

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

CIVIL APPEAL No. 26 OF 2021

ERASTO SESE MWITA..... APPELLANT

VERSUS

ZULEKHA ABUBAKARI..... RESPONDENT

JUDGMENT

26th September & 06th October, 2022

OTARU, J.:

This is a second Appeal by ERASTO SESE MWITA, the Appellant herein, challenging the decisions of both the District Land and Housing Tribunal (DLHT) for Mwanza at Mwanza Appeal No. 34 of 2018 as well as the Ward Tribunal of Kiseke at Ilemela in Land Case No. 95 of 2018, which handled the matter.

It is not in dispute that both, the Appellant and ZULEKHA ABUBAKARI, the Respondent purchased plots of land next to each other in Nsumba in 2016 and 2012, respectively. Sometimes in 2016, the Ilemela Municipal Council conducted survey over the area and subsequently reallocated the boundaries. The dispute between the parties arose as a result of this survey when the Appellant started developing the plot that was originally purchased by the Respondent.

The Respondent successfully filed the matter before Kiseke Ward Tribunal and was declared to be the lawful owner of the land in dispute.

M. Otaru

The Appellant being dissatisfied, Appealed to the DLHT for Mwanza at Mwanza which *referred the dispute to Ilemela Municipal Council for amicable settlement.*

The Appellant was bemused by the decisions, hence this Appeal in which the Appellant is praying for judgments of both tribunals to be set aside and a declaration that the appellant is the lawful owner. He also prayed for costs. The initial Petition of Appeal contained three grounds. Later the Appellant added two more grounds which are reproduced below:-

1. That the honorable appellate chairperson grossly erred in law in determining the Appeal which has no jurisdiction to determine the matter.
2. That the honorable appellate chairperson grossly erred in law for failure to rule that the matter was determined at the trial stage with absence of the necessary party.
3. That the honorable appellate chairperson grossly erred in law in determining the appeal by relying on extraneous matter.
4. That the honorable appellate chairperson grossly erred in law by delivering illegal and defectively incompetent judgment.
5. That the honorable appellate chairperson grossly erred in law by relying on the proceedings of the trial tribunal which were taken in controveerse to the law.

The matter was disposed off by way of oral submissions. Kick starting the submissions was Mr. Mwita Emmanuel, learned counsel who represented the Appellant. He began with the 4th ground above, faulting the decision of the DLHT of referring the matter for amicable settlement. The learned counsel argued that the decision contravened the provisions of Order XX Rule 4 of the **Civil Procedure Code** (Cap.33) (RE 2019), which requires decisions to determine rights of the parties and not otherwise. He insisted that the impugned decision was totally misplaced as the tribunal abdicated its jurisdiction to determine the dispute when it referred it to the Municipal Council for amicable settlement. He supported his averments by citing Mulla II, (16th edn) **the Code of Civil Procedure**, at Page 2368 which provides for contents of the judgment and the decision in the case of **Prosper Paul Massawe and 2 Others vs Access Bank (TZ) Ltd**, Civil Appeal No. 39 of 2014 (CAT at Dar es Salaam) (Unreported).

Regarding the 5th ground above, the learned counsel for the appellant contended that, the trial chairman erred in law by relying on unsworn evidence. He stated further that, a tribunal being a quasi-judicial body had a duty to ensure that evidence is taken under oath or affirmation. To bolster his arguments, the learned counsel cited the case of **Getrude Mkonyoka vs Harish Parekch**, Land Appeal No. 238 of 2016, High Court at Mwanza (unreported).

Grounds 2 and 3 were combined, and the learned counsel argued that the matter was determined without the necessary party being joined and that the Tribunal relied on extraneous matters in determining the case.

On failure to join the necessary party Mr. Emmanuel stated that since the dispute arose immediately after survey which was conducted by Ilemela Municipal Council, it was important for it to be joined in the case and such failure vitiated the proceedings under the subsequent judgments. He abandoned the 1st ground of appeal.

In rebuttal submissions, the Respondent who was unrepresented stated that, she is saddened by the learned counsel for the appellant using legal provisions to hide the truth. She stated further that, they went through the process until judgment was delivered by the trial Tribunal. That the Tribunal did everything correctly and there was no reason for this Appeal. She added that, the decision was read in January but they were supplied with copies in August. Originally the judgment was in support of her rights but is now changed to read as, *the matter is directed for amicable settlement.*

Lastly, the Respondent urged the Court to consider evidence adduced at the trial Tribunal so that she gets her rights and the appeals be dismissed with costs.

In his brief rejoinder, the learned counsel for the appellant stated that proceedings and judgment in both Tribunals were tainted with illegalities and were unprocedural thus should be nullified.

Having heard the submissions made by both parties and the records of the Ward Tribunal as well as of the District Land and Housing Tribunal, there are a number of issues for consideration in this Appeal in order to determine whether the appeal carries any merit or otherwise. I shall however confine myself to one issue as addressed in the 4th ground of Appeal. It is whether the Appeal has merits.

The Appellant submitted that the Municipal Council was a necessary party to the suit, therefore it should have been sued as well. In refuting, the Respondent claims that it is the tactics of the Appellant's counsel trying to deprive her of her rights.

I have given due thought and consideration on the issue of the necessary party and wish to cite the case of **Abdullatif Mohamed Hamis V Mehboob Yusuf Osman & Another**, Civil Appeal No. 6 of 2017, CAT (Unreported) which was faced with a similar question. In resolving the question, the Court of Appeal relied on the Indian case of **Baranes Bank Ltd. V Bhagwandas**, A.I.R. (1947) All 18, and adopted the tests laid down by the full bench of the High Court of Allahabad for determining whether a particular party is necessary party:-

'First, there has to be a right of relief against such a party in respect of the matters involved in the suit and; second, the court must not be in a position to pass an effective decree in the absence of such a party'.

According to the facts of this Appeal, the Ilemela Municipal Council organized and conducted the survey in the area where the land in dispute is situated. The survey and reallocation of boundaries is the source of the dispute between the parties herein. Evidence in the trial tribunal indicates that none of the parties were involved in the survey process. It is well established in **Obeid Mtei v Rukia Omari** [1989] TLR 111 (CAT) that, failure to involve parties in the survey and installation of beacons is wrong.

Following on the steps of **Abdullatif's** case (supra) The instant matter has a prima facie right of relief against the Ilemela Municipal Council, which in my view requires it to be authoritatively moved so that they resolve the dispute they have caused. Having said that, that no effective decree that may be passed in the absence of Ilemela Municipal Council.

Based on the above reasoning I hold that Ilemela Municipal Council is a necessary party whose presence in the proceedings cannot be avoided as may occasion a miscarriage of justice. Consequently, I hold that failure to include Ilemela Municipal Council as a necessary

party to these proceedings was a non-joinder of parties making it difficult if not impossible enforcing any rights of the parties.

Therefore, the Appeal has merits and is hereby allowed. The proceedings and Judgment of both Tribunals are hereby quashed and set aside. Any of the parties if still interested, may institute fresh proceedings with competent jurisdiction which should also include Ilemela Municipal Council as the necessary party. Based on the circumstances of the case, no order as to costs is given.

It is so ordered.


The right of appeal is duly explained.



DATED at **MWANZA** this 6th day of October, 2022.


M.P. OTARU
JUDGE

This Judgment is delivered under my hand and the seal of this Court this 6th day of October, 2022 in the presence of Zulekha Abubakari, the Respondent and in the absence of the Appellant who was informed.


M.P. OTARU
JUDGE
06/10/2022