**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**LAND APPEAL NO. 9 OF 2022.**

**(Originating from the decision of the District Land and Housing Tribunal for Iringa District, at Iringa in Land Application No. 96 of 2018).**

**JOSEPHAT LUDAGO (As the administrator**

**of the estate of the late Francis Ludago) ..... APPELLANT**

**VERSUS**

**EVARISTO MWIPOPO (As the administrator**

**of the estate of the late Sadiki Kihalaga).....RESPONDENT**

**RULING**

**23rd June & 21st September, 2022.**

**UTAMWA, J:**

This is an appeal against the judgment (The impugned judgment) of the District Land and Housing Tribunal for Iringa, at Iringa (The DLHT) in Application No. 96 of 2018 (The original case). The appellant in this appeal is one JOSEPHAT LUDAGO (As the administrator of the estate of the late

Francis Ludago). The respondent is EVARISTO MWIPOPO (As the administrator of the estate of the late Sadiki Kihalaga).

A brief background of this appeal goes thus: before the DLHT the respondent (in his capacity as the administrator of the estate of the late Francis Ludago), sued the appellant (in the name of JOSEPHAT LUDAGO) for among others, a declaration that the respondent and his family were the legal occupiers and heirs of the suit property, an order for vacant possession and costs of the suit. The respondent's application was partially allowed to the extent that, the suit property was declared to be part of the estate of the late Sadiki Kihalaga. The appellant was aggrieved by the said decision, hence this appeal.

The appellant's appeal is based on eight grounds of appeal. I will not list them here since they are inconsequential to this ruling due to it's nature as it will notable soon. The respondent on the other hand filed his notice of preliminary objection (The PO) against the appeal. It contained the following two limbs:

i. The appeal is incompetent for being filed by a wrong person.
ii. That the appellant has no *locus standi* in the appeal and even in the judgment of the trial tribunal.

Parties were ordered to dispose of the PO by way of written submissions following their consensus.

In this matter, the appellant appeared in person. In fact, the appellant informed the court that he had an advocate, but he did not

mention him/her and the said counsel did not appear in court for even a single day. Even the petition of appeal shows, at its bottom, that it was drawn and filed by the appellant himself and not by his counsel. This court will thus, proceed to consider the appellant as unrepresented. On the other side, the respondent was represented by Mr. Shaba Mtung'e, learned advocate.

According to the scheduling order fixed by the court for the parties to present their respective written submissions on the PO, the respondent had to present his written submissions in-chief on or before 26th May, 2022. He in fact, did so timely on the 25th May, 2022. On his part, the appellant did not filed any replying submissions on the 8th of June, 2022 as directed by the court. When he appeared before this court on 30th August, 2022 he informed the court that, though he had been accordingly served with the respondent's written submissions in-chief, he did not file his replying submissions. This was because, he gave the respondent's submissions to his advocate. Nonetheless, his counsel did not appear in court on that 30th August, 2022 since he got an emergency. His said counsel did not however, inform him (the appellant) of the nature of the emergency. The appellant added that, his counsel had also informed him (appellant) that he had attempted to file the replying submissions electronically, but it could not be possible to do so.

Having heard the appellant's submissions on his failure to file the replying submissions timely, this court ordered for the matter to proceed to this ruling without considering the appellant's submissions. This court then

reserved the reasons for that directive to this ruling. The court is now set to give the reasons at this juncture before it proceeds to the examination of the merits of the PO by considering the respondent's submissions only.

Indeed, the reasons for proceeding to this ruling on the PO without considering the appellant's replying submissions are the following: in the first place, the appellant was in court when the scheduling order was fixed by this court and he conceded to the style of hearing by written submissions. He promised to inform his purported advocate on that mode of hearing. He also conceded the receipt of the written submissions in-chief of the respondent. His failure to file the replying submissions timely therefore, has no any good excuse. This is because, he said his alleged advocate had promised to file the submissions in court, but he did not mention the name of such advocate. He also said, his counsel had an emergency, but he did not mention the nature of the emergency. Indeed, in law cases are adjourned for good reasons only. A court cannot thus, adjourn a case for any emergency of a party to court proceedings or his/her counsel unless it knows its nature and it assesses it as a good reason for the adjournment. It follows thus, that the alleged emergency of the appellant's counsel could not form any good reason for adjourning the case since it's nature is not known by the appellant himself and this court.

Furthermore, if the alleged appellant's counsel really faced difficulties in filing the replying submissions electronically as contended by the appellant, it could be open to him to apply for extension of time to do so.

Nevertheless neither the applicant nor his alleged counsel did attempted to do so.

It is also the law that, where a matter before a court is to be heard by written submissions in lieu of oral hearing, an unexplained failure by a party or his counsel to present written submissions in court timely, is in law, tantamount to failure to be ready or appear for the hearing of the matter in view of prosecuting or defending it. Under such circumstances, the court is justified to proceed to the verdict or make necessary orders. This stance was underlined by the Court of Appeal of Tanzania (The CAT) in the case of **National Insurance Corporation of (T) Ltd & Another v. Shengena Limited, Civil Application No. 20 of 2007 CAT at Dar es Salaam** (unreported). In that precedent the CAT observed thus, and I reproduced the pertinent passage:

> "The applicant did not file submissions on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act.....it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case".

The same stance was echoed in the cases of **Patson Matonya v. The Registrar Industrial Court of Tanzania & Another, Civil Application No. 90 of 2011, CAT at Dodoma** (unreported) and **Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014, CAT at Dar es Salaam** (unreported).

The above listed reasons were thus, the grounds why this court ordered for the case to proceed to the present order without considering the appellant's submissions.

Despite the fact that this court opted to proceed to this one-sided order, the failure by the appellant to file his written submissions timely alone, is not a reason for upholding the PO. The same must be tested according to the law. This is because, the firm and trite principle of our law is that, courts are enjoined to decide cases according to the law and the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (The Constitution). This is irrespective of the reaction by the parties to court proceedings. This stance of the law is indeed, underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N.E. Govan (1973) LRT n. 60**. In supporting this legal stance the CAT also held in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza,** (unreported Ruling), that, normally a court cannot close its eyes on a glaring illegality, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. I will now proceed to examine the merits of the PO raised by the respondent in the present matter.

In his written submissions in-chief supporting the first limb of the PO, the respondent's counsel submitted that, it is a settled principle of law that only original parties in a suit can appeal. In the present appeal the appellant who is the administrator of estate of the late Francis Ludago was not a party in the DLHT. He argued that, the change of his tittle goes to the root of the case. He supported his contention by citing the case of **Hamid Siddy Hepautwa v. Johari Abdallah Pangani (PC), Probate**

**Appeal No. 03 of 2019, High Court of Tanzania (HCT), at Iringa** (unreported). This precedent, he contended, emphasized that, the right to appeal is for the parties who have been involved in the original suit and not for any other person.

The respondent's counsel added that, the appellant in the appeal at hand, as the administrator of the estate of the late Francis Ludago is a stranger to the appeal since he was not a party to the original case. In his view, the defect goes to the root of the case. He cited the case of **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd, Civil Appeal No. 34 of 2010, Court of Appeal of Tanzania (The CAT) at Dar es Salaam** (unreported) to cement his point.

On the second point of objection, the learned advocate for the respondent submitted that, the appellant in the present appeal, as the administrator of the estate of the late Francis Ludago, was not a party in the original records before the DLHT. He argued that, the appeal is incompetent and cannot be amended at this stage as there is already a preliminary objection filed by him. He cited the **Jaluma case** (supra) to support the contention.

The respondent's counsel thus, prayed for the appeal to be struck out with costs as the appellant is not a proper party in the present appeal.

The record also shows that, the same counsel for the respondent also filed rejoinder submissions as if the appellant had filed his replying submissions. I will not consider such submissions in this order since the foundation for rejoinder submissions is, in law, the replying submissions by

the adverse party. Now, since in the matter at hand there was no any replying submissions by the appellant, the rejoinder submissions filed by the respondent's counsel were a superfluous exercise. This court thus, expunges the same from the record.

I have considered the record, the law and the written submissions in-chief by the respondent's counsel. In my settled opinion, the two limbs of the PO are interrelated and can be considered cumulatively. They thus, call for one major issue of *whether the appeal at hand is competent owing to the reasons adduced by the respondents' counsel.*

In my settled opinion, the circumstances of the case at hand attract a negative answer to the major issue posed above. The reasons for this opinion are as follows: in the first place, the law is in favour of the contention by the respondent's counsel that, an appeal against a decision of a trial court is open only to a party who was involved in the original proceedings. The **Jaluma case** (supra) and the **Hamid case** (supra) cited by the respondent's counsel earlier underscored this legal position. The case of **Attorney General v. Maalim Kadau and 16 Others, Civil Application No. 51 of 1996, CAT at Dar es Salaam** (unreported) also underlined the position.

The rationale for the principle just underlined in the above cited precedent is not far to fetch. It is this; the right of a party to be heard and to address the court (the right to *locus standi*) in an appeal, begins in the original proceedings. It is therefore, only a party who had *locus standi* in the original proceedings can be involved in an appeal as appellant or

respondent for purposes of promoting fair trials to parties. The other reason is that, court proceedings usually, end with either an award of a right to a deserving specific party or an imposition of liability to a specific party. The foundation of such right or liability is the original proceedings and not the proceedings before an appellate court. It follows thus, that, permitting a person who was not a party to original proceedings to be involved in appellate proceedings (whether as an appellant or respondent) may lead to an unfair trial to the parties and ultimately to a serious injustice. This is because, that course may mislead the court in awarding rights or imposing liability to wrong persons.

The above mentioned right to fair trial/hearing to parties is a fundamental right and is well enshrined under article 13(6)(a) of the Constitution. This right has been graded by the CAT as one of the corner stones of the process of adjudication in any just society like ours, in both civil and criminal proceedings: see the decision by the CAT in **Kabula d/o Luhende v. Republic, CAT Criminal Appeal No. 281 of 2014, at Tabora** (unreported). Courts of this land cannot therefore, entertain any proceeding which is likely to offend the right to fair trial for any person.

In the present matter, it is common knowledge that, the right to appeal against decisions of a DLHT exercising its original jurisdiction like the one under discussion, is provided under section 41(1) of the Land Disputes Courts Act, Cap. 216 RE. 2019 (The LADCA). These provisions guide thus, and I quote the same for a readymade reference:

> "**Subject to the provisions of any law for the time being in force**, all appeals, revisions and similar proceeding from or in respect of any

> proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court."(Bold emphasis is provided).

In my settled opinion, though the above quoted provisions of section 41(1) of the LADCA do not expressly guide that only persons who were involved in the original proceedings can appeal to this court, the bolded text of **"Subject to the provisions of any law for the time being in force"** qualifies persons who can appeal to this court. In my view, the phrase "provisions of any law" referred to under that section includes the principle underlined in the precedents cited previously. It follows thus, that, appeals of this nature are also subject to such useful restriction for the sake of justice.

Owing to the above reasons, the pertinent sub-issue at this juncture is therefore this; *whether the appellant in the appeal at hand was party to the proceedings of the original case before the DLHT in the eyes of the Law.*

The record of this appeal clearly shows that, before the DLHT the respondent was Josephat Ludago. He was thus, sued in his personal capacity. Nonetheless, in this appeal, he has changed his capacity. He is now appealing as "JOSEPHAT LUDAGO (As the administrator of the estate of the late Francis Ludago)." In other words, the appellant is appealing in his capacity as the administrator of the estate of the late Francis Ludago and not in his personal capacity. Nonetheless, it cannot be said that the respondent before the DLHT is now the appellant before this appeal. This is because, in the original case before the DLHT the appellant was sued in

his own capacity as Josephat Ludago. In this appeal, he has changed capacity and is now the administrator of the estate of another person, i.e. the late Francis Ludago. However, the late Francis Ludago was not party to the original case before the DLHT.

It follows therefore that, though the human being who appeared before the DLHT as respondent is the same before this court as the appellant, it cannot be said that the appellant was party to the proceedings before the DLHT. This is because, in this appeal he is representing the late Francis Ludago and he is not representing himself as he did before the DLHT in the original case. This court cannot thus, condone the appellant's ingenious technique of changing capacities like a chameleon which changes its skin colour to match its surroundings so that it cannot be seen. Legal eyes are sharp enough to detect such uncalled behaviour which may lead to unfair trials as observed above.

Having observed as above, I answer the sub-issue posed above negatively that, the appellant in the appeal at hand was not party to the proceedings of the original case before the DLHT in the eyes of the Law.

Before I answer the major issue posed above, I feel indebted to also remark here that, the irregularity committed by the appellant in the present appeal cannot be saved by the principle of overridden objective. This principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v.**

**Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

Now, the reasons why the error in this appeal cannot be cured by virtue of the principle of overriding objective are that, its effect is serious as demonstrated above. It offends the fundamental right of fair trial which is enshrined by the Constitution as observed previously. The irregularity is not thus, a mere technical matter. It in fact, goes to the root of the case as rightly contended by the learned counsel for the respondent.

The above negative answer given to the sub-issue, and the stance of the laws I underlined above, compel this court to also answer the major issue posed above negatively that, the appeal at hand is incompetent owing to the reasons adduced by the respondents' counsel and others adduced by this court.

Having observed as above, I uphold the PO raised by the respondent. I accordingly strike out the appeal for incompetence and the appellant shall pay costs of this appeal since costs follow event. It is so ordered.


JHK UTAMWA

JUDGE

21/08/2022

21/09/2022.

CORAM; JHK. Utamwa, J.

Appellants: present in person.

Respondent: present in person ad Mr. Shaba Mtung'e, advocate.

BC; Gloria, M.

Court; Ruling delivered in the presence of both parties in person and Mr. Shaba Mtung'e, advocate for the respondent, this 21st September, 2022.


JHK UTAMWA
JUDGE
21/09/2022.