THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB - REGISTRY)

AT MOROGORO

LAND APPEAL NO. 02 OF 2023

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Kilombero, at Ifakara in Land Appeal No. 31 of 2021, Originating from the decision of Mkula Ward Tribunal, in Land Dispute)

BETWEEN

ALEXANDER J. MNEGA.....APPELLANT

VERSUS

NASORO S. MTOMI..... RESPONDENT

EX-PARTE JUDGMENT

Last Order: 14/08/2023

Judgement: 13/11/2023

CHABA, J.

Before this house of justice, the appellant Mr. Alexander Mnega filed the instant appeal seeking to challenge the concurrent decisions of the District Land and Housing Tribunal for Kilombero, at Ifakara (the DLHT) and Mkula Ward Tribunal, both of which decided in favour of the respondent.

The main dispute between the parties' concerned with the harvest of sugarcane. The respondent was leased the cane field which belonged to the appellant's father, the late Joachim Alexander Mnega, whose

estate the appellant administers. The deceased family convened a meeting and resolved that the leased farms including that which was leased to the respondent should revert back to the estate of the deceased and the respondent seems to have been present as his signature appears in the minutes of the meeting which were tendered before the trial Tribunal. Sugarcane was harvested from that farm. The respondent sued the appellant before the Ward Tribunal on account of the harvested sugarcane in that cane field saying that the appellant had harvested the sugarcane while he had leased that field and the lease agreement was yet to expire.

He further prayed that, the payment in respect of the sugarcane which was supplied to Chama cha Wakulima wa Miwa Nyangumi Group be withheld, pending determination of the case before the Ward Tribunal, an injunction which was granted. After the hearing, the Ward Tribunal decided that the respondent succeeded. The proceeds of the harvest which were outstanding, were ordered to be paid to the respondent.

Following such decision, the appellant was seriously displeased, hence appealed to the District Land and Housing Tribunal for Kilombero,

at Ifakara. Thus, being assisted by Mr. Bageni Elijah, who was engaged only for drafting, filed a petition of appeal raising three grounds, to wit: -

1) That, the learned appellate tribunal chairman misdirected himself having dismissed the 2nd ground of appeal over the appellant's complaint against the trial tribunal's unwarranted denial of his witness' right to testify without there being evidential and legal support for his reasoning or findings.
2) That, the appellate tribunal wrongly dismissed the 5th ground of appeal which was wholly on the validity of the contract upon which the trial tribunal wrongly relied to decide in favour of the respondent.
3) That, the tribunal erred in law and fact to have failed to properly re analyse and re evaluate the evidence on record, thereby it wrongly upheld the trial tribunal's decision in favour of respondent who failed to prove his case.

At the hearing of the matter on 22/03/2022, the appellant appeared in person, and unrepresented while the respondent did not enter appearance in Court. According to the appellant's information, though the respondent was duly served with the summons and other relevant documents but he refused the service of summons. An affidavit was produced before this Court by the applicant to prove his statement. However, despite of being served with the summons, the respondent

maintained his non-appearance, which made the Court to order that respondent be served through substituted services. In compliance with the Court's order, the appellant published the summons in three issues of Mwananchi Newspaper dated 4th, 5th and 7th July, 2023 respectively. Still the respondent did not appear. That is why on the 14/08/2023 I proceeded with the hearing of the present appeal *ex parte.*

As hinted above, at the hearing of the appeal, the appellant appeared in person, and unrepresented. During the hearing, he managed to address all grounds of appeal. Starting with the first ground, the appellant submitted that, his witnesses who would have proved on the harvest of sugarcane in the disputed land, were denied opportunity to testify. On the second ground, he pointed out that the Tribunals did not consider the duration of the agreement which was to expire around the year 2020. He relied on the evidence of one Athumani Muyoke (PW2). Regarding the third ground, he argued that the respondent's claim based on hearsay evidence that during the harvest, the respondent was not around, thus no proof that the appellant harvested the sugarcane. He invited this Court to examine the evidence adduced before the trial Ward Tribunal and the whole proceedings.

On the basis of the above background and submission, I am prepared to determine the merit of this appeal. I am aware that this is a second appeal and the two Tribunals below have had a concurrent finding of fact regarding the facts and evidence. Also, as it appears, they had a unanimous position regarding the status of the objection raised by the respondent as against eligibility of the two witnesses on the side of the appellant.

When such a situation occurs, this Court's liberty to depart from the lower Tribunal's finding is limited, especially on the finding of fact(s). The principle has been to the effect that a second appellate Court cannot vacate the concurrent findings of the lower Courts or Tribunals unless there was misdirection of the law or principle in appreciating the evidence and reaching at the finding which was made. The precedents are numerous on this position of the law. Among them is the case of **Trevor Price and Another Vs. Raymond Kesall [1957] EA 752** where it was held that: -

> *"Where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial Court before expressing a view, derived from demeanour, or reliability of a witness, it is open to the appellate Court to find that the view of the trial Judge*

regarding the witness is ill founded and, where wrong inferences have been drawn from the evidence, it is the duty of an appellate Court to evaluate the evidence itself."

The Court of Appeal of Tanzania in the famous case of the **Registered Trustees of Joy in The Harvest Vs. Hamza K. Sungura (Civil Appeal 149 of 2017) [2021] TZCA 139,** the rule was followed and the Court observed that: -

"We are as well, aware of the fact that this is not only a second appeal, but the appeal is seeking to fault findings of two concurrent decisions. Ordinarily, this Court would not readily disturb such findings, unless it can be demonstrated that the findings of the lower courts, are clearly unreasonable or are a result of a complete misapprehension of the substance of the evidence or that the findings are based on a violation of some principle of law culminating into a miscarriage of justice".

Being mindful of the above rule which this Court is obedient and compliant, I pay the respect to the lower Tribunal's findings deserve in the process of examining the records and evidence cautiously. However,

when there are sufficient grounds, the appellate Court is superior, it can rectify the errors and make any order which it deems appropriate for the interest of justice.

On scrutiny of the grounds of appeal, I will start addressing the first ground of appeal but in respect of the second and third grounds of appeal, in my view, the same fits to be determined jointly.

On the first ground, the appellant complaint is that he was denied a right to be heard through his witnesses basing on the objection raised by the respondent. It would appear that, the appellant does not accept the merit of the respondent's objection and further is challenging the decisions of the Tribunals in respect of that objection. The appellate Tribunal agreed that the objection was valid and that the trial Ward Tribunal was correct to have rejected those witnesses. In resolving this ground, I studiously examined the records of both Tribunals below. What transpired before the trial Ward Tribunal is on pages 31 - 32 of the handwritten proceedings, which shows after the appellant testified, when the first witness of the appellant was prepared to testify, the trial Tribunal received an objection as follows: -

"Kabla shahidi hajatoa maelezo yake mdai alimwekea pingamizi kuwa hana imani na shahidi kwa sababu

kabla kesi haijaanza shahidi alienda kumuona mdai na kutaka awe shahidi wake, alipomkataa anashangaa kumuona shahidi huyo huyo anakuwa shahidi wa mdaiwa...Pili ni kuwa mdaiwa alidai kuwa hana shahidi ila ana vielelezo ambavyo vitatosheleza. Sasa shahidi kawapata wapi?."

The gist of the above excerpt from the trial Ward Tribunal in this Court's language is that, before the witness gave his statement, the claimant objected to him that, had no trust to the witness because before commencing the trial, the witness went to see the claimant and expressed his intention to be his witness, but he refused. However, he was surprised to see the same witness became the respondent's witness... Secondly, the respondent claimed that had no witnesses but only exhibits that could suffice to prove the matter. Now, the question is, where did he obtained or secured the witness. The other reason was that, the appellant told the trial Tribunal that he will not call witnesses. After hearing the objection from the respondent alone, the tribunal did not invite the appellant to address the objection, but proceeded to uphold the objection in the following words: -

"Baraza limekubaliana na pingamizi la mdai na kumtaka shahidid asitoe ushahidi wake. Baraza linaendelea na shahidi wa pili".

When the second witness was ready to advance his testimony, again, the respondent raised an objection to the effect that, the said witness is the one who advised him to report the appellant to police, also that the appellant said that he did not have any witness. This time again, same trend, same verdict. The trial Tribunal upheld the objection without any audience to the appellant. Judgment followed a month later, on 11/02/2021 to the appellant's disfavour. Such trend was blessed by the first Appellate DLHT which reasoned that, those witnesses were unfit and it was too hard for the trial Ward Tribunal to believe them.

In this second appeal, the appellant is therefore inviting the Court to decide whether such a conduct of proceedings by the trial Ward Tribunal and its confirmation or upholding by the first Appellate DLHT were correct. To resolve this contention, I had ample time to review and examine the records of the trial Ward Tribunal and first Appellate Tribunal. Further, I spent my time to scrutinise the relevant part of trial proceedings quoted herein above. In my considered view, I found out that, two principles are relevant to the proceedings. One; is on

competency of the witnesses and, Secondly; is on the principle of natural justice which is centred on the rights to be heard. On those two principles, among others, the lower Tribunals proceedings will be tested against the decisions thereof.

Regarding competency of witnesses, it is a true statement of the law that any person who is aware of any fact and is able to respond to any question put to him qualifies to be a competent witness in the case, unless he is excluded by the law. This is notwithstanding the issue of whether or not he has interest to serve in the case. What is stated above dwells on the spirit of section 127 of The Evidence Act, [CAP. 6 R. E, 2022] which provides thus: -

> *"127.- (1) - Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

I understand that, the trial Ward Tribunals are never bound by strict and technical rules of evidence and the exclusion of witnesses is a limited avenue as the same is technical. There should be a cogent and

fair reason to exclude a person from testifying in Court or Tribunal. In my opinion, the anatomy of this jurisprudence was beyond the height of the trial Ward Tribunal's ability to handle, though it purported to deal with it. The excluded witnesses in this case were both for the appellant while the objection was baseless and the trial Ward Tribunal should not have upheld it.

Even the fact that, the said persons had other encounters with the respondent, would not ipso facto disqualify them from testifying. Of course, the weight to be accorded on their testimonies, is another issue which would have been for the trial Ward Tribunal to gauge, but first they must be accorded the right to testify before it.

Apart from that, the appellant was not given any chance to reply to the objection on both witnesses. What the trial Ward Tribunal did was a pure contravention of the principle of natural justice. To fold the whole ground, the trial Tribunal contravened the principle of natural justice in two ways; *One* - when it decided the objections against the appellant's witnesses and excluded them without affording a right of hearing from his side. *Two* - when it decided the main case after having denied his right to have the testimonies of the two witnesses.

Obviously, failure of the Court or Tribunal to stick fast to the principle of natural justice, vitiates the proceedings and all done becomes a nullity. This is what was underscored by the Apex Court of our Land in the case of **Abbas Sherally & Another Vs. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported), which was quoted with approval in the case of **Margwe Erro & Two Others Vs. Moshi Bahalulu,** Civil Appeal No. 111 of 2014 (unreported), where the Court held inter-alia that: -

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

See also the cases of **R.S.A. Limited Vs. Hanspaul Automechs Limited & Another [2020] 1 TLR. 589** (unreported) and **Christian Makondoro Vs. Inspector of General Police & Another (Civil Appeal 40 of 2019) [2021] TZCA 30.**

Placing reliance on the above precedents, I am afraid to hold that, the whole proceedings of the trial Ward Tribunal was faulty. Same applies to the proceedings and the decision reached by the first Appellate DLHT. Even in the case of **Danny Shasha Vs. Samson Masoro & Others (Civil Appeal 298 of 2020) [2021] TZCA 653** (extracted from www.tanzlii.org), the CAT maintained that in case of the fault of this nature, all proceedings should be nullified and retrial be ordered when convenient. This is what the CAT stated:

> *"The first appellate court ought to have ordered a retrial after considering that the parties were denied the right to be heard. This being an infraction which violated the rules of natural justice requiring the tribunal to adjudicate over a matter by according the parties full hearing before deciding the dispute."*

Coming to the matter under consideration, there were two issues as earlier observed. According to the remedy which suits the circumstance, the other grounds of appeal are pre-empted. In **Ally Rashid & Others Vs. Permanent Secretary, Ministry of Industry & Trade & Another (Civil Appeal 71 of 2018) [2021] TZCA 460**

(extracted from www.tanzlii.org), the Court addressed on the hierarchy of issues in Court's determination in the following terms: -

> *"There are two types of issues, there are issues of law and issues of fact. These issues are not determinable at random. According to law they must be determined in sequence, the issues of law start and if they are overruled, those of facts follow. Let us hasten to state right here that if the issues of law are upheld, the court is precluded from entertaining issues of facts".*

In the **Ally Rashid & Others Vs. Permanent Secretary, Ministry of Industry & Trade & Another** (supra), the CAT having referred further to Order XIV, Rule 2 of The Civil Procedure Code, [CAP. 33 RE 2019] (the CPC), which provides that issues of law must be tried first, rested as follows: -

> *"In civil trials and even in criminal proceedings, trial courts are required by rules of procedure to try and determine issues of law first if such issues arise before getting to determining issues of facts".*

On the ground of the serious faults committed by the trial Ward Tribunal which were also upheld by the first Appellate DLHT, I proceed

to nullify all the proceedings, judgments, decree and orders stemmed from both Tribunals below for their wilful neglect of the basic principle of natural justice on the rights to be heard. Having so said and done, I find no basis to proceed with the other grounds of appeal which are mainly based on facts but the determination above suffices to dispose of the entire appeal. Should any of the parties be interested to pursue for what he believes to be his rights, he is at liberty to institute the matter to the Tribunal with competent jurisdiction to deal with the matter according to the law.

In the final event, I hold that this appeal is meritorious and it is hereby allowed with costs payable by the respondent. For avoidance of doubt, I have reached to a conclusion that the proceedings, judgments, decree and orders emanated therefrom both lower Tribunals are nullity for violation of the right to be heard, hence declared to be null and void. Order accordingly.

DATED at **MOROGORO** this 13th day of November, 2023.

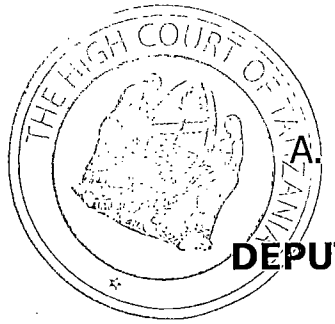
M. J. CHABA

JUDGE

13/11/2023

Court:

Ex-parte judgement delivered under my hand and the Seal of the Court in Chamber's this 13th day of November, 2023 in the presence of the Appellant who appeared in person, and unrepresented and in the absence of the Respondent.



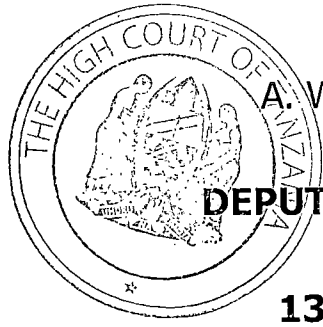
A. W. Mmbando

DEPUTY REGISTRAR

13/11/2023

Court:

Rights of the parties to appeal to the CAT fully explained.



A. W. Mmbando

DEPUTY REGISTRAR

13/11/2023