

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO

LAND APPEAL NO. 29 OF 2022

(Originating from District Land and Housing Tribunal of Morogoro Land Application No. 9 of 2014)

MUGANDA MICHAEL.....APPELLANT

VERSUS

SIMON LIDUCKEY.....RESPONDENT

JUDGEMENT

Hearing date on: 26/10/2022

Judgement date on: 13/12/2022

NGWEMBE, J:

At the District Land and Housing Tribunal for Morogoro, the respondent herein successfully sued the appellant for ownership of Plot No. 457 Block "A" located at Tungi area within Morogoro Municipality. The Trial Tribunal, ended up deciding in favour of the respondent after being satisfied that, he had proved the case to the preponderance of probability. Hence the following orders were issued namely; first, the suit land belonged to the applicant (respondent); second, the appellant is a trespasser; third, permanent injunction against the appellant from



interfering or disturbing the respondent on his ownership of that plot of land; and fourth costs of the suit.

Brief recap of the genesis of this suit goes back to 12th July 1994 when it is alleged, the respondent acquired such land from Morogoro Municipal Council, when he was still a minor. Hence was registered as the owner of that piece of land under the guardianship of his father John Safari Barnabas. On the other side, the appellant established his ownership through purchase of same plot of land from the family members of the late Mwantobe on 25th July, 2012.

Before the Trial tribunal, the case was prosecuted by John Barnabas Safari under Power of Attorney from the Respondent who was by then in United States of America.


Being dissatisfied with the decision of the trial tribunal, the appellant preferred this appeal clothed with four (4) grounds. In the course, on 9th June 2022 the appellant through his advocate successfully prayed to amend his memorandum of appeal by adding one more ground, thus constituting an aggregate of five grounds of appeal. For easy of reference the grounds of appeal are reproduced hereto: -

1. That the trial tribunal erred in law and in fact by entertaining a land dispute in respect of Plot No. 457 Block "A" Tungi within Morogoro Municipality without necessary parties, hence vitiating the entire proceedings;
2. That, the trial Tribunal erred in law and in fact by deciding the matter in favour of the Respondent on hearsay evidence;

3. That, the trial Tribunal erred in law and in fact by failing to properly analyze and evaluate the evidence on record and due to such misapprehension reached to an erroneous decision;
4. That, the trial Tribunal erred in law and in fact by deciding the matter in favour of the Respondent while the Respondent failed to discharge the burden of proof to the required standard; and
5. That, on the 10/07/2019 learned Honorable Chairman took over the matter without assigning a reason, hence vitiating the proceedings.

Both parties in this appeal procured services of learned advocates, while the appellant was represented by learned advocate Jovin Manyama, the respondent procured legal service of learned advocate Ignas Punge. The learned advocates successfully prayed to dispose of this appeal by way of written submissions. Both parties complied with the schedule order of filing their written arguments in this court. I appreciate for their inputs.

In submitting this appeal, Advocate Manyama argued the first ground, briefly that, the proceedings of trial tribunal were vitiated for lack of necessary parties. To appreciate his argument, he cited the case of **Juliana Francis Mkwabi Vs. Lawrent Chimwaga, Civil Appeal No 531 of 2020 (CAT – Dodoma)** where at page 9 of the judgement defined who is a necessary party. **Black's Law Dictionary 8th Edition** also defined "*necessary party*" to mean "*a party who, being closely*"



connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings"

The court went on to cite with approval the decision in the case of **Tang Gas Distributors Limited Vs. Mohamed Salim Said & 2 others, Civil Application for Revision No 68 of 2011 (unreported)** at page 9 and 10 of the judgement, which discussed the circumstances in which a necessary party ought to be added in a suit and the court held: -

"An intervener, otherwise commonly referred to as a NECESSARY PARTY, would be added in a suit under this rule even though there is no distinct cause of action against him where; -

(a) N/A

(b) His propriety rights are directly affected by the proceedings and to avoid multiplicity of suits, his Joinder is necessary so as to have him bound by the decision of the court in the suit"

Mr. Manyama further submitted that the Respondent herein alleged to have been allocated the suit land by the Morogoro Municipal Council under the guardianship of John Barnabas Safari meanwhile the Appellant purchased the alleged disputed land by the family members of the late Mwamtobe, both were necessary parties to this matter for its proper adjudication. Failure to involve them would result into multiplicity of suit and ineffectual resolution of the dispute and for them being bound by the decision.

Moreover Mr. Manyama cited **Order I Rule 9 of the Civil Procedure Code [Cap 33 R.E 2022]** as to the fact that the suit shall

not be defeated for non-joinder or mis joinder of parties. However, the court has to take into consideration and decide the matter depending on its peculiar circumstance, he referred to the case of **Godfrey Nzowa Vs. Selemani Kova & another, Civil Appeal No 183 of 2019 (CAT at Arusha)**, at page 17 and **Stanslaus Kalokola Vs. Tanzania Building Agency and Another, Civil Appeal No 45 of 2018 (unreported)** the court observed:-

"...there are non-Joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential"

Mr. Manyama concluded that, since necessary parties were missing during trial at the Tribunal, the proceedings thereof are characterized with irregularity, hence the same deserve to be quashed.

On the second, third and fourth grounds jointly, Mr Manyama submitted that, respondent did not discharge his burden of proof as per the provisions of **Section 110 and 111 of the Evidence Act [Cap 6 R.E 2022]**, he contends that, the respondent never testified before the trial tribunal, rather John Barnabas Safari testified on his behalf on the account that he was granted Power of Attorney and the evidence was without evidential value to be relied upon. He cited the case of **Ngusa Noni Vs. Sayi Maduka, Land Appeal No 101 of 2016 (HC – Shinyanga)** which had similar circumstance like this appeal at hand, on page 11 of the judgement the court observed:-

"Therefore, since the applicant Sayi Maduka never testified before the trial Tribunal to prove what he had asserted, the



evidence by the other witnesses certainly lacked foundation and therefore had nothing to prove"

The court went on to observe: -

"Since the evidence by Zipha Sayi, PW1 the holder of power of attorney from Sayi Maduka, the applicant, never mentioned how she was related to the Respondent Sayi Maduka, her evidence completely has been hearsay which in law is inadmissible, and since the same inadmissible evidence was admitted and acted upon by the trial Tribunal in reaching to the decision in favor of the Respondent who never testified in support of his application, I find that was an irregularity which went to the root of the matter"

Above all, he submitted that, the present matter falls squarely within the ambit of the above, the evidence of John Barnabas Safari was greatly hearsay because he is not the legal owner of the suit land and also his guardianship has ceased, thus his evidence contravened **Section 62 (1) of the Evidence Act**. Lastly, he submitted that the trial tribunal did not properly scrutinize and evaluate the evidence prior to its conclusion. Thus, prayed this court being the first appellate court to evaluate the evidence on record and come up with its own findings and conclusion.

On the last ground Mr. Manyama submitted that, Hon. Khasim (Chairperson) took over the matter and proceed with the hearing, which was initially presided by Hon. Mbega, O.Y without advancing any reason thereto, contrary to **Order XVIII Rule 10 (1) of the Civil Procedure Code [Cap 33 R.E 2022]**, to support his submission Mr. Manyama

cited the case of **Mariam Sumburo (Legal Personal Representative of Late Ramadhani Abas) Vs. Masoud Mohamed Joshi & 2 Others, Civil Appeal No 109 of 2016 (CAT - Dar es Salaam)** the court had this to say in regard to recording of reasons for taking over the court file at page 8;

"The above quoted extract provides for a clear interpretation and rationale behind existence of Order XVIII Rule 10 (1) of the CPC to the effect that, recording of reasons for taking over the trial of the suit by a judge is a mandatory requirement as it promotes accountability on the part of the successor judge. This means failure to do so amounts to procedural irregularity which in our respective view and as rightly stated by Mr Shayo and Mr Mtanga, cannot be cured by the overriding objective principle as suggested by Dr Lamwai"

In contrast Mr. Punge started his submission by defining the term owner of the land as per **section 2 of the Land Registration Act [CAP 334 R.E 2019]**. He referred this court to the case of **Salum Mateyo Vs. Mohamed Mateyo (1987) T.L.R 111** at page 112 affirming the statutory definition of owner of the land to mean a person for the time being in whose name the estate or interest is registered. Also, it was held in the case of **Amina Maulid Ambali and Two Others Vs. Ramadhani Juma, Civil Appeal No. 35 of 2019 (Unreported)** that when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner. He submitted that the appellant claims that he purchased the plot from Mwantobe's family which was invalid as they

did not comply with the legal requirements in disposition of a registered land. He also cited the case of **Nitin Coffee Estate and 4 Others Vs. United Engineering Works Ltd and another [1988] T.L.R 203**

In replying to the first ground of appeal, that Morogoro Municipal Council and Mwantobe family members to join them as necessary parties is totally misconception, the appellant ought to have raised that point as preliminary Objection on point of law at the trial tribunal. In support, he cited the following cases **A.G Vs. Francisco Teotionio Bragaza (1953 – 1957) 2 T.L.R 86, Ramadhani Kisuda & Mdilu Ujamaa Village Vs. Adamu Nyarandu & 3 Others (1998) T.L.R 68, Betty Kassiri Vs. Eastern and Southern African Management Institute (ESAMI) (2001) T.L.R 478.**

He further submitted that, there was no need to include Morogoro Municipal Council as the dispute is not based on double allocation and that, appellant was at liberty to join Mwantobe's family through third party notice if he deemed fit to do so as per **Order, I Rule 14 of the CPC**. Alternatively, he could have summoned Mwantobe's family members as witnesses. Moreover, he submitted that the respondent cannot be compelled to sue persons whom he has no desire to sue. He referred this court to a Law Book of **Mulla's Treatise, CODE OF CIVIL PROCEDURE, 15th edition. Vol. II at pages 1011-2: -**

"Plaintiff is the dominus litis. He cannot be compelled to sue a person against whom he does not claim any relief... It is for him to decide the forum where the suit is to be instituted and the parties to be impleaded "

In replying to grounds number two, three and four, Mr. Punge submitted that the appellant's advocate had erroneously combined the grounds as are distinct and unrelated, worse the submission is based on a different and new ground not contained in the Memorandum of Appeal which is not allowed, he referred this court to the case of **Twagira Vs. Attorney – General and Others (2009) 1 EA 418.**

Notwithstanding the above, Mr. Punge submitted that the evidence of respondent was not hearsay, the used Power of Attorney was validly registered and was admitted during trial without any objection. Likewise, **Order III, Rule 1 and 2 (a) of the CPC** allows recognized agents to appear for and on behalf of parties to the case and one of such persons is an Attorney appointed under Power of Attorney. Further cited the case of **Parin A.A Jaffer & Another Vs. Abdulrasul Ahmed Jaffer & Two Others 1996 T.L.R 110, Page 114**

On the last ground that, Honorable Chairman took over the matter without assigning a reason, hence vitiating the proceedings. Mr. Punge submitted that the law has not been infringed, that both successor chairperson (Hon. Khassim and R.W Mbwambo) stated the reasons for taking over and proceeding with the case. He referred this court to article **107A (2) (e) of the Constitution of the United Republic of Tanzania.**

Mr. Punge also cited **Section 45 of the Land Disputes Courts Act, Cap (216 R.E 2019)** and the case of **Yakobo Magoiga Gichere Vs. Peninah Yusuph, Civil Appeal No. 55 of 2017 CAT (Unreported).** Lastly, he prayed that this appeal be dismissed in its entirety with cost.

In rejoinder Mr. Manyama insisted that Morogoro Municipal Council and Mwantobe family are necessary parties hence ought to be joined, he cited cases of **Mussa Chande Jape vs Moza Mohammed Salim Civil Appeal No 141 of 2018 CAT at Zanzibar (Unreported) and Tang Gas Distributors Limited (Supra).**

On hearsay evidence, Mr. Manyama submitted that he did not question the validity of Power of Attorney, but the fact that no evidence was established as the Respondent's incapacity to attend the trial at the Tribunal.

On the fifth ground Mr. Manyama submitted that the case and provisions cited, intends to persuade the court to invoke the overriding objective, but they cannot be relevant in the circumstances where the requirement is mandatory. He prayed that this Honorable court may find this appeal with merit and accordingly allow the same with costs.

Having heard and considered the submissions of rival arguments in this appeal, I think the best answer on the first ground, without going into details of the matter is the provision of law itself. The issue of who should be the defendant/respondent, the law is settled that the plaintiff or applicant is seized with powers so to decide. I think, Mr. Punge is right, the respondent had every right to decide as he did, that the appellant was the one who interfered in the rightful ownership of the respondent. In the contrary, the suggestion of the appellant that he ought to sue Municipal Council and the one who purported to sell such piece of land to the appellant is unwarranted shifting the burden to the respondent. If the appellant had any relief from the family of Mwantobe or Municipal council, he ought to apply Order 1 Rule 14 of Civil

Procedure Code to invite them as co – respondents/defendants. Failure to do so, meant were not necessary parties.

Rightly so, Mr. Manyama cited several authorities on this ground, but unfortunate, those precedents were distinguishable to this appeal and are inapplicable in any standard. Failure to apply such right during trial meant admission and estoppel from raising it on appeal. In conclusion, I find no merit on this ground.

Considering the second bundle of grounds of appeal, that is grounds 2, 3 & 4 jointly, which are related to proof of claim of ownership, I am troubled seriously with those grounds. It is on record that the respondent produced and successfully tendered unopposed a certificate of occupancy bearing title No. 48249 issued on 18th July, 1994. From that evidence alone, in the eyes of law, it means plot No. 457 Block 'A' Tungi Morogoro, for the period of thirty-three (33) years shall be owned by Simon Liduckey, unless otherwise changed by operation of law.

Considering the evidences adduced by the appellant herein, I am attracted on the nature of the contract marked annexure MM1 of the written statement of defence of the appellant during trial, that the appellant purchased such plot of land on 25th July, 2012. Obvious and without citing any precedent to such effect, the one who occupied such plot of land from 1994 and who is registered owner by the Commissioner for lands and the Registrar of Titles by operation of law is the true owner. In essence there was no plot of land for either Mwantobe or another person to transact in year 2012. Since 1994 to 2027 the suit plot is lawfully occupied and owned by the respondent.

Equally important, is for the purchaser to be aware and make necessary search on the true ownership of a surveyed land prior to effecting sale. Failure to perform such noble duty by the purchaser was fatal, consequently he should blame himself for inaction. I therefore, subscribe to the arguments of learned advocate Punge that those grounds bear no merits on this appeal.

Considering the last ground of appeal on recording reasons for taking over of tribunal's file from one chairman to another. This point is statutory, as rightly argued by both parties. Section 51 (2) of Land Disputes Act Cap 216 R.E. 2019, imposes procedural duties to District Land Tribunal to apply Civil Procedure Code and the Evidence Act in determining land disputes before it. Observed clearly under Order XVIII Rule 10 (1) of CPC is quoted hereunder: -

"10 (1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."


The significance of the above provision has previously been discussed by the Court of Appeal in **M/S Georges Centre Limited vs Attorney General and Another, Civil Appeal No. 29 of 2016**. In that case, it was held, once the trial of a case has begun before one judicial officer, that judicial officer must bring it to completion unless there are some reasons hindering him/her to do so, since the law

imposes an obligation to the successor judicial officer to put on record why he/she has to take up the partly heard case from another judicial officer.

Similarly, in **M/S Flycatcher Safaris Ltd Vs. Ministry of Lands and Human Settlements Development and the AG, Civil Appeal No. 142 of 2017 (unreported)**, the Court held: -

"In essence, the law is well settled on succession of judicial officers. Successor judicial officers are empowered to deal with the evidence taken before another presiding judicial officer where the predecessor judicial officer is prevented from concluding the trial or suit by reason of death; transfer or other cause."

Undoubtedly, the above precedents are applicable in every judicial hearing of a suit. The rationale is well settled and need not be repeated herein. However, Land Tribunals like Labour Tribunals and other Tribunals are not courts per se as defined by the law. Most of time tribunals are not manned by competent and regulated legal professionals like in the courts of law. Equally important is the Ward Tribunals, though do make decisions, but they are manned by common men in the society. Likewise, the District Land Tribunals are manned by officers who are employed and regulated by the Ministry of Lands. To do justice to those tribunals, at most have relaxed procedural strictness like in the courts of law.



Usually in those tribunals they are concerned with substantive justice as opposed to procedural compliance. This position was rightly

considered by the Court of Appeal in several cases including in the case of **William Stephen Vs. Ms. Leah Julius (Administratrix of estate of the late Neema Saboro), Civil Appeal No. 64 of 2013** and **Yakobo Magoiga Gichere Vs. Penina Yusuf, Civil Appeal 55 of 2017** where it was observed: -

"We are of the decided view that the Court should not read additional procedural technicalities into the simple and accessible way Ward Tribunals in Tanzania conduct their daily business"

In similar vein, the Court of Appeal in **Chandrakant Joshubhai Patel Vs. R, [2004] T.L.R. 218**, provided a long living guideline as follows: -

"No judgment can attain perfection but the most that Courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism"

In contemplation of what is on trial tribunal's records, in line with the above procedural rules, it is inevitable the chairman Hon. M. Khassim on 10th July, 2019, took over the proceedings of Hon. Chairman Mbega without assigning any reason. But the taking over of the same land dispute by chairman R. Mmbando from Hon. Chairman M. Khassim comprised reasons. To the best such irregularity alone did not affect substantive justice to the disputants, thus in respect to this appeal such irregularity alone was not fatal.

On the basis of the above legal provisions and the examination conducted on the tribunal's procedures and judgement, I am satisfied that the District Land Tribunal substantially complied with procedural requirements.

In totality, this appeal lacks merits, the decision of the trial District Land Tribunal is upheld consequently this appeal is dismissed forthwith. Due to the nature of this dispute, it is just and equitable to order each one to bear his own costs.

Order accordingly.

DATED at Morogoro in Court Chambers this 13th day of December, 2022.



A handwritten signature in blue ink, appearing to be "P.J. Ngwembe", is written over a horizontal line.

P.J. NGWEMBE

JUDGE

13/12/2022

Court: Judgment delivered at Morogoro in Chambers on this 13th day of December, 2022, **Before Hon. A.W. MMBANDO, DR** in the presence of Mr. Hassan Nchimbi, Advocate for the Appellant and in the ^{absence} Absent of the Respondent.

Right to appeal to the Court of Appeal explained.

SGD. HON. A.W. MMBANDO

DEPUTY REGISTRAR

13/12/2022

I Certify that this is a true and correct copy of the original	
Deputy Registrar	
Date	13/12/22 at Morogoro