

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBIA DISTRICT REGISTRY**

**AT BUKOBIA**

**MISC. LAND APPEAL NO. 61 OF 2021**

*(Arising from Land Appeal No. 39 of 2020 the District Land and Housing Tribunal for Kagera at Bukoba and Original Case No. 31 of 2020 of Mushasha Ward Tribunal)*

**ANANIA KAMALA.....APPELLANT**

**VERSUS**

**TRYPHONE KAIJUNGA.....RESPONDENT**

**JUDGMENT**

*30/06/2022 & 06/06/2022*

***E. L. NGIGWANA, J.***

This is an appeal against the judgment of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in land Appeal No. 39 of 2020 handed down on 11/05/2021, which the said judgment reversed the judgment of Mushasha Ward Tribunal in Land dispute No. 31 of 2020 handed down on 01/07/2020.

The antecedent facts that triggered the instant appeal are captured as follows; In 2020, the appellant instituted a land dispute in Mushasha Ward Tribunal seeking to be adjudged the owner of the piece of land in dispute located at Bulinda Hamlet, Mushasha Village within Misenyi District in Kagera Region. The appellant alleged that he bought the disputed land on 02/06/2020 from one Nathaniel Kamala at the price of Tshs. 800,000/=, and from there, he planted therein different trees including pine trees. The appellant further alleged that in 2019, the respondent trespassed into his land.

On his side the respondent alleged that the disputed land belongs to him as he bought the same on 02/07/1977 from one Yosia Katewara Nyamirima.

After a full trial, the trial tribunal delivered its judgment in favor of the Appellant.

The respondent being unhappy with the decision of the Ward Tribunal appealed to the DLHT. Upon deliberations, the tribunal allowed the appeal. Consequently, the judgment and award of the Mushasha were quashed and a set aside. The respondent was declared the lawful owner of the suit land.

The appellant was dissatisfied by the decision of the DLHT hence this appeal. In his petition of appeal, he filed a total of three (3) grounds of appeal to protest the judgment of the DLHT. The grounds were coached as follows:-

- 1. That the first appellate court erred in law for failure to consider that the trial tribunal properly adjudged the dispute after considering all evidence placed before it for determination.*
- 2. That the first appellate court erred in law to proceed with the determination of an appeal which had no specific prayer hence incurably defective.*
- 3. That the Appellate Tribunal erred in law to base its decision on extraneous matters not forming part of the original records of the Tribunal ward tribunal and for failure to consider that once a document is admitted without objection, its contents are deemed to have been proved.*

Wherefore, the appellant is praying to this court to allow this appeal by upholding the judgment and the decision of the Ward Tribunal with costs.

When the appeal came for hearing, the appellant was represented by Mr. Projestus Mulokozi, learned advocate while the respondent was represented by Mr. Ally Chamani, learned advocate.

I would like to state at the outset that, the appellant has raised three (3) grounds of appeal and were all argued but because determination of the 2<sup>nd</sup> ground of appeal might dispose the whole appeal, I will confine myself on the 2<sup>nd</sup> ground of appeal.

Arguing the 2<sup>nd</sup> ground of appeal, Mr. Mulokozi submitted that in the appellate tribunal, upon being served with the petition of appeal, the appellant raised a P.O that the appeal is incompetent for want of specific prayer, but the same was heard and finally overruled by the DLHT. The learned counsel submitted that the law is clear that where there is no specific prayer, the appeal is incompetent and should be struck out. To support his argument, Mr. Mulokozi referred the court to the case of **Chama Cha Msingi cha Mazao Mabunda versus Abeli Baguma**, Land Case Appeal No. 32 of 2017 where the appeal was struck out for want of specific prayer.

On his side, Mr. Alli Chamani admitted that the Petition of Appeal lodged in the DLHT had no specific prayer. He argued that appeals from Ward Tribunals to the District Land Housing Tribunals are governed by section 21 of the Land Disputes Courts Act Cap. 216 R: E 2019 which states that; the Minister may make rules prescribing procedure for appeals from Ward Tribunal to the District Land and Housing Tribunal.

He further stated that, up to this moment, the said rules are not yet in place; therefore it is not fair to subject the respondent who was the Appellant in DLHT to procedural technicalities. He invited this court to invoke section 45 of the Land Disputes Courts Act Cap. 216 R: E 2019 to cure to defect. He further argued that the decision in the case of **Chama cha Msingi cha Mazao Mabunda versus Abel Baguma** (supra) is not binding to this court, likewise the case of **Zacharia Mililo versus Onesmo Mboma** [1983] TLR 240 .

He added that the reliefs sought is the issue of procedure, thus urged the court not to allow the same to defeat justice. He made reference to the case of **East African Cables Limited versus Spenco Services Limited**, Commercial Case No. 42 of 2016. Where the court held that it a well- established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.

In his rejoinder, Mr. Mulokozi, submitted that in the case of **Chama cha Msingi cha Mazao Mabunda versus Abeli Baguma**, (supra) the P.O that the appeal was incurably defective for want specific prayer was raised by **Mr. Chamani** who was representing the respondent Abeli Baguma, and the provisions of section 45 of the Land Disputes Courts Act Cap. 216 R: E 2019 was considered and found not capable of curing the defect. Mulokozi added that, in that premise, Mr. Chamani cannot deny the truth that the Petition of Appeal without specific prayer is incurably defective. Mulokozi added that the fact that the rules are not in place is baseless because it is trite law that appeal is lodged by way of petition or memorandum of appeal. The learned counsel added that the rules of procedures are merits of justice too. He ended his rejoinder submission urging the court to allow this appeal by upholding the judgment and decision of the Ward Tribunal with costs.

Having heard submissions by both parties, the issue for determination is whether Appeal No. 39 of 2020 of the DLHT for Kagera at Bukoba was incurably defective for want of specific prayer.

It is undisputed that, upon being served with the Petition of Appeal, the Appellant who was the Respondent in the DLHT filed the reply to petition of Appeal together within a notice of preliminary objection. The P.O read as follows;

***"Appeal by the Appellant is incompetent for want of specific prayer".***

The P.O was argued by way of written submissions whereas, at the end of the hearing, the Chairman (Hon. E. Mogasa) in a half page ruling dismissed the objection. The ruling read;

*"The objection is to the effect that the appeal has no specific prayer, however, looking at the appeal, the appellant raised prayer that the appeal be allowed. That alone is a prayer. I therefore dismiss the objection".*

From that piece of ruling, you cannot even see what was submitted in support of the P.O or against the PO. Since the ruling was in the form of interlocutory order, there was no room for the respondent, now appellant to appeal against that order therefore, the same has been raised at this stage as a ground of appeal.

I agree with Mr. Chamani, learned advocate for the respondent that appeals from Ward Tribunals to the DLHT are governed by section 21 of the Land Disputes Act Cap. 216 R: E 2019 which states that;

*"The Minister may make rules prescribing procedure for appeals from Ward Tribunal to the District Land and Housing Tribunal".*

Since, the rules are not yet out, the court has to be guided by case law. I also agree with Mr. Mulokozi, learned advocate that appeal is always filed by way of Petition of Appeal or Memorandum of Appeal.

In the instant case, the appeal in the DLHT was filed by way of Petition of Appeal, The same read; **"PETITION OF APPEAL"**

In the petition of appeal, the respondent listed eight (8) grounds of appeal whereas he ended them by the prayer which was coached as follows:-

***"Wherefore the petitioner prays for appeal to be allowed with costs".***

In the case of **Chama cha Msingi Mazao Mabunda** (supra), Mr. Alli Chamani, learned advocate who in that case appeared for the respondent raised an objection that the appeal was defective for want of specific prayer. The prayer was coached as follows; "*appeal be allowed with costs*". In that appeal, Chamani cited these cases of **Zacharia Mililo versus Onesmo Mboma** [1983] TLR 240 and **Anastazia Kapongo versus Zabina Said Kanyowa**, Land Appeal No. 60 of 2009 (unreported). Mr. Chamani was very bold in his submission that failure to specify reliefs renders the appeal incompetent before the court of law, and that even within the written Laws (Miscellaneous Amendments) Act No. 8 of 2018 which recognizes the use of overriding objective could not apply in that matter because it was found that failure to specify reliefs goes into the root of the appeal because it raises the issue of jurisdiction. In that premise, the said appeal was struck out for want of specific prayer.

In the instant matter, the learned counsel, Mr. Chamani has totally changed his direction and argued that the omission is curable under section 45 of the Land Disputes Court Act Cap. 216 R:E 2019, which I do not agree because, reading the judgment of the DLHT as a whole, it is apparent that the procedure adopted by the DLHT to proceed with incompetent appeal occasioned miscarriage of Justice to the parties because the relief granted by the DLHT was based extraneous matters not forming part of the original records of the Trial ward tribunal to wit; the records of a village Council which was just a mediator, and therefore its record does not go to the adjudicating tribunals. See **Paulo Rumberi versus Margarita John**, Misc. Land Appeal No.62 of 2018 HC –Bukoba (Unreported).

I am also alive that the Principle of Overriding Objective introduced in 2018 vide the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 was aimed to facilitate the just, expeditious, proportionate and affordable resolution of

disputes without due regard to technicalities as opposed to substantive justice but I am also alive that the principle does not help a party to circumvent the mandatory procedure. See **Martin Kumalija & 117 Others versus Iron and Steel Ltd**, Civil Application No. 70 o/18 of 2018 CAT (unreported).

This position was stated in the case of Juma **Busiya versus Zonal Manager, South Tanzania Postal Corporation**, Civil Case No. 273 of 2020 where the Court of Appeal had this to say;

*"The principle of overriding objections is not the ancient Greek goddess universal remedy called panacea, such that its objective is to fix every kind of defects and omissions by the parties in court".*

Stressing on compliance of the mandatory procedures, the Supreme Court of Zambia in the case; **Access Bank (Zambia) Limited and group five Zcon Business Park Joint venture (2016)** (although it is a persuasive decision) had this to say;

*"Justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit can't respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. In our considered view, it is in the even-handed and dispassionate application of the rules that courts can give assurance that there is a clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried"*

Indeed, in the instant matter, I subscribe to the position stated in **Zacharia Milalo versus Onesmo Mboma** (supra), **Anastazia Kapongo versus Sabina Said** (supra) and **Chama cha Msingi Mazao Mabunda versus Abeli Baguma** (supra), that the court cannot grant a relief which has not been specifically prayed by the parties.

I also gained inspiration from other jurisdiction as follows; in **Zimbabwe News Papers [2980] Ltd versus Tembani Kufa** [2021] ZWSC 137, the Supreme Court of Zimbabwe addressing an appeal which had no specific prayer held that; *"In this case there was no mention of whether the whole or part only of the judgment was being appealed against. The exact nature of the relief sought was not stated. What was prayed for in the notice of appeal was that the judgment of the court a quo be dismissed with costs. It is the appeal which is dismissed or allowed. If the appeal is allowed, the judgment or decision against is then set aside and a new order substituted in place. In this case, it was not known what order the appellant wanted this court to make in the event the appeal succeeded". (Emphasis supplied)*

The Supreme Court concluded that the notice of Appeal which purported to institute the appeal was incurably defective.

In another persuasive case; **commissioner of Correctional Services versus Ntetsелеlo Hlatwako** (69/09) 2010SZSC 31, the High Court of South Africa, Gauteng Division Pretoria held that;

*"At the outset, it is instructive to note that the first order setting aside the decision of the Disciplinary Board was not prayed for. Accordingly, it was in my view incompetent for the court a quo to make an order in absence of an amendment of the notice of motion. This part of the order was unfair both*



***procedurally and materially. It is trite that a litigant can also not be granted that which he/she has not prayed for in the lis".*** (Emphasis added)

In the event, I hereby invoke revisional powers of this court under section 43(1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the whole proceedings, quash and set aside the judgment and decree of the DLHT in Appeal No. 39 of 2020 as they stemmed from incompetent Appeal. The respondent **Tryphone Kaijunga** is at liberty to lodge a competent Appeal if he so wishes subject to the law of limitation. Given the nature of the appeal and conduct of the parties, I order each party to bear its costs. It is so ordered.

Dated at Bukoba this 6<sup>th</sup> day of July, 2022.



E. L. NGIGWANA

JUDGE

06/07/2022

Judgment delivered this 6<sup>th</sup> day of July, 2022 in the presence of the Appellant in person, Mr. Peter Joseph Matete, learned advocate for the Appellant, but also holding brief for Mr. Alli Chamani, learned advocate for the respondent.



E. L. NGIGWANA

JUDGE

06/07/2022