

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

LAND APPEAL NO. 28 OF 2021

*(Arising from the decision of the District Land and Housing Tribunal for
Mwanza at Mwanza Misc. Land application No. 13 of 2019)*

KHAMIS NDURWE APPELLANT

VERSUS

ADIONIAS E. DOMINICO RESPONDENT

JUDGMENT

05/08/2021 & 01/09/2021

W. R. MASHAURI, J;

Being aggrieved by the ruling of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Application No. 13 of 2019, the appellant Khamis Ndurwe now appeals to this court.

He has fronted in his memorandum of appeal 4 grounds, to wit: -

1. That, the learned trial District Land and Housing Tribunal chairman erred in law and fact in dismissing the appellant's application for execution of the decree of Nyamagana Ward Tribunal which had

ordered the appellant to prune/remove his grown up trees from the decree suit plot of land and the respondent to demolish away his dwelling house by five feet from the appellant's suit plot of land.

2. That the learned chairman of the trial District Land and Housing Tribunal for Mwanza at Mwanza erred in law and fact when he declared and held that, there was no decree to be executed, after the appellant's grown up trees been cut down in execution of the Nyamanoro Ward Tribunal decree without removing the respondent's house five feet from the appellant's suit plot of land as ordered by the Ward Tribunal.
3. That the learned trial District Land and Housing Tribunal chairman erred in law to hold that, the Trial Nyamanoro Ward tribunal was properly executed by WASSA Court Broker by cutting down the appellant's grown up trees from the suit plot of land without bothering to take in consideration that Wassa court Broker did not demolish the respondent's house five feet from the appellant's decreed plot of land as per the Nyamanoro Ward Tribunal Judgment dated 16/03/2017 attached to the memorandum of appeal.
4. That, the appellant was granted extension of time to appeal to the High court of Tanzania at Mwanza vide Misc. Land Application No. 22

of 2021 dated 26/04/2021 as per ruling attached to this memorandum of appeal.

Wherefore: The appellant prays for the following orders: -

- (i) Appeal be allowed with costs.
- (ii) Ruling of the District Land and Housing Tribunal be quashed and set aside.
- (iii) An order to demolish his dwelling house five feet from the appellant's suit plot of land.

During the hearing of this appeal, the appellant appeared in person and Mr. Yusufu Mapesa learned counsel appeared for the respondent.

In his submission in support of this appeal the appellant argued that, this matter is originating from Nyamanoro Ward Tribunal in which the respondent was ordered to demolish his house five feet from the appellant's house as well as removing from the appellant's house five feet distance from the appellant's suit plot of land.

Having so submitted he prayed the court to allow his appeal so that justice triumphs.

On his part, Mr. Yusufu Mapesa learned counsel for the respondent refuted the appellant's submission and said that, this matter is originating from Misc. Land Application No. 13 of 2019 dated 16/9/2020, which was dismissed because the appellant had no decree of tribunal which he tendered in court. And in Misc. Application No. 83 of 2019 the appellant had applied for execution of the decree of the tribunal. His application however was dismissed by the District Land and Housing Tribunal Nyamanoro and ordered the matter to be tried denovo. Following this order of the DLHT, the matter was tried afresh whereby the appellant Khamis Ndurwe was declared lawful owner of the disputed parcel of land; and upon declared owner of the disputed land he lodged in the DLHT for Mwanza an application for execution No. 13 of 2019 which on 16/09/2019, was dismissed with costs for being improperly filed in the DLHT without attaching the decree of the Trial Tribunal. Hence this appeal by the appellant Khamis Ndurwe.

The issue is whether, the order of the DLHT tribunal for dismissing the application for execution which had been improperly filed in the DLHT with no excusable decree is proper in law.

It is general rule that an incompetent application ought to be struck out and not dismissal.

However, the same can be dismissed if it was heard on merits and found both incompetent and also lacks merit. **Joseph Ndogwisangu v/s Minister of Finance & Another** Civil Reference No. 10 of 2005 CAT DSM Registry (unreported).

In this matter in this matter, the application was not heard on merits it was dismissed followed a point of preliminary objection raised that the same was improperly before the DLHT for want of attachment to it the decree of the trial tribunal. Being in competed before the DLHT the application ought to be struck out and not dismissal.

This appeal is allowed with an order that, the appellant shall re-file his application in the District Land and Housing Tribunal being attached with the decree of the trial tribunal. No order as to costs is made.




W. R. MASHAURI

JUDGE

01/9/2021

Date: 01/09/2021

Coram: Hon. W. R. Mashauri, J

Appellant:

Respondent:

B/c: Elizabeth

Court: Judgment delivered in presence of Dioniz John Advocate for respondent and the appellant in person this 01/09/2021. Right of appeal explained.



W. R. MASHAURI

JUDGE

01/9/2021