

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)**

**CIVIL APPEAL NO. 59 OF 2021**

**RODA NKABA ..... APPELLANT**

**VERSUS**

**DAUD NTUMILIGWA ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Tabora)**

**(Mallaba, J.)**

**dated the 17<sup>th</sup> day of July, 2018**

**in**

**Land Appeal No. 9 of 2017**

**.....**

**JUDGMENT OF THE COURT**

*19<sup>th</sup> & 27<sup>th</sup> September, 2023*

**KITUSI, JA.:**

The appellant was a successful party at the Ward Tribunal of Kasulu Urban in Land Application No. 35 of 2013 which had been instituted by the respondent. However, on appeal by the respondent vide Land Appeal No. 124 of 2013, the District Land and Housing Tribunal (DLHT) quashed the judgment of the Ward Tribunal and declared the respondent the lawful

owner of the suit property whose description is unclear but, in our view, not relevant for purposes of this decision.

Though she was aggrieved, the appellant could not immediately appeal against that decision to the High Court. Therefore, she successfully applied for extension of time within which to do so, and time was extended. In granting the prayer, the High Court (Rumanyika, J as he then was) observed that although the appellant had not managed to account for each day of the delay for two years nor had she pleaded illegality, the submissions from the bar by the learned advocate for the appellant that there was failure or omission to evaluate evidence constituted an illegality. The learned judge also took the view that the suit was bad for non-joinder of parties. For those reasons, the appellant was given extension of time.

The width and breath of it is that the appellant appealed to the High Court in Land Appeal No. 9 of 2017 raising five grounds, and at the hearing, Ms. Flavian Francis, learned advocate represented her. In the course of hearing, the learned advocate is recorded to have addressed the court that: -

*"We were given extension of time mainly on the ground that there were illegalities in the decision*

*appealed against. We will concentrate on that point. We have raised that point in paragraph 5."*

In its judgment the High Court towed the line and stated:

*"The extension was on account of existence of an illegality. On this basis, the learned counsel for the appellant was agreeable that, although they had preferred five grounds of appeal, they could only argue grounds on illegality, not other grounds not based on illegality. This Court shares that position. Where a person is given extension of time on account of illegality then the respective appellant can only argue grounds of appeal pertaining to the alleged illegality. In this regard, in this appeal, it is only the 5<sup>th</sup> ground of appeal which pertained to illegality."*

As intimated in the two excerpts above, the High Court considered only the 5<sup>th</sup> ground of appeal, to wit,

*"That the appellate Chairman of the Tribunal erred in law and in fact for failure to recognize that there was a misjoinder of a necessary party, that is, the Land Officer of Kasulu."*

After referring to the arguments by the parties, the learned judge was of the view that Order 1 rule 13 of the Civil Procedure Code (CPC)

which requires an objection as to non-joinder or mis-joinder of parties to be raised at the earliest possible opportunity, had not been complied with, therefore it was taken to have been waived. The learned judge then concluded as follows:

*"In all, the Court finds that, the appellant has failed to prove existence of any illegality in this matter. Accordingly, the appeal is dismissed with costs."*

Despite that defeat, nothing would deter the appellant from pursuing the matter further. Therefore, having lodged a notice of appeal, she sought for and obtained a certificate on a point of law in terms of section 47(1) and (2) of the Land Disputes Courts Act, Cap 216. The learned judge considered the arguments for and against the application and finally agreed with the point that had been proposed by the appellant under paragraph 6(i) of the affidavit. It certified the following point of law for our determination, to wit;

*"Whether an appellant who obtains extension of time on account of illegality, his grounds of appeal ought to be limited to illegality or that he may raise and argue any other ground"*

In the memorandum of appeal, the appellant raised three grounds but he only argued the first and third grounds of appeal in earnest which

are in consonant with the certified point. Given the hair-thin line which differentiates between the points argued in this appeal we shall reproduce the first and third grounds: -

*"1 That the learned High Court Judge denied a fair hearing to the appellant by limiting the appellant's right to challenge the decision of the lower tribunal to a sole ground raised during an application for extension of time to appeal.*

*2 That by limiting the appellant to argue the appeal on the sole ground, the High Court erred in law and ended up denying the appellant the right to access justice"*

Before us the appellant enjoyed services of Mr. Kelvin Kayaga, learned advocate. The respondent appeared in person. Mr. Kelvin Kayaga had earlier presented written submissions and the respondent, though unrepresented had also presented written submissions in which he raised interesting arguments against the application. We shall consider both written and oral submissions.

The ratio decidendi in Land Appeal No. 9 of 2017, is that a person who, on ground of illegality, obtains an extension of time to appeal, may not, on that appeal, argue grounds other than the alleged illegality. The

High Court has certified that very point inviting us to determine whether it is correct or not. The first and third grounds of appeal echo that certified point, in our view. So, the underlying question is whether the learned judge's formulation of the principle is correct.

In his submissions, Mr. Kelvin Kayaga stated that the point of illegality is relevant to the extension of time only and pointed out that in exercising that discretion the court may leave out other grounds even if raised by a party. He further argued that the principle that has been suggested by the learned High Court judge wrongly gives the judge who determines an application for extension of time powers to also determine what grounds should be argued on appeal. The learned counsel underlined the danger of applying that principle as it may possibly lead to curtailment of a party's right to be heard. He cited the cases of **Samwel Kimaro v. Hidaya Didas** [2013] TLR 486 and **Julius Ishengoma Francis Ndyanabo v. The Attorney General** [2004] TLR 14 to persuade us to consider the parties' right to fair hearing without undue regard to technicalities.

On the other hand, the respondent opposed that submission. In order to consider it in its proper context, we reproduce the relevant part:-

*"If the appellant was never limited, this could cause miscarriage of justice towards the respondent and also create loop hole before the Court of law, as anyone can allege illegality so that the time should have been extended while during the appeal argue other grounds which could have benefited him/her winning the case and leaving the so-called illegality unattended."*

To some extent we agree with the respondent because in our view, prudence demands that the point of illegality raised during extension of time should be pursued on appeal. To that extent the respondent's submission on the point makes sense, but there is no justification for limiting the appellant to that ground alone as held by the learned judge. More so, as in this case, where the issue of illegality and its nature were picked by the learned judge, unsolicited.

In addition, we hold the view, as did Mr. Kelvin Kayaga, that limiting the appellant to the ground of illegality, is to subject the powers of appeal under the whims of the court that extends time. We say so because there is neither statutory nor case law to support that limitation.

We are aware of the limitation imposed on an appellant upon obtaining a certificate on a point of law. In **Yakobo Magoiga Gichere v.**

**Peninah Yusuph** Civil appeal No. 55 of 2017 and **Rashid Rashidi Mniposa v. Lyeha Jamali Msoi**, Civil Appeal No. 15 of 2022 (both unreported) we emphasized that principle in the latter case, that;

*"...where the High Court has certified points of law in appeals originating from Ward Tribunals, the grounds of appeal filed in the Court must substantially conform to the points of law which the High Court has certified."*

With respect, we are not aware of the limitation, let alone the justification, for an appellant who is granted extension of time to appeal to the court, on ground of illegality, arguing only that point of illegality. An appellant, for instance, who obtains extension of time to appeal to the Court, on ground of illegality, is thereafter governed by the Constitution and the Appellate Jurisdiction Act, Cap 141 (AJA). In **Eustace Kubalyenda v. Venancia Daud**, Civil Appeal No. 70 of **211** (unreported) the Court stated;

*"The Constitution of the United Republic of Tanzania, 1977 aside, the only and most comprehensive single statute conferring appellate jurisdiction on this Court, is the Appellate Jurisdiction Act, Cap 141, R.E. 2002 (the Act). Furthermore, it is in section 5 of the Act where we*



*find the right of appeal to this Court by a person aggrieved by a decision of the High Court of Tanzania in the exercise of its various jurisdictions."*

In the whole of section 5 of the AJA and its many subsections, there is no mention of the limitation that the learned judge suggested. Nor in the Land Disputes Courts Act Cap. 216 are there provisions giving validity to the suggested limitation. To begin with, section 38 of Cap 216 provides:-

*"38-(1) Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court:*

*Provided that, the High Court may for good and sufficient cause extend the time for filing an appeal either before or after such period of sixty days has expired.*

*(2) Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision or order which the appeal is brought.*

*(3) Upon receipt of a petition under this section, the District Land and Housing Tribunal shall, within fourteen days dispatch the petition together with the record of the proceedings in the Ward Tribunal and the District Land and Housing Tribunal to the High Court”.*

Also, section 41 of Cap 216 provides: -

*“41. – (1) subject to the provisions of any law for the time being in force, all appeals, revisions and similar proceedings from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.*

*(2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order: Provided that the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days”.*

We have sufficiently demonstrated above that Cap. 216 does not provide for the bar that the learned judge sought to impose and we have not seen any inspiration from the AJA that would give legitimacy to that bar. Since we have found no statutory provision limiting the powers of

appeal of the High Court to the point of illegality identified during grant of extension of time, we are constrained to allow the appeal and hold that a person who obtains extension of time to appeal by establishing existence of an illegality may argue other grounds in addition to that of illegality, subject to law and the direction of the appeal court.

The next question is whether the appellant argued the other four grounds of appeal. We drew the attention of Mr. Kelvin Kayaga to the part of proceedings where Ms. Francis who was representing the appellant had informed the court that she would argue only the 5<sup>th</sup> ground concerning illegality. Mr. Kayaga submitted that the learned counsel did not abandon the other grounds but only intimated that she would concentrate on the 5<sup>th</sup> ground. The learned advocate submitted that he would not attempt to impeach the court record, but hinted that the course that was taken by Ms. Francis was upon an informal dialogue with the learned High Court Judge. The respondent scarcely addressed this point, in our view.

With respect, we agree with Mr. Kelvin Kayaga on essentially two points. The first is that, looking at the statement of Ms. Francis declaring that she would concentrate on ground 5 and the learned judge's conclusion and directions on that course, we are inclined to hold that there

was a prior discussion that influenced the course. The following excerpt is relevant in our view: - "*The extension was on account of existence of an illegality. On this basis, **the learned counsel is agreeable that, although they had preferred five grounds of appeal, they could only argue grounds on illegality...***". That the learned counsel was agreeable is suggestive of having there been a dialogue. The second point is that fair hearing requires the court to determine all issues or grounds of appeal in the case or appeal. See **Ally Rashid & 534 Others v. Permanent Secretary, Ministry of Industry and Trade and Attorney General**, Civil Appeal No. 71 of 2018 (unreported). In that case the Court held that if there be points of law as well as points of fact, the court ought as a duty under order XIV rule 2 of the CPC, first determine points of law and if not upheld determine points of fact. In this case the learned judge determined the 5<sup>th</sup> ground against the appellant. However, since we have concluded that his determination was faulty, it means the other grounds of appeal must be determined. The statement that was made by Ms. Francis that she would concentrate on the 5<sup>th</sup> ground of appeal did not, in our view, amount to saying she was abandoning the other grounds of appeal, given the obtaining circumstances to which we have alluded above.

Consequently, we allow this appeal by quashing the judgment of the High Court in Land Appeal No. 9 of 2017, and setting aside the orders therefrom. We remit the record to the High Court for determination of the remaining grounds of appeal as per law. Costs shall abide the outcome of the appeal.

**DATED** at **TABORA** this 27<sup>th</sup> day of September, 2023.

S. A. LILA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

Judgment delivered this 27<sup>th</sup> day of September, 2023 in the presence Mr. Kelvin Kayaga, learned Counsel for the Appellant and Mr. Daud Ntumiligwa, the Respondent in person via video link from Kasulu District Court is hereby certified as a true copy of the original.



G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**