

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO 13 OF 2022

(Arising from the decision of District Land and Housing Tribunal of Musoma at Musoma in land Appeal no 171 of 2021 and Originating from Ward Tribunal of Bweri in Application no 47 of 2021)

RITHA D. BYABATOAPPELLANT

VERSUS

HELENA DANIEL LUNYANGI RESPONDENT

JUDGMENT

25th & 19th September, 2022

F. H. Mahimbali, J.:

The appellant in this case had successfully sued the respondent before Bweri Ward Trial Tribunal in a claim of land boundary encroachment. It was claimed that the respondent had encroached into the appellant's land by joining her wall fence to the fence earlier built by the appellant. At the trial Ward Tribunal, the case was determined *exparte* after the respondent had defaulted appearance before it.

Dissatisfied by that *exparte* decision, the respondent successfully by his appeal lodged on 19th November 2021 challenged it before the District Land and Hosing Tribunal. In allowing the appeal, the first appellate tribunal summarily nullified the trial tribunal's proceedings and orders on legal basis that it had no rules warranting the hearing of the proceedings *exparte*.

Not being amused by that decision, the appellant has knocked the doors of this Court challenging the decision of the first appellate court on the following grounds:

- 1. That the appellate District Land and Housing Tribunal erred on point of law to make a finding without spelling out a law that mandated his finding and that which the trial tribunal contravened.*
- 2. That, the appellate DLHT forum chairman erred on point of law to come to a finding without involving the parties and thus denied them, particularly the appellant the right to be heard.*

On these two grounds, the appellant then prays for the following orders in consideration of her appeal.

- a) That the decision and orders of the first appellate tribunal be quashed and set aside.

- b) This court finds an order that the matter was determined by the trial Tribunal according to law and the said judgment be upheld.
- c) This court finds and order that the trial Tribunal judgment was legal and lawfully found.
- d) The respondents be condemned to pay costs of this appeal and below.

During the hearing of the appeal, the appellant enjoyed the legal services of Mr. Makowe learned advocate, whereas the respondents appeared in person and unrepresented.

In arguing the appeal, Mr. Makowe faulted the first appellate tribunal proceedings as it didn't involve the tribunal assessors which is contrary to section 23 (1) and (2) of LDCA, Cap 206 read together with Reg. 19 (2) of the GN 174 of 2003- The land Disputes Courts (the District Land and Housing Tribunals) Regulations of 2003.

Since an appeal is not amongst the matters falling under exclusive powers of the chairman DLHT, the summary dismissal of the appeal in the absence of the tribunal assessors was not justified and thus unlawful as per law. Mr. Makowe argued this issue in line with the second ground of appeal of the petition of appeal in which the learned chairperson

introduced this as new issue which did not even address the parties. As it was a new issue raised by the chairman himself suo motto, he was legally duty bound to address the issue to the parties for their submission before it. Not doing so, he argued it was unlawful as it condemned parties unheard.

On this stance he invited this court to the case of **Michael Chacha Johaness vs John Kikosa Seremonda**, Misc. Land Case No 2 of 2014, Court of Appeal at Mwanza making reference to the case of **Ausd Tanzania Ltd vs Musa Joseph Kivuli**, Civil Appeal No 38 of 2014, Court of Appeal at Mwanza. He considered what the Honourable chairperson ruled was a nullity in the eyes of the law.

On the first ground of appeal he submitted that the appellant's grievance is on the legality of the chairperson's order nullifying the Ward Tribunal's proceedings on reason that the Ward Tribunal has no powers of proceedings with the matter *ex parte* in the event the defendant does not heed appearance to it when duly summoned. He submitted by way of analogy that pursuant to section 13 (2) of the Ward Tribunal Act Cap 206, R. E. 2019, when a matter is scheduled for hearing and the defendant appears but the plaintiff does not appear, the suit is bound to be dismissed for want of prosecution. He therefore conversely submitted

that if the same law penalises the plaintiff at Ward Tribunal for non-appearance, equally by analogy, the Ward Tribunal can proceed exparte against the defendant in the event there is sufficient legal proof that she/he was dully served.

On this submission, he prayed that this appeal be allowed with costs.

The respondent on her part, had nothing substantial to submit, however she prayed that her reply to the grounds of appeal dully filed in court be adopted to form part of her relevant submission.

In her reply to the grounds of the petition of appeal, the respondent stated the following:

- 1. That the dispute between the parties is on boundary (uchochoro) between the two plots. Which previously was unsurveyed plots. That after the survey, the respondent started erection of a wall surrounding her premises.*
- 2. That the appellant made complaints against the respondent to the municipal council. The Municipal council visited the site and made an order that each party should demolish a piece of wall in dispute to the tune of 1.5.meters.*
- 3. None of the parties have complied with the Municipal order, hence the basis of this case now to High Court*

level. On these reasons, she submits that the appeal is baseless and be dismissed with costs.

The respondent could not counter anything on the issue raised by Mr. Makowe. As it is more legal, I can understand that may be it was out of her scope in knowledge.

I have keenly digested the submissions by both sides. I have also gone through the whole records of this case from the trial Ward Tribunal to High Court. The issue for consideration now is whether the appeal is meritorious.

In consideration of this second appeal, I have found it important to peruse what was the appeal before the DLHT. There were seven ground of appeal, namely:

- 1. Kwamba, hukumu ya Baraza la kata imeegema upande mmoja (mjibu rufaa) hivyo haitoi haki.*
- 2. Kwamba, Baraza la kata linanishutumu na kimekosea katika misingi ya Haki na sheria kwa kumuona Muomba rufaa kuwa ni Mkorofi.*
- 3. Kwamba, ubishi katika shauri hili linatokana na mipaka kati ya Muomba rufaa na Mjibu rufaa, hata hivyo Baraza la kata lilitakiwa lipate ushahidi wa mipaka kutoka mamlaka inayohusika kabla ya kutoa maamuzi ya shauri hili.*
- 4. Kwamba, kama inavyosomeka katika hukumu ya Baraza, Mjibu rufaa anatakiwa kuacha mita 1.5 kutoka katika kigingi (Bicon) halali inayowekwa na mamlaka husika na si vinginevyo.*

5. *Kwamba mjibu rufaa pamoja na mashahidi wake walipotosha Baraza kwa kudai kuwa muomba rufaa ni mkorofi.*
6. *Kwamba, mjibu rufaa amekaidi kutekeleza notisi ya kubomoa sehemu ya ukuta wake ili kupisha uchochoro kati yake na muomba rufaa badala yake ametumia ujanja wa kuleta shauri hili mbele yako.*

On these grounds of appeal before the DLHT, the respondent prayed that the matter be remitted to DED – Musoma (land Office) for execution order of the said notice of demolition dated 2/8/2021.

Astonishingly, when the appeal was set for hearing on 13/12/2021, the following is what transpired, I reproduce.

Tarehe 13/12/2021

Akidi

Mwenyekiti: Kitungulu, E

W/Baraza:

Mdai: Yupo

Mdaiwa: Yupo

K/Baraza: Pude.

Mdai (sic): *Nimekata rufaa dhidi ya uamuzi wa Baraza la kata, lilisikiliza kesi upande mmoja.*

Mdaiwa: *Ni kweli kesi hii ilisikilizwa upande mmoja, baada ya mrufaniwa kukataa kuja kwenye Baraza la kata.*

Amri: *Baraza la kata halina mamlaka ya kusikiliza kesi upande mmoja na kutoa hukumu. Hivyo mwenendo na hukumu ya baraza la kata ya Bweri katika shauri Na 43/2021*

vilikua batili tangu mwanzo, hivyo vinafutwa shauri hili linaweza kufunguliwa upya kwa kufuata sherira. Maombi madogo Na 1088/2021 kwa uamuzi huu pia yanafutwa.

Sgd: Kitungulu, E

Mwenyekiti

13/12/2021

In consideration of the submissions by Mr. Makowe learned advocate for the appellant, it is clear that the DLHT in determining this appeal had the following legal faults:

Firstly, it was not properly constituted as per law (section 23 (2) and Regulation 19 (2) of the GN 174 OF 2003 (THE LAND Disputes Court (the District Land and Housing Tribunal) Regulations, 2003. The law requires save for matters stated in Regulation 22 of the GN 174 of 2003, every sitting of the DLHT the chairman must be with the aid of assessors who shall give their opinion before the decision is made. In this case there was no such involvement of assessors from the beginning to the end. Thus the orders of the DLT which were issued without involving the tribunal assessors are nullity as per law (see **Michael Chacha Johanness vs John Kiskosa Seremonda**, Misc. land Case no 2 of 2014 and **Ausd Tanzania Ltd vs Musa Joseph Kivuli**, Civil Appeal No 38 of 2014, CAT at Mwanza).

As the order by the chairman of the DLHT nullifying the Ward Tribunal's ex parte orders does not fall amongst the orders issued by the chairman himself under section 22 (a-d) of GN174 OF 2003. By doing so, the chairman committed two apparent errors:

- *Firstly*, he introduced this as new issue and the parties did not address the tribunal for its consideration. (See Article 13 (6) of the constitution of the United Republic of Tanzania.
- *Secondly*, the introduced issue of the trial tribunal lacking power to proceed ex parte, has no legal support.

In my close reading of section 13 (2) 15 and 16 of the Ward Act Cap 206, it is clear that the Ward Tribunal can regulate its own procedure. It is not unclear of this is not one of its regulated procedures. However, where it is established that the respondent to the case has neglected appearance, the trial tribunal can legally proceed the trial per its procedure. This is because, the chairman assume the role of the whole DLHT but in exclusion of Tribunal Assessors. That was an error.

Secondly, the learned chairman introduced new issues of the jurisdiction of Ward Tribunal without addressing it to the parties. This is a legal contravention as per Article 13 (6) of the Constitution of the

United Republic of Tanzania (of 1977) which guarantees a right to be heard before legal action is to be taken against any person.

Thirdly, the learned chairperson abandoned the whole grounds of appeal as filed by the appellant and in leau of them, he introduced his own ground which formed the basis of the DLHT's decision. That is improper as per law.

All this said and done I find this appeal meritorious. The proceedings orders and decision of the DLHT (First appellate tribunal) are quashed and set aside. In its place, I order rehearing of the appeal before another chairman and his set of assessors expeditiously.

It is so ordered.

DATED at MUSOMA this 19th day of September, 2022.




F. H. Mahimbali

JUDGE