IN THE UNITED REPUBLI OF TANZANIA

(JUDICIARY)

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LAND APPEAL NO. 11 OF 2022

(Originating from Application No. 16 of 2018 by the District Land and Housing Tribunal for Njombe at Njombe)

NICHOLAUS THOMAS KIDUKO .....APPELLANT

VERSUS

KISA KIANZIO SANGA .....RESPONDENT

Date of last order 12/7/2022

Date of Judgment 25/8/2022

JUDGMENT

MATOGOLO, J.

The appellant one Nicholaus Thomas Kiduko was successfully sued by the respondent Kisa Kianzio Sanga (as an administrator of the estate of the deceased one Kianzio Vahomile Sanga), claiming that, the appellant defaulted to pay rent for the "kibanda" used for business located at Makambako main Market since 01/08/2016 up to 2018. It was ordered that, the Respondent is the lawful owner of the disputed property and the appellant was ordered to pay the Respondent disturbance allowance Tshs.

4,000,000/=. He was also ordered to pay rent of the said disputed property that he was indebted from 1/08/2016 up to date.

The appellant was aggrieved with the decision, he has come to this court with a total of four (4) grounds of appeal as follows:

1. The whole proceedings were bad at law for not impleading a necessary party, the Makambako Town Council.
2. Having admitted rival documentaries evidence on ownership of the suit land, the tribunal erred not to visit the locus in quo to ascertain the description and location of the suit land hence it lacked a solid basis to declare the respondent the winner who had in fact and law failed to prove her case and which was full of contradictions.
3. The two assessors did not back up their opinions with reasons hence the decision of the Honourable Chairman went beyond the reliefs granted by both assessors hence the entire decision of the tribunal was bad at law.
4. The Respondent did not prove locus standi as the legal representative of the late Kianzio Sanga.

At the hearing, the appellant appeared in person (unrepresented) while the respondent was represented by Mr. Mhagama the learned Advocate.

The matter was disposed of by way of written submissions for reason that the appellant was not represented by an advocate.

In support his appeal the appellant first prayed for the memorandum of appeal to be adopted and form part of his submission.

With regard to the first ground of appeal, he submitted that, as the respondent refused to pay rent of "Kibanda" alleging that, she was not a tenant of the disputed property rather he was allocated the disputed "kibanda" by the Makambako Township or Njombe District Council. Thus, he was of the considered opinion that, the respondent was supposed to join Makambako Town Council as necessary party for an effective and final determination of this dispute. To support his argument he cited the case of ***Juma Kadala versus Vicent Mukande (1983) TLR 103.*** He contended that, this is a binding decision which the District Land Tribunal ought to have abided to. He said as the respondent failed to join Makambako Town Council as a necessary party he prayed to this court to quash the entire proceedings of the trial Tribunal.

He went on submitting that, in reply to the memorandum of appeal, the learned counsel for the Respondent argues that the non-joinder was not fatal because an officer from the Council, AW.2 was called by the Respondent to testify and confirmed that as a former Deputy Chairman of the Makambako Market he knows that the suit plot was allocated to the father of the Respondent as No. 282 and not to the Appellant who however had been allocated plot No.278 (see p. 13 para 2 line 13). He went on submitting that, non-joinder of a necessary party, according to the cited case above is fatal because without him the execution of the decision of the tribunal would be impeded in case the tribunal finds that there was double allocation.

He submitted that, the attendance of the alleged official of the Council as a witness would therefore not cure the said defect. That witness was not acting on behalf of the Council, which means the decision of the tribunal lacks reliable basis in resolving the crucial issue of allocation of the disputed kibanda. Thus, he prayed for this ground to be allowed.

As to ground of appeal No. 2 he submitted that, since both allege they were allocated the suit land by the same landlord, the Applicant producing through AW 3 a handwritten list of bandas and shows of allocates (Exh. A2), and Appellant producing minutes and a receipt for levy as Exh. 3, he contended that, it was proper for the tribunal to visit locus in quo to ascertain to which kibanda those member relate if it is the suit kibanda or otherwise. He submitted further that, while witness for the Respondent, AW.3, a former Deputy Chairman of the market confirmed that the Appellant legally owned kibanda No. 278. So, the identity and allocation of Kibanda No. 282 was an important issue to resolve and the easiest way was to visit the locus quo so that parties and their witnesses could show the location of the suit Kibanda. He argued that, the reaction by the counsel for the respondent that, it was not necessary to visit locus in quo has no merit as the counsel for the respondent has failed to cite any law that prohibits that course of action. He submitted that, it is relevant in some cases provided the court takes care to allow parties to conduct XXD, during the locus quo, to support his argument he cited the case of ***Michael versus Magige (2000) TLR 94.***

He submitted further that, as he had said above, this case stood unproved by the Respondent, as the Respondent produced a hand-written

list of numbers of "vibandas" and the owners thereof, one of them, Kianzio Sanga (the father of the Respondent). He argued that, this document was not authentic because (a) it was not in original form. (b) The author was not summoned to tender the same nor reasons were adduced to admit a secondary form of it. (c) The document let some numbers without names of owners.

He contended that, another weak aspect in the case of the Respondent is her failure to produce any written rental contract with the Appellant who allegedly had rented the suit Kibanda from Kisa Kianzio Sanga way back in 2006 and later from his daughter, the Respondent until in 2018 without causing him (Appellant) to execute a lease contract, nor did she produce any written proof of payment by him of rent her father or herself. He argued further that, the appellant at the trial tribunal showed to the tribunal the rental written contract with the landlord, Makambako Town Council.

He submitted further that, another weakness on her part, as argued by the Appellant, why did the Respondent in this case claim only TSHS 720,000/= instead of TSHS 1,200,000/= as she did when she instituted Civil case No. 35 of 2017 before the Primary court the proceedings of which Appellant tendered in his case before the DLHT as exhibit. He was of the considered view that, this is proof that Respondent was a liar. This Court should hold that, Appellant was never her tenant and she never owned kibanda No. 282. On a balance of probability, therefore, Respondent had failed to prove her case against the Appellant.

He went on submitting that, another legal procedural error is that when the assessors were invited to give their opinion on 20/10/2021, both gave their verdict without giving reasons. He argued that a valid decision should reflect reasons for the decision, and this duty is attached to both assessors and chairperson, in essence, therefore the assessors did not assist the chairperson. He was of the view that, this decision needs correction.

He said on 18/11/2020 one assessor, Mr. Mwapinga, was absent and for unknown reason, the tribunal proceeded to hear the case with one assessor recording the evidence of A.W.4 surprisingly, Mr. Mwapinga, later participated to decide the case while he did not hear the evidence of A.W.4, the act which was wrong and they prayed for some correction here.

Thus, he prayed for this appeal to be allowed with costs.

In reply Mr. Mhagama submitted that, in this case the respondent had never been in any cause of action with Makambako Town Council. Since the sublease agreement was between the respondent and appellant. But is the appellant who rejected to pay rent to the respondent who was recognized by Makambako Town Council as the one who build the said disputed business store (Kibanda).

Mr. Mhagama argued that, page 20 of the typed proceedings show the witness A.W.4 who came as a business officer of Makambako Town Council, testified to the effect that the records of Makambako Town Council knows the respondent's late father as the owner of the Kibanda No. 282 which is in dispute with the appellant. He argued that the said witness tendered a list of tenants who are recognized by the Director of

Makambako Town Council. He said that, even when the said witness while being cross-examined testified that, the records shows that the business store No.282 was the property of Kianzio Sanga.

Mr. Mhagama submitted that as a requirement of the law under the provisions of ***Order 1 Rule 3 of The Civil Procedure Code*** No.3 of 1966 R.E 2019 provides that:

> *"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise".*

He went on contending that, in this case there was no any such question of law which would arise since the Director of Makambako Town Council still recognized the respondent as her tenant.

With regard to the second ground of appeal that, having admitted rival documentary evidence on ownership of the suit land, the tribunal erred not to visit the locus in quo to ascertain the description and location of the suit land hence it lacked a solid basis to declare the respondent the winner who had in fact and law failed to prove her case and which was full of contradictions. Mr. Mhagama submitted that, first of all the dispute

before the Njombe District Land and Housing Tribunal was not land, he proceeded arguing that, the tribunal heard the evidence no any part of evidence which shown the existence of two different business stores. And in records there is no any party who prayed for the Tribunal to visit the site. He said non-visiting at locus in quo cannot be a bar to the tribunal to know the disputed area or Kibanda and make a justified decision thereon.

He went on submitting that, admissibility of the evidence is governed by The Evidence Act Cap 6 R.E under section 67 (1) (a) to (g) providing the circumstance where secondary evidence can be admissible in Court. He said exhibit A2 was not a secondary document. Since its attached list of names was certified, it therefore falls under paragraph (g) of the above law mentioned. Thus, the argument that why the some names have no number this is not a legal issue since the appellant was represented by an advocate who had right to cross-examine the witness to that effect. He submitted that, the claim why the respondent failed to produce written lease contract has no any legal basis, since if you go to the A. W1, A.W.2 and A.W 3 all in the evidence shows the appellant was a tenant to the Kibanda No.282.

Regarding the claim that, the two assessors did not back up their opinion with reasons hence the decision of the Honourable Chairman went beyond the reliefs granted by both assessors hence the entire decision of the Tribunal was bad at law. Mr. Mhagama submitted that, there is no law which needs the assessors to back up their opinion with reasons, also there is no any law which requires the Chairman of the Tribunal to be bound by the assessor's opinion. He argues that, in our instant case the assessors gave their opinion accordingly.

Mr. Mhagama concluded by submitting that, the submission of the appellant is unjustifiable, unsustainable and unnecessary, and he prayed for this appeal to be rejected with costs.

In rejoinder the Appellant mainly reiterated what he submitted in submission in chief.

Having read the rival submissions by the parties and having carefully gone through the courts records, I am of the considered opinion that, the issue to be determined here is whether this appeal has merit.

Regarding the first ground of appeal the main complaint here is that, as the appellant was a tenant and the said Kibanda was allocated to the respondent's late father by the Makambako Township, the respondent was supposed to join the Makambako Town Council as a necessary party for an effective and final determination of this dispute. To support his argument he cited the case of ***Juma Kadala*** (supra). Mr. Mhagama responded that, since the respondent had no any cause of action against Makambako Town council as the sublease agreement was between the respondent and appellant, thus to him there was no need of joining Makambako Township as necessary party.

In the case of ***Abdulatif Mohamed Hamis versus Mehboob Yusuf Othman & Another,*** Civil Revision No. 06 of 2017 it was held that:-

> *" ..... There is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to*

adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non- necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not to be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff.

Since, as we have just remarked, the legal representative of the deceased was a necessary party, her non- joinder was fatal and the trial court, either on its own accord, or upon a direction to the 1st respondent, was joined to strike out the name of the 1st respondent and substitute to it her name .... Unfortunately, that was not done and, indeed, the non-joinder of the legal representative in the suit under our consideration is a serious procedural in-

exactitude which may, seemingly, breed injustice".

Having considered the arguments by the parties, I agree with the Mr. Mhagama in submission that, there was no need of joining Makambako Town council as necessary party as the respondent has no cause of action against Makambako Town Council. Also, in absence of the said non- joined party the District Land and Housing Tribunal was in a position to pass an effective decree. I view this ground lacks merit the same is disregarded.

With regard to the second ground of appeal that, the trial Tribunal erred to declare the respondent to be the winner for his failure to visit locus to ascertain the description and location of the suit land, to him the trial Tribunal for his failure to do so it lacked the solid basis to declare the respondent the winner who had in fact and at law to prove her case and which was full of contradictions. Mr. Mhagama on his side argued and I agree with him that, during trial there was no any party who prayed for the Tribunal to visit the site and failure to visit the locus in quo, cannot be a bar to the Tribunal to know the disputed area and make a justified decision thereon. On my part visiting locus in quo is not mandatory, since the evidence offered by the parties during trial suffice to dispose the matter. It was correctly submitted by the learned counsel for the respondent that this issue of visiting locus in quo was not raised by any party, thus the trial Tribunal was not moved by the parties for it to visit the locus in quo. Needless to say that, this ground of appeal is baseless, as it is a settled principle of law that it is not mandatory to visit locus in quo as it was held in the case of ***Dar es Salaam Water and Sewage Authority versus***

Didas Kameka, Civil Appeal No.233 of 2019 CAT at Dar es Salaam (unreported) at page 30 the Court has this to say:-

> *"The case before us presents similar outlook which seals the fate of the appellant who faulted the trial court for not inspecting the Locus in quo.Based upon the foregoing principle, we think, the learned trial judge found it unnecessary to inspect the Locus in quo which is not mandatory and as rightly argued by Mr. Kariwa, the learned trial judge found the facts and evidence placed before him were sufficient to dispose of the dispute.* ***In any case, the learned trial Judge did not find the need to go into fishing expedition by assuming the role of an investigator and gather fresh evidence at the trial something which is abhorred as stated in the case*** **of** ***Nizar M.H Ladak (supra) and Mukasa (supra)".*** (Emphasis added)

The above position applies to our instant case, the trial Tribunal chairperson found it unnecessary to inspect the locus in quo as the facts and evidence placed before him were sufficient to dispose the dispute.

The argument by the appellant that the trial Tribunal ought to visit the locus in quo in order to ascertain the description and location, is in my view baseless and is an afterthought because if he thought it necessary for the tribunal to visit locus in quo he was supposed to pray for it. But it should be noted that the dispute is not on the boundary which would need to ascertain such boundary. Appellant has argued that there is no law prohibiting the Tribunal to take that course to visit locus in quo. But equally there is no law compelling the Tribunal to visit locus in quo. But the truth is that it is unnecessary as it was held in ***Dar-es salaam Water and Sewage Authority Case***. There is also complaint by the Appellant that Respondent tendered before the trial Tribunal secondary evidence without giving evidence for doing so. This complaint was well addressed by the Respondent's advocate that, exhibit A2 was not secondary evidence. The same was certified to show its authenticity. Above that the Appellant's advocate raised objection at the trial Tribunal the same was justifiably overruled after being found that the objection was hinged not on point of law. This ground lacks merit too.

With regard to the third ground of appeal that, the assessors did not back their opinion with reasons, the appellant was of the considered opinion that, the decision of the Honorable Chairman went beyond the reliefs granted by both assessors hence the entire decision of the Tribunal

was bad at law. I have carefully read the arguments by the parties with regard to this ground, I concur with Mr. Mhagama in his submission that, there is no law requiring assessors to give reasons for their opinion. The law only requires Judges and Magistrate to give reasons for the decisions they reach. For that reason, this ground lacks merit. The relevant provision on participation of assessors in decision making is Section 23 of the Land Disputes Courts Act [Cap. 216 R.E. 2019], the same provides:-

> *"23(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.*
>
> *(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment".*

There is nowhere in the above reproduced provision requires assessors to give reason in their opinion.

As regard to the complaint that, one assessor Mr.Mwapinga on 18/11/2020 when the case was scheduled for proceeding with the hearing of the A.W4, the assessor one Mr. Mwapinga was absent but he gave opinion. This may be good point however the practice taken by the Appellant is not proper, it is a bad practice, I say so because the appellant raised the complaint in his submission while the same was not raised in the

pleadings, thus, the same appears an afterthought, Appellant did not raise this in his memorandum of appeal.

It is settled principle of law that, parties are bound by their pleadings, as it was held in the case of ***Yara Tanzania Limited versus Charles Aloyce Msemwa t/a Msemwa Junior Agrovet and Another*** (unreported), Mwambegele, J. as he then was said the following:

> *"It is a cardinal principle of the Law of Civil Procedure founded upon prudence that parties are bound by their pleadings".*

Hence the complaint is an afterthought, I will not consider it.

With regard to the fourth ground of appeal, the main complaint is that, the respondent did not prove locus standi as the legal representative of the late Kianzio Sanga. This argument is baseless because having perused the records reveals that, the respondent on 11/12/2018 at the trial tribunal proceedings testified that, she is the administratrix of the Estates of her late father. But reading through the records I have found the letter of administration showing that, the respondent was appointed by Makambako Primary Court on 08/12/2017 to be Administratix of the Estate of Late Kianzio Vahomile Sanga. This, argument must fail, as the respondent has locus standi to sue the appellant as explained above.

Having discussed as herein above I find that the appeal has no merit, the same is dismissed with costs.

It is so ordered.

DATED at **IRINGA** this 25th day of August, 2022.

F.N. MATOGOLO

JUDGE.

25/08/2025

Date:	25/08/2022
Coram:	Hon. F. N. Matogolo –Judge.
Appellant:	Present
For the Applicant:	Absent
Respondent:	Present
For the Respondent:	Absent
C/C	Grace

COURT:

The case is for judgment. Judgment is delivered.

F. N. MATOGOLO,

JUDGE.

25/08/2022.

Right of appeal is explained.

F. N. MATOGOLO,

JUDGE.

25/08/2022.