his defence paved the way for the DLHT to hear and determine the matter. On this issue, I think I should end here.

From the discussion above, the ground of appeal must fail.

In the upshot, for the reasons elaborated above, I hold that the appeal lacks merits, and I dismiss it with costs.

Dated at Geita this 18th day of March 2024.




K. D. MHINA
JUDGE
18/03/2024