

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

LAND APPEAL NO. 21 OF 2019

(From the Decision of District Land and Housing Tribunal of Nzega District at Nzega in Land Application No. 8 of 2015)

1. JOHN HAKILI }1ST APPELLANT
2. EDWARD HAKILI }2ND APPELLANT

VERSUS

SHIMA PASTORY.....RESPONDENT

JUDGMENT

Date: 05/7/2021- 06/8/2021.

BAHATI,J.:

The appellants being aggrieved by the decision of the Nzega District Land and Housing Tribunal in Land Application No. 8 of 2015 before Nyaruka, Chairman dated 26/11/2018 preferred this appeal against the judgment and the decree on the following grounds;

- 1. That the learned tribunal chairperson erred in law and fact in holding that the suit premises belonged to the appellants' late brother while the said brother is alive and gave his powers and authority over the case to his younger brother one Adam Hakili.*
- 2. That the learned chairman erred in law and fact in holding that the appellants collectively lack locus standi to prosecute the case while they are parties to the tenancy agreement over the suit premises.*

3. *That the learned tribunal chairperson erred in law and fact in holding that the late Anna Wande Swale is the necessary party without whom the dispute cannot be resolved while the appellants are the children of the said Anna Wande Swale and are parties to the agreement between the parties to the dispute.*
4. *That the learned tribunal chairperson erred in law and fact in holding that the appellants needed letters of administration of the estates of the deceased brother since there is no deceased brother in the facts of the case.*
5. *That the learned tribunal chairperson erred in law and fact in departing from the main issue of expiry of the tenancy agreement between the parties which formed the main issue to the dispute and went on to discuss other issues, not in the concern of the appellants.*

Briefly here are the facts that the appellants are suing the respondent over a premise located along Tabora road within Nzega Township. The appellants entered into a four-year contract with the respondent from 2011-2015. That after the end of the contract the respondent refused to vacate the tenancy.

When this appeal was scheduled for hearing on 5th July 2021, the appellants were represented by Langa Mvuna, learned counsel while the respondent was represented by Yuda Kavungushe, learned counsel.

Submitting on the first and fourth grounds of appeal collectively the counsel for the appellants claimed that Edward Hakili gave power of Attorney to Adam Hakili who is his young brother to represent on his application No.8/2015. He further averred that the power of attorney was delivered before the DLHT Nzega which was registered on 2/11/2015 therefore the DLHT misdirected itself stating that the 2nd appellant Edward Hakili was dead and requested letters of administration though the appellant was still alive. The counsel submitted that it is a practice of law, where a person is not present he can give power of attorney to anyone to represent him which the 2nd appellant Edward Hakili fulfilled according to the law. Henceforth the District Land and Housing Tribunal misdirected on that issue.

As to the second ground of appeal, he submitted that the chairman erred in law and fact on *locus standi*. He contended that the appellants were among the persons entered into the said contract. The exhibit which was admitted as P1 revealed clear that the 1st and 2nd appellants are the ones who signed the contract. Therefore, they have *locus standi* for the suit. He further stated that this issue was not addressed by any party because the respondent was familiar with it. The Chairman of the Tribunal raised it *suo motu*.

On the third ground of appeal, he submitted that as revealed the appellants signed the said contract however Anna Wande Swale did not sign the said contract which was submitted before the DLHT, and thereafter they were right to proceed with the said suit without the presence of Anna Wande Swale although her name was included in the said contract.

On the fifth ground of appeal, he contended that the District Land and Housing Tribunal misdirected from departing from the main issue which was before him. He claimed that what was requested by the appellants was on the expiry of the tenancy agreement between the parties which formed the main issue to dispute but the chairman went on to discuss other issues, not in concern of the appellants. He submitted that the chairperson deliberated on *locus standi* and letters of administration of estates which his decision is based on those issues. The chairman never decided on the issues agreed before the trial.

He reiterated his submission that as a practice if the Chairman is raising another issue *suo moto* should give parties opportunities to address it; which is the right to be heard by both parties. To substantiate his argument he cited the case of **Rwegesa Joseph M. Nyamaisa Vs. Chacha Muhogo Civil Appeal, 2016. (Unreported)** where the Court of Appeal held in the case of **EX-B 8356 S/SGT Sylvester S. Nyanda Vs the**

Inspector General of Police & the Attorney General, Civil Appeal No. 64 of 2014 (unreported) the court observed that;

“There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to jurisdiction of the court. On this again we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to a fair hearing.”

Guided by that principle, the counsel for the appellants prayed to this court that the judgment and decree be quashed with costs and the respondent vacate on the said suit property and should he not collect rent as requested previously before the District Land and Housing Tribunal.

Responding, the counsel for the respondent in opposing the appeal submitted that, this appeal has no merit and be dismissed with costs. The District Land and Housing Tribunal having found the irregularities in the dispute found it was right for the case to be re-opened to shield all

parties especially Mama Anna Wande Swale whose name was among the parties to the contract reduce the endless litigation in one case.

The counsel conceded that even though the issue raised by the District Land and Housing Tribunal was *suo motu* what is the remedy. He thought that this was proper for the court to order to restart again.

Submitting on the first and fourth grounds of appeal jointly; he averred that in the pleadings nowhere Adam Hakili has been given such power. He submitted that this is improper as the document submitted in the plaint does not reveal it. He submitted that the second appellant was supposed to reveal by filing an amendment of the plaint. He submitted that the representative of Edward Hakili was supposed to be dismissed from the start.

Concerning the issue of *locus standi*, he submitted that the property in dispute was of Camillus, the deceased. This property was succeeded by his mother and younger brothers for them to sue without having the letter of administration, they had no *locus standi*. He further submitted that the exhibit P1, submitted, they were four appellants and respondent of which among them two appellants have brought this suit. Ana Wande Swale, a necessary party was not in court.

He further submitted that on the judgment; the evidence on record especially of that of the appellants indicated that the disputed premise

belonged to their deceased brother that the respondent begged to develop. He submitted that the District Land and Housing Tribunal was right to decide because if the appellants would be granted their right, there is a possibility of other people to institute the same suit.

To bolster his suggestion he referred this court to Order XXX Rule 1 of the Civil Procedure Code, Cap.33, and also he cited the case of **Ally Ahmed Ally Vs. Wastara Kipati Land Case No. 126 of 2017HC (Unreported)** that;

“In all suits concerning property vested in a trustee or administrator, where the contention is between the person beneficiary interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.”

Addressing the 5th ground of appeal, the counsel for the respondent submitted that the District Land and Housing Tribunal was right in its decision. The District Land and Housing Tribunal did not go into substantive justice as an alternative focus on technicalities since it is a public policy that the suit should come to an end. He, therefore, prayed to this court to dismiss the appeal with costs.

In his rejoinder, the counsel for the appellants submitted that the dispute is on tenancy and ownership. He submitted that the judgment does not state for a retrial as submitted by the respondent.

In respect of Adam Hakili being given the power of attorney, he reiterated his submission in chief that the suit in hand was filed in 2015 by John Hakili and Edward Hakili as applicants and afterward Edward gave power of attorney to Adam Hakili after the case was instituted as stipulated.

On the issue of letters of administration, the counsel for the appellants submitted that the second appellant is not dead and clarified to this court that letters of administration of estates are given where the person is dead. Thereafter, it is not quite clear to submit letters of administration.

He further opposed the submission of the case of **Ally Ahmed**, *supra* in which, to him, is distinguishable. He further averred that the respondent agreed with the fifth ground that the chairperson indeed erred in law and fact in departing from the main issue of expiry of the tenancy agreement rather on technicalities. He submitted that Exhibit P1 has been signed by the 1st and 2nd appellants. The respondent is the tenant of the appellants which he did not deny. He prayed to this court to allow the appeal with costs.

Having heard from both parties, the court has considered the grounds of appeal, the records, and submissions advanced for and against the appeal. The issue for determination is whether the grounds of appeal are meritorious.

As well submitted by the parties, the contract agreement was entered between three persons namely Edward Hakili, John Hakili, and Anna Wande Swale whereas on the other part by Shima Pastory, for the respondent to stay on the premises for 4 years. It was admitted by the court as the exhibit P1 that;

“Mimi Edward Hakili, John Hakili and Anna Wande Swale , tumempangishia Shima Pastory, vibanda vyetu vilivyopo Tabora road avitengeneze na kufanyia bashara zake kwa muda wa miaka minne, shughuli hizo zitaanza baada ya kumaliza ujenzi.”

As submitted by both parties this issue is a bit complicated. Starting with the first ground and fourth ground of appeal as submitted collectively, the issue is whether the appellant Adam Hakili was rightly appointed to hold the power of attorney by the 2nd appellant and whether Anna Wande Swale is a necessary party without whom justice cannot be met and whether the appellants needed letters of administration for the estates of the deceased brother.

As noted from the court records the power of Attorney of Adam Hakili was registered on 2.11.2015 by the Registrar of titles. Therefore from the record the second appellant, Edward Hakili was a competent person. This court finds that Adam Hakili acquired the power of attorney legally and was registered by the registrar of titles. The appellant Adam Hakili was competent as he was given power and authority over the case of his brother. This ground has no merit.

Coming to the second ground that the learned chairman erred in law and fact in holding that the appellants collectively lack *locus standi* to prosecute the case while they are parties to the tenancy agreement over the suit premises.

I wish to refer to the decision made by Lord Justice James, a distinguished English Judge. In 1880 Lord Justice James in the **Ex P. Sidebotham case (1880) 14 Ch D 458, [1874-80] All ER 588** laid down the principle to the effect that:

"A man was not a 'person aggrieved' unless he had suffered a particular loss in that he had seriously affected in his money or property rights."

It is not in dispute that the records at the District Land and Housing Tribunal observed that the appellants' appeal was dismissed for lack of *locus standi*. The evidence of PW1 at the trial tribunal revealed that the

disputed premise belonged to their late brother, Camillus. It is a practice of the law that;

“No one can defend the estate of the deceased without first appointed as administrator of the estate; this rule covers even the issue.”

However this court went further to examine whether this contract is on the ownership of the land or tenancy agreement?

The court having scrutinized and analyzed carefully the matter beforehand and submission from the counsel of the appellant that the matter is distinguishable since the contract agreed was between Edward Hakili, John Hakili and Anna D/O Wande Swale was not on the ownership of land but the tenancy agreement and henceforth I see no justification on why the appellants should be deprived of their rights since the tenancy was already in execution.

On the third ground that Anna Wande Swale being a necessary party, the court having perused on the *“Mkataba wa Kutengeneza Vibanda kwa ajili ya Kupangisha”* went further to see whether she was among the parties, this court noted that the name of Anna Wande Swale appears to be part of the contract although she never signed the document.

As rightly submitted by the respondent and in the court records that Exhibit P1 in the said contract, Anna Wande Swale is a party together with Edward Hakili and John Hakili, where she is a necessary party without whom justice cannot be met. Hence all parties to the contract were supposed to be part of the proceedings and not otherwise.

In the case at hand, it is my view that since Anna Wande Swale did not sign the said contract, she is not bound by the said contract. Hence there is no merit.

As to the fifth ground of appeal that the Chairman misdirected himself on departing from the main issue which was on expiry of the tenancy agreement between the parties which formed the main issue to dispute but he went on to discuss other issues, not in concern of the appellants.

As a practice of the law, if the court is raising another issue *suo motu* the parties must be given opportunities to reply on which is the right to be heard. However, upon court perusal this court neither found anywhere the parties were called to argue in support of that the case. The issues which were agreed upon were not deliberated.

Similarly, this court went on and found that the Chairman did not address the issue addressed by the parties. The District Land and Housing Tribunal erred to raise this matter *suo motu*. In the case of **Margwe Erro**,

Benjamin Margwe & Pater Marwe V Moshi Bahalulu, Civil Appeal no. 111 of 2014 the court stated that;

“The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the court.

Without much ado, we find there to be merit in this appeal which we accordingly allow. We find the judgment of the high court to have been a nullity for violation of the right to be heard.”

Guided by the above principle, and also the respondent conceded that the Chairman did not call parties to address that issue which is unacceptable in law without allowing parties to be heard, Likewise the Court restated in **Mbeya Rukwa Autoparts and Transport LTD V Jestina George Mwakyoma [2003] TLR 251** that;

“ ...Natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among the attributes of equality before the law”.

Being guided by the above-settled authorities as expounded by the Court of Appeal of Tanzania it is obvious that the trial tribunal violated the

cardinal principle of the right to be heard when it framed new issues in the cause of composing the judgment which formed the basis of its findings thus the judgment reached is nothing but a nullity one. The fifth ground of appeal is thus allowed.

As a result, this appeal is allowed partly to the extent explained above. I consequently hereby order a fresh trial before another chairperson with a distinct pair of assessors.

Order accordingly.



A handwritten signature in blue ink, appearing to read "Bahati".

A.A.BAHATI

JUDGE

06/08/2021

Judgment delivered under my hand and seal of the court in the open court, this 6th day August, 2021 in the presence of first appellant and 2nd absence of other parties.

J. KATTO

For DEPUTY REGISTRAR

06/8/2021

Right to further appeal is explained.




J. KATTO

For DEPUTY REGISTRAR

06/08/2021