

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

MISC. LAND APPEAL NO. 15 OF 2021

*(Arising from the Ruling of the District Land and Housing Tribunal of Chato at Chato
Application No. 03 of 2019 dated 03.03.2021.)*

EUSTACH SAHILO----- APPELLANT
VERSUS
AKILIMALIN DAUDI & 4 OTHERS-----RESPONDENTS

RULING

*Last Order: 11.10.2021
Ruling Date: 09.11.2021*

M. MNYUKWA, J.

This is a Land Appeal in which the Appellant Eustach Sahilo hereafter referred to as the Appellant, is appealing against a decision of the District Land and Housing Tribunal for Chato, hereafter referred to as the "DLHT" dated 03.03.2021 delivered by Honourable Colex, B the Chairperson.

The brief background of this matter is that, the appellant named Eustach Sahilo instituted before the DLHT, a Land Application No. 03 of 2019. He was represented by Mr. Amos Lukinda through the power of attorney. The representative of the appellant and holder of the power of

attorney one Mr. Amos Lukinda successfully prosecuted the case and sometimes in 2021, he alleged that the Chairperson of the DLHT was biased. On 15.02.2021, Mr. Amos Lukinda holder of the power of attorney wrote a letter to the chairman of the Tribunal that the chairman has to disqualify himself from hearing the application. In 16.02.2021 he wrote another letter to the Ministry of Lands, Housing and Human Settlements Development praying re-assignment of the case to another chairperson. The DLHT chairperson upon receiving the complaints and being aware that there was a complaint to the Ministry, he moved the matter *suo moto*, composed and delivered the ruling rejecting disqualifying himself to the matter and disqualifying Mr. Amos Lukinda from representing the applicant in Land Application No. 03 of 2019 by the power of attorney and ordered the appellant to prosecute his case without being represented by power of attorney. The appellant through his representative who holds a power of attorney did not see justice and therefore appealed before this court against the ruling of the trial chairman that disqualify him. The appellant advanced three grounds of appeal: -

1. *That the trial chairperson erred in law and in fact to pronounce the ruling suo moto and terminate the applicant's representative (Mr.*

Amos Lukinda) from being the representative of the applicant without giving parties a right to be heard.

- 2. That the chairperson of the trial tribunal erred in law and in fact on 03rd March 2021 to pronounce ruling which he was functus officio/res judicata of the first ruling dated on 1st November 2019.*
- 3. That the trial chairperson erred in law and fact for denying the applicant the right to be represented.*

The appeal was conducted by way of written submissions vide this court order dated 09.09.2021 whereas both parties complied. The appellant was represented by Mr. Amos Lukinda, the holder of the power of attorney, the 1st and 4th respondents afforded the services of Mr. Manase King, the learned counsel and the 2nd and 3rd respondents did not enter appearance though they were served with substituted service through Mwananchi Newspaper, thus the matter was heard ex-parte against them.

The representative of the appellant on the first ground of appeal claims that the DLHT erred by determining the matter *suo moto* without giving parties right to address the court contrary to article 13(6)(a) of the United Republic of Tanzania Constitution of 1977 (as amended).

He went insisting that the trial chairperson upon receiving the complaint letter dated 15.02.2021, was supposed to fix the date for hearing of the matter interparty on determination of the complaint and it was improper to move himself *suo motu*. Insisting he cited the case of **Zabron Pangamaleza vs John Joachim Kiwaraka & Another** [1987] TLR 140 and **Kishore Vallabhadas & Another vs Serikali ya Mapinduzi ya Zanzibar** [2001] TLR 167.

On the second ground of appeal, he avers that there was no application which move the tribunal to set aside the ruling entered on 01.11.2019 which allowed Mr. Amos Lukinda to represent the applicant through the power of attorney. He insisted that it was improper for the chairperson to terminate the appellant representation without objection from any party. He insisted that the tribunal was therefore functus officio to deliver another ruling in contradiction of its previous ruling.

On the third ground, the appellant claimed that the chairperson of the DLHT erred for denying the appellant a right to representation contrary to law. Citing section 30 of the Land Dispute courts Act, Cap. 216 R.E. 2019 and Order III Rule 2(a) of the Civil Procedure Code Cap. 33 RE. 2019 that the right of representation is legally provided. He also cited the

case of **Joachim Lesuli vs Barnabas Mallya**, Land Appeal No. 14 of 2020. He insisted that the appellant representative had on several occasions prosecuted the application in the DLHT and it was not proper for the tribunal chairperson to revoke his representation. He, therefore, prays this appeal to be allowed.

Responding to the appellant submissions, Mr. Manase King for the 1st and 4th respondents opposed the appellant's grounds of appeal.

On the first ground of appeal, he responded that the trial tribunal was right to move *suo moto* citing the case of **Abdallah Hassan vs Juma Hamisi Sekiboko**, Civil Appeal No. 22 of 2007 CAT. He went on that the chairperson did not decide the matter *suo moto* rather it was by application of the appellant representative through a letter addressed to the chairperson wanting her to disqualify herself as she has personal hatred against the representative of the appellant. He insisted that the application was also followed by the formal letter of complaints to the Ministry of Lands, Housing and Human Settlements Development dated 16.02.2021 that the trial chairperson had to disqualify from hearing the matter. He went on disputing the cited case of **Zabron Pangamaleza** (*supra*) that is not relevant to the case at hand.

He went on that, the application for disqualification of a presiding chairperson/magistrate was done by a party who finds that his rights are in jeopardy. He buttresses his position by citing the case of **Isack Mwamasika & 2 Others vs CRDB Bank Ltd**, Civil Revision No. 06 of 2016 CAT and **Laurean G. Rugaimukamu vs Inspector General of police and Another**, Civil Appeal No. 13 of 1999.

On the 2nd ground of appeal, that the termination of the appellant's representative was improper, therefore functus officio/res judicata. He claims that there is no legal authority to that extent for the main suit was not brought to an end at the date of the ruling and it is not among the same parties litigating under the same title for it is between the representative and the chairperson.

He insisted that the trial chairperson in DLHT acted under its inherent powers vested under section 95 of the CPC, Cap. 33 R.E 2019 and section 51(2) of the Land Disputes Courts Act, Cap. 216 R.E 2019. Citing the case of **Kamunye & others vs the Pioneer General assurance Society limited** (1971) EA 263 he insisted that the instant case does not qualify to be res judicata.

Submitting on powers and limitations of the power of attorney, he cited the case of **Zarina Mohamed vs Leonida F Sakulo**, Land Case No. 166 of 2010 HC Land division at Dar es Salaam that the holder of the power of attorney must be distinguished with the legal representative. That the holder of the power of attorney has to be done in narrow and special circumstances. He went on that no room for the court to admit evidence on behalf of another person that will be a piece of secondary evidence. Insisting, he cited the case of **Oscar Kazaura vs Cornelia Gaura & Others** [1982] TLR 143 and **National Agriculture and Food Corporation (NAFCO) vs Mulbadav Village Council and Others** [1985] TLR 88. He insisted that though the appellant holds the power of attorney, the presence of the applicant was inevitable. He insisted that the evidence in the trial tribunal is void and ought to be discarded summarily.

On the 3rd ground of appeal, on the denial of the appellant the right of the representation, he acknowledged that the trial tribunal dismissed the representation of Amos Lukinda for the reasons that he was using the power of attorney in different cases for personal gain and cited section 30 of the Land Disputes Courts Act, Cap 216 R.E 2019 and Regulation 13(1) of the Land Disputes Courts (the District Land and Housing Tribunal)

Regulations, 2003 which allow representation. He cited cases of **Salama Mgasa (Administrator of the Estate of Mugasa Kazahura) vs Sungulile Kanyalala**, Land Application No. 11/2019 and Misc. Application No. 49 of 2020, **Leonard Kulwa vs Clemence Lukanda, Juma Bupili, and Amina Mohamed** Land Application No. 1 of 2019, and **Eustach Sahilo vs Akilimali Daudi & 4 Others** Land Application No. 03/2019. He insisted that it is evident that Amos Lukinda is an unqualified person who carries representations in court for personal gain.

He went on citing the case of **Julius Petro vs Cosmas Raphael** [1983] TLR 346. He insisted that power of attorney is permitted in special circumstances and not to the professional agent who makes his life for representing clients. Insisting, he also cited the case of **Ruth Langen Mfanga vs Ilemela Municipal Council**, HC Labour Revision No. 66 of 2019.

He, therefore, prays this appeal to be dismissed with costs and the Ruling of the trial tribunal be upheld.

Re-joining, maintaining his submissions in chief, he submitted that the Ruling of the trial tribunal caused miscarriage of justice.

Adding on the 1st ground of appeal, he insisted that, it was improper for the trial tribunal to decide the matter *suo moto* without affording parties the right to be heard. Insisting he cited the case of **Kalunga & Co. Advocates vs National Commerce Ltd**, Civil Application No. 24 of 2005 that the court is barred from raising an issue *suo moto* without affording the parties chance to address the court. Re-citing the case of **Zabron Pangamaleza**(Supra) and **Kishore Valabhads**(supra) he insisted that the cited cases are relevant as the issue was the failure for disqualification of the magistrate.

On the 2nd ground of appeal, he insisted that the chairperson of the tribunal was *functus officio* for the decision as to whether the holder of the power of attorney was a bush lawyer or *kishoka* was already decided in the ruling dated 1st November 2019 and the revision before Tiganga J. in this court which was dismissed. The appellant maintained that it was not proper for the chairperson to determine the matter which he previously determined in controversy. He insisted that the chairperson of the tribunal was *functus officio*.

On the 3rd ground that the trial chairperson denied the applicant the right of representation, he added that the trial chairperson was not

mandated to issue two Rulings based on the same thing at a time, and revoking the representation of Amos Lukinda was unjust.

Having gone through the parties' submissions for and against the appeal, and after carefully going through the DLHT records, when I was composing judgement, I called the parties to address the court on the competent of the present appeal.

It was the respondent who submitted first to address the Court on the competent of this appeal. He briefly stated that the appeal is incompetent because the main case is still pending before the DLHT and therefore the order is not appealable as per the provision of Regulation 22 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003.

On his side, the appellant representative submitted that the appeal is competent because it denied the appellant the right to be heard.

Upon going through the entire record and carefully considered the grounds of appeal as advanced by the appellant, the main issue for consideration and determination is whether the appeal is competent before this Court.

It is on record that the appellant preferred this appeal against the decision of the DLHT while the matter is still pending. It is the settled principle of law that any decision or order which does not have effect to finally decide the matter is not appealable.

In the present case the appellant filed a complaint while the hearing of the main application was still going on. The complaint filed by appellant made a request to move the chairperson of the DLHT to give an order that will assist the appellant in the prosecution of his case. In fact, the appellant moved the chairperson to give an order on his request while the main application was still pending. It is my considered view that the request which was preferred by the appellant while the suit was pending was an interlocutory application and the order which was delivered by the chairperson is an interlocutory order which is not appealable.

I reached to that conclusion based on the definition of interlocutory order as it has been provided for in case of **Nuzrat Azat Abdulrahman & 3 others vs Fahad Zaban Elsha Maary and the Registrar of Companies**, Civil Application No 44 of 2005 cited with approval the decision in the case of **Israel Solomon Kivuyo vs Wayani Langoi and**

Naishooki Wayani (1989) TLR 140, the term interlocutory proceeding was defined in the following terms:-

"an interlocutory proceedings is incidental to the principal object of the action, namely, the judgement. Thus, interlocutory applications is an action include all steps taken for the purpose of assisting either party in the prosecution of their cases, whether before or after judgement; or protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined; or of executing the judgement when obtained."

Again, the Court of Appeal of Tanzania in the case of **Junaco (T) Limited & Another vs Hariel Mallac Tanzania Limited**, Civil Application NO 473 /16 of 2016 when quoted with approval the statement of Lord Alverston in **Bozson v Altrincham urban District Council** (1903) 1 KB 547 at Page.548, the statement provides that:

"It seems to me that the real test for determining this question ought to be this: Does the judgement or order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not, it is then, in my opinion an interlocutory order."

In view of the above authorities, it is evident that the determinant test as to whether the order is an interlocutory order or not is to look on

whether the order finally determined the rights of the parties. If it does, then that is not an interlocutory order and the order is subject to appeal or revision and if it does not, then that is an interlocutory order which is not appealable and it is not subject to revision.

The law as it stands now by virtue of Regulation 22 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 prohibits appeal on a suit that has no effect of finally deciding the matter. The said Regulation provides that

"Regulation 22. The Chairman shall have power to determine: -

(a).... (N/A)

(b)..... (N/A)

(c).....(N/A)

(d) interlocutory applications

Provided that a ruling on preliminary point of law or any interlocutory applications which have no effect of finally deciding the case shall not be appealable."

Coming back to our case at hand, it is undisputed that the appellant made a complaint before the DLHT so as to get an order on the matter complained of, the Ruling that has been delivered by the chairperson of

the DLHT did not finally determine the matter at hand. Therefore, the said Ruling is not appealable and therefore the appeal is incompetent.

In the final result. I find and hold that the appeal is incompetent and I accordingly strike it out. Consequently, I order that the record be remitted to the DLHT to proceed with the hearing of the application No. 3 of 2019 on merit.

Costs to follow the event.

It is so ordered.



M.MNYUKWA
JUDGE
9/11/2021

Ruling delivered on 9th day of November, 2021 via audio teleconference whereby all parties were remotely present.



M.MNYUKWA
JUDGE
9/11/2021