

IN THE HIGH COURT OF TANZANIA
(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 92 OF 2022

*(Arising from Land Appeal No.17 of 2022, In the District Land and Housing Tribunal
for Kilombero/Ulanga, at Ifakara, Originating from Utengule Ward Tribunal in Land
Case No. 94 of 2019)*

NEMES MKONGWE..... APPELLANT

VERSUS

HADIJA LIHANJUKA..... RESPONDENT

JUDGMENT

31st August, 2023

CHABA, J.

In this second appeal, the appellant, Nemes Mkongwe is challenging the decision of the District Land and Housing Tribunal for Kilombero, at Ifakara which dismissed his appeal which arose from the decision of the Utengule Ward Tribunal in Land Case No. 94 of 2019.

Briefly, the facts leading to this appeal are to the effect that: At the Ward Tribunal, the respondent instituted a Land Case against the appellant claiming ownership of a parcel of land measuring 8 acres, located at Iduindembo Village allegedly to have been encroached by the appellant herein. After a full hearing, the Ward Tribunal landed to the decision that, the disputed land belongs to the

respondent herein and consequently ordered the appellant to vacate the suit land immediately.

Dissatisfied with that decision, the appellant unsuccessful filed an appeal to the first appellate Tribunal, the District Land and Housing Tribunal for Kilombero, in Land Appeal No. 17 of 2020, hence this appeal which has been premised on the following two grounds of appeal, thus:

1. That, the entire trial proceedings and decision thereto is tainted with serious irregularities that went to the root of the matter, hence occasioning grave injustice.
2. That, the trial tribunal erred in law and in facts by upholding the decision of the trial ward tribunal while the parties had no locus standi to prosecute the matter.

At the hearing of the appeal, the appellant entered appearance through Ms. Suzana Mafwele, the learned advocate, holding brief for Mr. Juma Mwakimatu, also learned advocate. On the other hand, the respondent who had no legal representation never entered appearance but filed her written submission in accordance with Court's scheduled orders.

In support of the appeal, Mr. Mwakimatu who drew and filed the appellant's written submissions commenced by pointing two irregularities on the impugned judgement, to wit; lack of assessors' opinion on the record of the proceedings of the District Land and Housing Tribunal and unjustifiable changes of parties.

As to the issue of opinion of assessors, he highlighted that the decision of the first Appellate Tribunal lacks opinion of assessors and added further that, it has only the general summary of what the Hon. Chairperson call opinion of assessors which according to him, cannot be considered as the same as per the requirement set out under section 23 (2) of the Land Disputes Courts Act, [CAP. 216 R.E. 2019]. Mr. Mwakimatu referred this Court to the case of **Ameir Mbarak and Azania Bank Corporation Vs. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) in support of his submission on this point, in which the learned advocate insisted that the opinion of the assessors has to be on record.

As regards to the complaint on changes of parties, the learned advocate for the appellant submitted that, the records of the trial Tribunal in Application No. 94/2019 reveals that, the Applicants were SAID KAPOA and HADIJA LIHANJUKA against NEMES MKONGWE and that it reveals further that, SAID KAPOA was acting on behalf of HADIJA LIHANJUKA.

He referred this Court to the first paragraph of the Ward Tribunal's decision and he registered his surprise that, on appeal before the District Land and Housing Tribunal, the Hon. Chairperson disregarded the original applicant (SAID KAPOA) and proceeded with HADIJA LIHANJUKA in person and he referred this Court to the first paragraph, in the first line of the Appellate Tribunal's decision and concluded that, leaving out the original Applicant (SAID KAPOA) who was the applicant at the trial Ward Tribunal is a serious irregularity that goes to the root of the matter and hence occasioning gserious injustice.

On the second ground which touches the issue of *locus standi*, Mr. Mwakimatu averred that, the record of the trial Tribunal is unclear in what capacity SAID KAPOA was acting on behalf of HADIJA LIHANJUKA as there is no any document(s) on record to show the legal capacity of the SAID KAPOA, neither the power of attorney nor the letters of administration were tendered. He fortified his stance by referring this Court to the cases of **Lujuna Shubi Balonzi Vs. The Registered Trustees of Chama Cha Mapinduzi (1996) TLR, 203** and **Projest Enery Vs. Evelina George**, Land Appeal No. 65 of 2021 and concluded that, SAID KAPOA had no *locus standi* since he was claiming that the land belongs to HADIJA LIHANJUKA and thus, the proceedings and decisions of both the trial Tribunal and first Appellate Tribunal were tainted with serious irregularities and the mistakes went to the root of the matter, thus occasioned grave injustice to the appellant herein.

Based on the above submission, Mr. Mwakimatu prayed this Court to quash and set aside the decisions of both Ward and District Tribunals and issue an order that the matter be heard afresh.

Responding to the submission advanced by the counsel for the appellant, the respondent highlighted that the opinion of assessors is available in the proceedings of the trial Ward Tribunal and Judgement of the first Appellate Tribunal.

As to the issue of change of parties, the respondent submitted that it was the appellant who ignored to include the names of SAID KAPOA on his petition

of appeal. According to her, the records of Ward Tribunal clearly revealed that HADIJA LIHANJUKA was the applicant and SAID KAPOA was acting on her behalf and she insisted that, it was upon the appellant to include both HADIJA LIHANJUKA and SAID KAPOA, when he chose to appeal.

Having heard the submissions from both parties, and after a keen scrutiny of the records from the trial Ward Tribunal and first Appellate Tribunal, the pertinent issue for consideration and determination is whether the instant appeal has merit or not.

For a smooth determination of this appeal, I propose to deal firstly with the second ground of appeal and then the first ground revolving on the irregularities in the judgment and the proceedings of the trial Tribunal. In testing the complained irregularities, for reasons to be apparently noticed later, I will start with the issue of lack of opinion of assessors, followed by the complaint as to the change of parties.

As to the issue of *locus standi*, without wasting precious time of this Court, I do not find any merit in this complaint and the reason is not far-fetched as Section 18 (2) of the Land Disputes Courts Act, [CAP. 216 R. E. 2019] allows a relative or member of the household of any party to any proceedings upon request of such a party to appear and act on behalf of such a party. The provision reads as follows:

"Subject to the provisions of subsections (1) and (3) of this Section, a Ward Tribunal may permit any relative or any

member of the household of any party to any proceedings upon request of such party to appear and act for such party".

In the case at hand, on 6th December, 2019, HADIJA LIHANJUKA who was a claimant in the Ward Tribunal made a prayer before the Tribunal that her son, SAID KAPOA had to appear and acts on her behalf. With the consensus from both parties, the trial Tribunal went ahead, and granted her prayers. In my considered view, the Ward Tribunal rightly allowed the oral request made by HADIJA LIHANJUKA and proceed with SAID KAPOA as indicated in the proceedings of the trial Ward Tribunal as the provision itself does not provide on the modalities of making such kind of request regarding the issue of representation of a party by his relative. It therefore goes without saying that, the Power of Attorney at the Ward Tribunal was not necessary, to the extent of vitiating proceedings thereto as complained by Mr. Mwakimatu, the counsel for the appellant.

More-over, the Ward Tribunal, in terms of section 15 of the Ward Tribunal Act [CAP. 206 R. E. 2022] is not only bound not only by the rules of evidence and procedure, but also on its own it regulates its own procedures. The section provides: -

"Section 15 (1) - The Tribunal shall not be bound by any rules of evidence or procedure applicable to any court.

(2) A Tribunal shall, subject to the provisions of this Act, regulate its own procedure.

(3) In the exercise of its functions under this Act, a Tribunal shall have power to hear statements of witnesses produced by the parties to a complaint, and to examine any relevant document produced by any party."

Further, under section 45 of Land Disputes Courts Act (supra), the law provides:

"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."

Applying the above provision of the law to the facts of the matter at hand, the complaint that, SAID KAPOA had no *locus standi* to represent the respondent herein at the Ward Tribunal has no weight and cannot hold water at all. In the result, it is therefore bound to fail.

As to whether the first Appellate Tribunal's Judgement contravened section 23 (2) of the Land Disputes Courts Act (supra) for failure to record and consider

the opinion of the assessors, to be acquainted with the entire records of the Tribunals, I was compelled to peruse the records of the DLHT. This is due to the reason that, usually, Court records are presumed to be serious and genuine transcripts on what had been transpired either in Courts or Tribunals, and cannot be easily impeached, unless there is evidence to the contrary. **[See: Halfani Sudi Vs. Abieza Chichili, [1998] TLR. 527].**

My scrutiny of the record of the DLHT shows that, after the hearing of the appeal on 16th March, 2022, the Chairperson ordered the opinion of assessors to be read out on 11th April, 2022. On close scrutiny of the record, I noticed further that there are two hand written opinions of assessors all dated 31st March, 2022 which suggests that, the two assessors had given their respective opinion in writing. For ease of reference, I propose to reproduce the headings of the respective papers as hereunder: -

1. "Maoni ya Mjumbe wa Baraza O. Mhomera Rufaa No: 17/2020 kutoka Baraza la Kata Utengule Shauri No. 94/2019

Uvamizi wa Shamba.

Mrufani - Nemes Mkongwe.

Mrufaniwa - Said Kapoa"

2. "Maoni ya Mjumbe wa Baraza Omary Abdallah, Rufaa toka Baraza la Kata Utengule, Shauri No. 94/2019.

Uvamizi wa Shamba.

Mrufani - Nemes Mkongwe.

Owing to the above observation, it suffices to say that, opinions of assessors are on record of the DLHT as illustrated above. It can therefore, be judged that the Chairperson actually recorded and considered the opinion of his assessors in the preparation of the impugned judgment as my further perusal of the proceedings has revealed that, the same were even read out before the Tribunal on 11th April, 2022 where the records of the Tribunal transpire that:

"11/4/2022

AKIDI: C.P. Kamugisha – M/kiti.

Mrufani – yupo

Mrufaniwa – Hayupo

Baraza: Maoni ya Washauri wa Baraza yamesomwa leo tarehe

11/4/2022 bila kuwepo mrufaniwa...."

More-so, in the last paragraph at page 6 of the typed first Appellate Tribunal's Judgement, the Hon. Chairperson summarized the opinion of assessors in the following terms:

"Kwa kuhitimisha sababu zote za rufaa hazina mashiko, hivyo basi kwa mtazamo huo nami nakubaliana na maoni ya washauri niliokaa nao wakati wa usikilizwaji wa rufaa hii Otilia Mhomera na Omary Abdallah kwamba rufaa hii haina mashiko....".

With the above pieces of evidence, it is safe to deliberate that the trial Chairperson met the requirements of section 23 of the Land Disputes Courts Act (supra) and the assessors were accorded with the opportunity to give out their opinions and the same were considered by the Chairperson in reaching into the decision of the Tribunal dated 23rd March, 2022. From the above reasoning, this ground of complaint also collapses.

I now turn to the last complained irregularity on the change of parties. As a general rule, the rights of appeal is for the parties who have been involved in the original suit and not any other person [See: **CRDB Bank Plc Ltd Vs. George Methiew Kilindu (Civil Appeal 110 of 2017) [2020] TZCA 361 (23 July 2020)** (extracted from www.tanzlii.org). In this appeal, the records show that at the trial Ward Tribunal the parties were SAID KAPOA / KHADIJA LIHANJUKA against NEMES MKONGWE, but when the matter reached at the DLHT in form of appeal, the Judgment of the DLHT indicates that the parties to the case are NEMES MKONGWE Vs. HADIJA LIHANJUKA omitting the names of SAID KAPOA who was representing the respondent at the trial Ward Tribunal. For clarity, the names as they appear in the petition of appeal filed at the DLHT as well as the Judgment of the DLHT shows as follows:

IN THE DISTRICT LAND AND HOUSING TRIBUNAL FOR KILOMBERO/ULANGA

AT IFAKARA

LAND CASE APPEAL NO. 17 OF 2020

(Arising from the decision of Utengule Ward Tribunal, Suit Land No. 94 of 2019)

NEMES MKONGWE..... APPELLANT

VERSUS

HADIJA LIHANJUKA..... RESPONDENT

On the other hand, the names of the parties in the heading of the decision of the Ward Tribunal which was a subject of the appeal at the DLHT are depicted hereunder:

"JAMHURI YA MUUNGANO WA TANZANIA

HALMASHAURI YA WILAYA YA KILOMBERO

BARAZA LA KATA YA UTENGULE

SHAURI LA MADAI YA ARDHI

SHAURI NAMBA 94/2019 KATI YA

SAID KAPOA/HADIJA LIHANJUKA MDAI

DHIDI YA

NEMES MKONGWE MDAIWA"

From the above observation, I hastened to agree with the counsel for the appellant that leaving out the names of SAID KAPOA in the registration of the petition of appeal, meant that the appeal before the DLHT was improperly filed.

However, I tend to disagree with him on the claim that the error or anomaly did occasion serious injustice to the appellant for two reasons. One; the omission did not go to the root of the case as it was argued by the counsel

for the appellant, but one which is curable under the overriding objective principle stipulated under section 3A (1) of the Appellate Jurisdiction Act, [CAP. 141 R. E, 2019] (the AJA) as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 (Amending Act) and Article 107 (2) (e) of our Constitution, calling for Courts to dispense substantive justice rather than being tightened with technicalities in meeting ends of justice. Section 3A (1) of the AJA stipulates that: -

"Section 3A (1) - The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate, and affordable resolution of all matters governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it with a view to attaining the following:

(a) Just determination of the proceedings;

(b) Efficient use of the available judicial and administrative resources including the use of suitable technology; and

(c) Timely disposal of the proceedings in the Court at a cost affordable by the respective parties.

Two; It was the appellant who lodged the appeal at the DLHT and removed the names of SAID KAPOA. In my unfeigned view, he cannot benefit from his own mistakes as it was observed by this Court when confronted with akin situation in the case of **Joakim Lesuli Vs. Barnabas Mallya (Land Appeal 14 of 2020) [2021] TZHC 3713 (17 June 2021)** [Extracted from www.tanzlii.org]. In this case, the Court held *inter-alia* that: -

"...Even though, this court finds it strange that the appellant is now complaining of his own wrongs or mistakes and indeed trying to convince this court and the first Appellate Tribunal to benefit from his own doings through the backdoor. Allowing this appeal will defeat the spirit of the well settled legal principle that, no one is to benefit from his/her own wrongs as rightly submitted by the Respondent's Advocate..."

Having so determined, the next question is, what is the way forward? As the names of parties in the case are crucial for their identification and smooth execution of Court orders, ordinarily I could have ordered the case file to be remitted back to the DLHT for rectification of the names of the parties to reflect the ones appearing in the judgment of the trial Tribunal which was subject of

its decision for proper Court records. However, I decline to make such an order for a reason that, upon a thoroughly examination of the records under consideration, I found that the trial Ward Tribunal was not properly constituted as per requirement of law. Section 11 of the Land Disputes Courts Act (supra) which is couched in mandatory terms, it requires the quorum of the Ward Tribunal to consist the minimum of four members of whom three of them must be women. The section reads:

"Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act."

In the matter at hand, the record of Utengule Ward Tribunal shows that on the 3rd December, 2016 and 20th December, 2019 the composition of the trial Ward Tribunal during hearing the parties' dispute consisted of seven members namely; Shaibu Mhala, Alexia Mhenga, Jovin Mwachipa, Farumens Mwibunga, Harid Mashatila, Rehema Msokowale and Twaibu Ngayaula. Glaring at the gender of all seven members as indicated in the proceedings of the trial Ward Tribunal, it is only two names, to wit, Rehema Msokowale and Alexia who are female. Additionally, on 27th December, 2019, which is the date of delivery of the decision of the trial Ward Tribunal, it is on record that five members attended whose names are: Jovin Mwachipa, Farumens Mwibunga, Harid

Mashatila, Rehema Msokowale and Twaibu Ngayaula of which only one female member (Rehema Msokowale) was present.

Basing on the above finding and the applicable laws governing the composition of Ward Tribunals, no doubt that the proceedings of Utengule Ward Tribunal in Land Case No. 94 of 2019 contravened the provision of Section 11 of the Land Disputes Courts Act. It follows therefore that, the trial Ward Tribunal was not properly constituted while adjudicating the matter which is the outcome of the present appeal.

Consequently, guided by the holding of the CAT in the case of **Edward Kubingwa Vs. Matrida A. Pima (Civil Appeal 107 of 2018) [2021] TZCA 662 (5 November 2021)** (extracted from www.tanzlii.org), in the same wavelength, I am also compelled to nullify the proceedings before Utengule Ward Tribunal in Land Case No. 94 of 2019 and set aside the Judgment and Decree sprang therefrom. Similarly, the proceedings of the first Appellate Tribunal (the DLHT) and Judgment thereof in Land Appeal No. 17 of 2022 are also declared a nullity for a reason that, both stemmed from a nullity proceedings, Judgment and Decree as well.

In the circumstance, since the Ward Tribunal in-terms of Sections 45 and 46 of The Written Laws (Miscellaneous Amendments) (No.3) Act No.5 of 2021, are tasked with the mediation of land disputes rather than adjudicating the same, I order and direct that, a party who still wishes to pursue for his or her rights, may institute afresh case before the Tribunal clothed with competent

jurisdiction to entertain the land dispute, but subject to the current legal requirements. Each party shall bear its own costs. I so order.

DATED at MOROGORO this 31st day of August, 2023.




M. J. Chaba

JUDGE

31/08/2023

Court:

Judgment delivered this 31st day of August, 2023 in the presence of the Appellant and Ms. Charity Mzinga, Learned Advocate holding brief for Mr. Juma Mwakimatu, also Learned Advocate and in the absence of Respondent.


A. W. Mmbando

DEPUTY REGISTRAR

31/08/2023

Court:

Right to Appeal to the parties fully explained.




A. W. Mmbando

DEPUTY REGISTRAR

31/08/2023