

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-REGISTRY)**

AT MWANZA

MISC. LAND APPEAL NO. 01 OF 2022

(From the decision of the District Land and Housing Tribunal of Mwanza District at Mwanza In Land Case Appeal No. 42 of 2018 and Original Ward Tribunal of Isamilo Ward in Application No. 59 of 2017)

ENOCK MARWA HARUN CHACHA

(Attorney of Gimonge PW 3).....APPELLANT

VERSUS

HALPHAN ALLY.....RESPONDENT

JUDGMENT

18th May & 5th July, 2022

DYANSOBERA, J.:

This appeal arises from the decision of the District Land and Housing Tribunal of Mwanza District at Mwanza in the Land Case Appeal No. 42 of 2018 whereby the appeal filed by the appellant was dismissed with costs.

The genesis of the case is that the appellant's reference before the Isamilo Ward Tribunal that in 1992 Gimonge bought a piece of land for building purposes from Mzee Tuma Mgaya Chacha and in 1993, he erected a foundation of house thereat but then went to Tarime and when back in 2009 they found a person already constructed there. They took the matter to the Ward Tribunal but the Tribunal indicated the case to be against Gimonge instead of Tuma. On 11th day of August, 2009 the Ward Tribunal decided in favour of Gimonge but at the same time, the respondent had already bought a house foundation from Consolata who had bordered Gimonge. The respondent then erected two rooms. It turned out that the respondent had built a house by encroaching their piece of land.

As to why the appellant took the reference before the Tribunal, he is recorded to have stated:

'Tumeleta malalamiko ili mlalamikiwa asogeze eneo lake nyuma ili upimaji ufanyike upya.'

The respondent denied these claims and alleged that he bought the suit land on 16th day of February, 2017 before the witnesses including the Street leadership.

The trial Ward Tribunal heard the parties before it and, in the end, decided in favour of the respondent. The appellant's first appeal to the District Land and Housing Tribunal in Land Appeal No. 42 of 2018 was dismissed with costs hence this second appeal.

In impugning the decision of the first appellate District Land and Housing Tribunal, the appellant has filed a total of seven grounds of appeal as reflected in the petition of appeal filed on 6th July, 2021.

For the reasons that will be apparent in my judgment I need not recite the said grounds of appeal.

On 18th day of May, 2022 when this appeal came for hearing, the appellant appeared in person whereas the respondent was absent. The matter therefore proceeded ex parte against the respondent. The appellant then submitted at length in support of the appeal.

I have carefully gone through the records of the lower Tribunals and considered the petition of appeal together with the appellant's submission. In my evaluation of the materials placed before me, I have the following to observe.

The appellant in the first ground of appeal is complaining that the trial Tribunal of Isamilo and the Mwanza District Land and Housing Tribunal erred in law and fact for failure to interpret the Courts (Land Disputes Settlements) Act, 2002 Part section 18 (2) which allowed the appellant to act on behalf of Gimonge Marwa and that the appellant was given powers of Gimonge Marwa vide power of Attorney due registered by the Registrar of Titles at Mwanza and that no one demanded

the sick sheet from Gimonge Marwa during the trial by the Tribunal of Isamilo Tribunal.

I think the appellant's complaint has substance. It is in record that Gimonge Marwa Chacha, by a power of attorney executed on 17th day of October, 2017, ordained, nominated and appointed Gimonge Marwa Chacha of P. O. Box 2574 to be his attorney.

A power of attorney is to be used to represent persons who are absent from the local jurisdiction of the court or with physical disability. Whether or not a person is outside the jurisdiction of the court or whether or not he is physically and mentally unfit, it is a question of fact and when disputed, has to be proved by way of evidence.

If the Ward Tribunal minded that the allegations of the appellant that the donor of power of attorney was sick was false, the Tribunal was enjoined under Section 18 (2) of the Land Disputes Courts Act direct the appellant and PW 3 to act under those provisions. For clarity, sub-section (2) of section 18 of the Act stipulates thus: -

'Subject to the provisions of sub-sections (1) and (2) of this Section, a Ward Tribunal may permit any relative or any member of the household of any party to any proceeding, upon request of such party, to appear and act for such party.

This, the Ward Tribunal failed to do. The observation made at p.11 of the typed judgment of the District Land and Housing Tribunal that '*Sikubaliani na uwakilishi wa Enock Marwa kumwakilisha mtoto wake Gimonge Marwa kwa madai kwamba ni mgonjwa tangu kwenye Baraza la Kata. Hana Ushahidi wa Daktari*' was, in the circumstances of the case, unfortunate.

Besides, the law was not observed on how a reference to the Ward Tribunal had to be made. The law stipulates the mode of making reference to the Ward Tribunal under Section 17 (1) and (2) of the Land Disputes Courts Act thus: -

(1)-any person may, subject to section 61 of the Village Land Act and sections 11,12 and 13 of the Ward Tribunal Act, make a complaint to the Secretary of the Tribunal.

(2) when a complaint is made to the Secretary under sub-section (1), that secretary under sub-sections (1), that secretary shall cause it to be submitted to the Chairman of the Tribunal who shall immediately select three members of the Tribunal to mediate.

(3) Where the complaint is received orally from the complainant, the Secretary shall immediately put it in writing and produce a copy for a complainant.

In the matter under consideration, there is nothing showing that this legal requirement was complied with. This means that the matter was not properly referred to the Ward Tribunal as per the legal requirement.

There is another disturbing feature before the trial Ward Tribunal which, in my view, vitiated the whole proceedings and this is the locus standi of the appellant.

As the records show, the *locus standi* of the appellant before the courts was and still is questionable. It is not clear if the appellant appeared before the lower Tribunals and still appears before this court as a sole party to the case, or as one of the parties to the case or in a representative capacity. According to the record, the appellant claimed the suit land to belong to Gemonge Marwa Chacha (PW 3) while at other times, he indicated that the suit land was the joint property between him and Gimonge who testified at the trial as PW 3. I will explain for clarification.

According to the reference before the Ward Tribunal, the appellant was complaining against the respondent encroaching onto the piece of land belonging to Gimonge who had bought it for construction purposes from Mzee Tuma Mgaya Chacha in 1992. However, the same appellant was testifying that during the survey of the suit land, they, that is he and PW 3, were absent but when back they found the stakes fixed in their suit land and they thus complained that the stakes should be removed.

In submitting the 'complaint' before the Ward Tribunal the appellant stated:

'Tumeleta malalamiko ili mlalamikiwa asogeze eneo lake nyuma ili upimaji ufanyike upya.'

This means that the complaint was a joint one and there was more than one complainant.

In his petition of appeal filed on the appellant indicated that he was appearing before this court in a representative capacity as an attorney of Gimonge PW 3. The legal position on the limitation of powers on a donee of power of attorney is clear. It is settled that a person holding power of attorney for a party in a suit cannot testify on their behalf because the power to give testimony in court cannot be delegated. The power of attorney given to the appellant did not authorize him to present himself as the owner of the suit property. The appellant's legal capacity to litigate was, therefore, unclear.

The requirement of *locus standi* is mandatory as the judicial power has to be exercised within the legally defined limits.

For the reasons stated above, I am satisfied and hereby find that the proceedings before the trial Ward Tribunal and the subsequent proceedings before the District Land and Housing Tribunal were invalid and void. They were incompetent for, it is trite that an action filed in court without adopting a legal procedure is incompetent.

Invoking revisionary powers conferred on this court, I declare the proceedings before both Tribunals a nullity. The same are quashed and set aside.

I direct that whoever wishes to pursue his rights should take appropriate action according to the procedures prescribe by law.

I make no order as to costs.

Order accordingly.



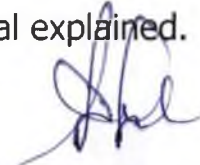
W.P. Dyansobera

Judge

5.7.2022

This judgment is delivered under my hand and the seal of this Court this 5th day of July, 2022 in the presence of the appellant but in the absence of the respondent.

Rights of appeal to the Court of Appeal explained.



W.P. Dyansobera

Judge