

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**MISC. LAND APPEAL NO 43 OF 2022**

(Arising from Land Appeal o 121 of 2021 in the District Land and Housing Tribunal for Mara, and originating from Land Application 71 /2021 at Kenyamonta Ward Tribunal)

**JULIUS MACHOTA ..... APPELLANT**

***VERSUS***

**NYABUSA MAHEMBA ..... RESPONDENT**

**JUDGMENT**

19<sup>TH</sup> Oct & 21<sup>ST</sup> Nov, 2022

**F. H. Mahimbali, J.:**

This is the second appeal after the District Land and Housing Tribunal of Musoma had nullified the decision of the trial Ward Tribunal (Kenyamonta) in case No 71 of 2021 for being legally incompetent. As if that was not enough, the DLHT went ahead to nullify the proceedings of the same Ward Tribunal in land case no 42 of 2020 in which it was not subject of this appeal, nor called for.

The facts of the case can be summarized this way. The appellant in this case is the successful party in a suit for a claim of land in case No 42 of 2020 of Kenyamonta Ward Tribunal via *exparte* decision.

The respondent on the other hand, instead of challenging the *exparte* decision in case no 42 of 2020, decided to file case No 71 of 2021 before the same trial tribunal of Kenyamonta where he won. This then had aggrieved the appellant who is the successful party in the former case no 42 of 2020. He unsuccessfully appealed before the DLHT and now has come before this court with only one ground of appeal that:

- 1. The 1<sup>st</sup> appellate tribunal erred in law to nullify the proceedings of land application no 42 of 2020 without any justification and without the records of the trial tribunal relating with the same.*

During the hearing of the appeal, the appellant was represented by Mr. Daudi Mahemba whereas the respondent was represented by Mr. Godwilly Mweya, both learned advocates.

In his submission in support of the appeal, Mr. Mahemba submitted that the first appellate tribunal erred in not finding that the subsequent case no 71 of 2021 was *res-subjudicata* to case no 42 of 2020 involving

same parties, same subject matter, same cause of action in which the former was also decided by the same trial tribunal. He added that as land Appeal no 121 of 2021 was against decision in Land Case No 71 of 2021, its appellate mandate only was confined to that case appealed against. Thus, it was wrong for the trial tribunal to arrive at the conclusion when determining the fate of Land case no 71 of 2021 to quash the decision in Case No 42 of 2020 which was not subject of appeal.

On the other hand, Mr. Mweya is of the firm view that for fairness, the first appellate tribunal was justified to quash the decision in land case no 42 of 2020 after it had noted that the trial Ward Tribunal had decided the matter *ex parte* without jurisdiction in line with the decision in the case of **Petro Bira Chato vs Hima Hudi Ubaya**, Misc. Land Appeal No 47 of 2020, High Court Dodoma.

I have keenly digested the arguments of both counsel for and against the appeal. I have carefully scanned the proceedings and decisions of the two lower tribunals as far as land case no 71 of 2021 and Land Appeal No 121 of 2021 are concerned. I first agree with the chairman's findings in his appellate jurisdiction when he determined Land Appeal No 121 of 2021

against the trial tribunal's decision no 71 of 2021 that it erred in its decision for two reasons:

1. The respondent had not given his testimony in respect of his ownership against the appellant as the person from whom had no such legal power.
2. The trial tribunal's decision in land case no 71 of 2021 had no legal judgment for want of tribunal members' decisions.

However, the first appellate tribunal (DLHT), went ahead to determine the said appeal by quashing the decision of the trial court in case no 42 of 2020 in which was not subject of appeal.

In my considered view, whereas in land case no 71 of 2021 had legal deficiencies, as it involved the same parties, same subject matter and same cause of action, the subsequent case was re-judicata to the former case no 42 of 2020. The argument that the DLHT was justified for all fairness, it is unjustifiable. So long as there is an existing judgment by the same court, it is only challengeable before the superior court/tribunal in hierarchy either by appeal or revision. As that was not done by the respondent, the trial tribunal was unjustified to determine the subsequent matter even if it was

preferred by a purported holder of power of attorney. It just remained re-judicata to the former case.

Had there been pointed out any legal error by the DLHT in respect of the former case in the course of determining the said appeal, would have only done so by inviting parties to address it to him before making such a finding. As doing that is condemning parties to the case unheard which is constitutionally guaranteed and legally condemned to do otherwise (see **Danny Shasha V. Samson Masoro & 11 Others**, Civil Appeal No. 298 of 2020, CAT at Musoma at Page 5 - 7), where the Court of Appeal has emphasized time and again that a denial of the right to be heard in any proceedings would vitiate the proceedings. Further, it is also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. The Court of Appeal in **Danny Shasha V. Samson Masoro & 11 Others** (Supra) made reference in its previous decision in **Mbeya - Rukwa Auto Parts & Transport Limited vsJestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (unreported), where the Court emphasized that: -

*"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:(a) Wakati haki na wajibu wa mtu ye yote vinahitaji kufanyiwauamuzi na Mahakama au chombo kinginecho kinachohusika,basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwakwa ukamiiifu"*

hey also had this to say in **Abbas Sherally & Another vs Abdul S.**

**H. M.Fazalboy**, Civil Application No. 33 of 2002 (unreported) that: -

*"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

That said, since Land case no 71 of 2021 is re-judicata to Land Case no 42 of 2020 (of the same Kenyamonta Ward Tribunal) its appeal to the DLHT is also a nullity. Thus, both the proceedings and decision emanating from Land case no 71 of 2021 before Kenyamonta Ward Tribunal and the appellate proceedings and decision before the DLHT (in appeal no 121 of 2021) are nullity. The same are hereby quashed and set aside.

In its place, I revive the decision of the ward Tribunal in land case no 42 of 2020. Any legal issue should then stem from there.

Appeal is allowed with costs.



DATED at MUSOMA this 21<sup>st</sup> day of November, 2022.

F.H. Mahimbali

Judge

**Court:** Judgment delivered this 21<sup>st</sup> day of November, 2022 in the presence of both parties and Mr. Gidion Mugo, RMA

Right of appeal is explained.

F.H. Mahimbali

Judge