IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 5 OF 2022

(Arising out of Land Application No. 77 of 2015 in the District Land and Housing Tribunal for Morogoro, at Morogoro)

BETWEEN

JOHN ANDREW DENGHE .... APPELLANT

VERSUS

MPONDA MTILLA .... 1ST RESPONDENT

DANIEL KURANGA .... 2ND RESPONDENT

JUDGMENT

30th Nov, 2022

M. J. CHABA, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro (the DLHT or trial tribunal). Facts raising to the present appeal can be briefly narrated as follows: The respondents, Mr. Mponda Mtilla and Daniel Kuranga sued Mr. John Andrew Denghe, the appellant herein over a parcel suit land found on Plot No. 435, Block "D", situated at Tungi area, within Morogoro Municipality.

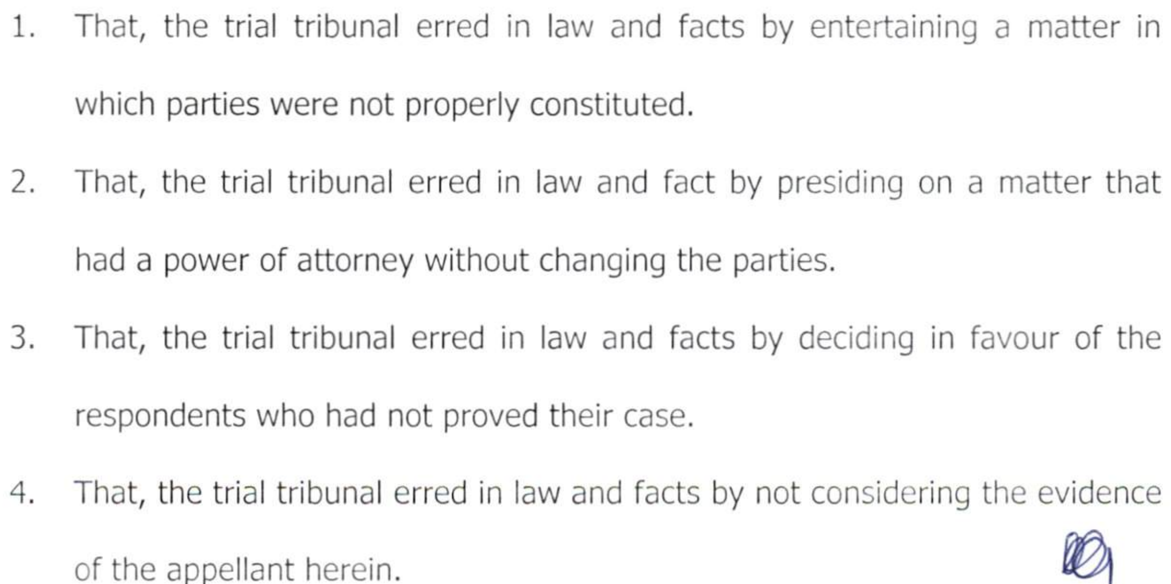
Records from the DLHT reveals further that, the respondents, without any claim of right trespassed the applicant's Plot and undertook massive

construction activities and developments / improvements on the disputed land.

The appellant who was also the applicant before the DLHT, prayed and urged the trial tribunal to award him the following reliefs: **One;** The Applicant be declared the owner of the disputed land and respondents as just trespassers, **Two**; Immediate eviction order be issued against both respondents, **Three;** Demolition order for improvements erected by the respondents, **Four;** Costs of the suit, and **Five;** Any other relief(s) as the Honourable tribunal may deem fit and just to grant.

After a full trial, the trial tribunal decided in favour of the respondents, and declared them as the rightful owners of the disputed parcel of land. Undaunted by the decision of the tribunal tribunal, the appellant preferred an appeal before this Court based on the following grounds: -

1. That, the trial tribunal erred in law and facts by entertaining a matter in which parties were not properly constituted.
2. That, the trial tribunal erred in law and fact by presiding on a matter that had a power of attorney without changing the parties.
3. That, the trial tribunal erred in law and facts by deciding in favour of the respondents who had not proved their case.
4. That, the trial tribunal erred in law and facts by not considering the evidence of the appellant herein.



When the appeal was called on for hearing, the appellant was represented by Mr. Alinanuswe Asifiwe, learned advocate, while the respondents had the service of Mr. Bartholomeo Tarimo.

Arguing in support of the first ground, the counsel for the appellant submitted that, in the trial tribunal, the appellant herein pleaded that he was granted the disputed parcel of land by the Municipal of Morogoro which had surveyed the said land. This assertion was back up by Mcharo Kihadu Mbega, a Land Officer from the Municipal Council who featured as AWII. The counsel averred that, a pertinent issue that was to be resolved by the trial tribunal is this, whether the Municipal Council had a better title to give. He said, it is who he has who can give it. He said, not impleading the Municipal Council was an error which goes to the root of the matter. In similar way, Mr. Asifiwe underlined that, failure by the trial tribunal to order the Municipal Council to be joined as a necessary part, has occasioned a miscarriage of justice to the appellant. To cement this point, the counsel submitted that the Court of Appeal of Tanzania (the CAT) on dealing with the issue of non-joinder of the Municipal, addressed the matter in the case of **Tanzania Railways Corporation (TRC) V. GBP (T) Limited,** Civil Appeal No. 218 of 2020 (unreported), wherein from pages 17-18 held *inter-alia* that: -

> *"We set aside the entire proceedings and judgment of the trial court and direct that the Land case No. 9 of 2017 be set down for trial after the Commissioner for Lands of Kigoma Ujiji Municipal Council, whichever granted*

the disputed land to the respondent shall have been joined as a party to the suit under Order 1, Rule 10 (2) of the CPC".

He accentuated that, suffice it to say that failure to join the Municipal as a necessary party has denied the Municipal itself an opportunity to be heard on the legality of the process of surveying the land in dispute and thereafter allocating it to the appellant. He added that, the issues as to whether there was adequate compensation and whether the respondent were "indigenous" would have properly resolved had the allocating authority would have made a part to the case. Guided by the decision of the CAT in **Tanzania Railways Corporation (TRC) V. GBP (T) Limited** (supra), he urged this Court to set aside the decision of the trial tribunal and order that the matter be tried *de novo.*

He further highlighted that, the evidence garnered from the judgment of a trial tribunal, there are other parties who were made part of the trial. These are Novati Valeri and Godfrey Valeri. According to him, these are necessary parties as it was underscored by the Court in the case of **Juma B. Kadala V. Laurent Mnkande [1983] TLR 103,** whereby it was held that, if there are issues as to the buying and selling, the seller must be made part of the proceedings.

On the second ground, Mr. Alinanuswe argued that the appointment of Daniel Amos Kunambi to represent the applicant John Andrew Denghe, had to go mutatis mutandis with the amendment of the pleading, as those who

appeared in the trail tribunal are not the ones who pleaded and therefore the case of the appellant was not heard. At page 2 of the printed judgment, the trial tribunal depicts that the applicant John Andrew Denghe appointed Daniel Amos Kunambi because the former was (is) sick. He averred that, the evidence of Daniel Amos Kunambi was a hearsay, and hence the appellant was not heard in the strictiest sense of fair hearing, it would have been better if the file and pleadings be read as *Daniel Amos Kunambi suing as an Attorney of John Andrew Denge*. He was of the view that, by not amending the pleadings the matter proceeded erroneously.

As to the third ground, the counsel submitted that, the respondents just testified that they were in the said area since 1980's, however they did not say anything as to where they were and when the survey was done. Again, they didn't tender any evidence as to the cancellation of the survey, they even didn't adduce any evidence proving that they at one time objected the survey, but still the trial tribunal declared them victors.

In respect of the fourth ground, the learned counsel asserted that, the evidence of the appellant was not considered at all at the trial tribunal which based its findings on the lawfulness or otherwise of the survey. He further stressed that, the matter at the trial tribunal had to be resolved by looking into who has the documents proving the real ownership.

To fortify the above point, the counsel referred the Court to the meaning of "owner" in terms of Land Registrations Act, [Cap. 334 R. E, 2019], which

states that, the owner, means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered. With this, it is the appellant whose name is in the register. He said, deciding otherwise it was an error which needs an intervention by this Court to rectify it.

From the above submissions backed up by authorities, Mr. Asifiwe prayed and urged the Court to quash with costs the decision of the trial tribunal and thereupon substitute with any other order(s) as it deem just and fit to grant.

In his reply, Mr. Tarimo submission on the first ground that it was the duty of the applicant in Land Application No. 77 of 2015 to properly make up his claims and identify those whom he wishes to sue and join as necessary parties to the suit. He submitted further that, there were no double allocation of land by the land allocating authority, hence there were no need to bring in the necessity of the same being joined as necessary party in the circumstances.

On the second ground, the learned counsel stressed that the pleadings could not read *Daniel Amos Kunambi suing as an attorney of John Andrew Denghe,* as the appellant was represented by Mr. Matimbwa, the learned attorney who is well versed with the requirements of the law and procedure.

Regarding the third ground, the counsel highlighted that, it is apparent that the finding of the trial tribunal was that, the evidence adduced by the respondents was much heavier than that of the appellant. The evidence

reveals further that, the appellant owns his Plot measuring five (5) acres separately and he is now trespassing on the respondent's land knowingly.

In respect of fourth ground, Mr. Tarimo argued that, the counsel for the applicant failed to point out which evidence of the applicant was not considered by the trial tribunal. He added that, it is undisputed fact that, the respondents have been in actual occupation of the suit land since 1980's and have been developing and dwelling in the same land since then. That being the case, the appellant's contention is therefore baseless as he is trying to shift the burden of proof to the respondents who are the actual occupiers to date. Arguing in respect of Land Registration Act (supra), the counsel accentuated that the same deals with the land genuinely registered and with approved registered plan by the Commissioner for Lands. He argued that, it was not so proved. To support his contention, Mr. Tarimo cited section 119 of the Tanzania Evidence Act, [Cap. 6 R. E, 2022] which says: -

> *"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner".*

The counsel emphasized that, since the respondents have been in occupation of the disputed parcel of land since 1980 and have been developing and dwelling on the same, then the appellant's contention is baseless for a reason that he is trying to shift the burden of proof to the respondents who are actual occupier. According to him, this fact was proved by credible witnesses

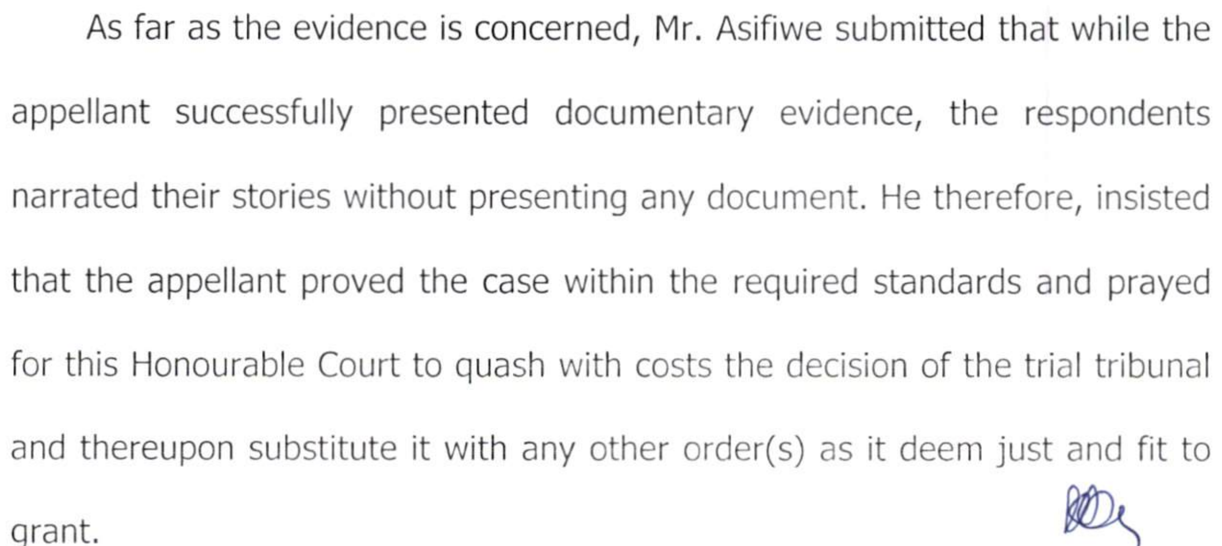
during the hearing including the respective Mtaa Executive Officer, Said Yusuph Mtegeta from the year 2012 to 2018. More-over, he referred this Court to the case of **Hemedi Saidi V. Mohamedi Mbilu [1984] TLR 113** to fortify his argument.

In conclusion, the counsel prayed the Court to uphold the decision of the trial tribunal and dismiss this appeal in its entirety with cost for want of merit.

In his re-joinder, Mr. Asifiwe reiterated his submission in chief and insisted that, Order 1, Rule 10 (2) of the CPC (supra) places the burden of adding or removing parties to the Court. He therefore, prayed this Court to quash the entire proceedings and judgment with its subsequent orders.

As for the second ground, he stressed that, after the applicant prayed to prosecute through the power of attorney, it was wrong for the trial tribunal to proceed without changing the names of the parties, the fact that the appellant had the legal services is immaterial and the Court cannot bless illegality.

As far as the evidence is concerned, Mr. Asifiwe submitted that while the appellant successfully presented documentary evidence, the respondents narrated their stories without presenting any document. He therefore, insisted that the appellant proved the case within the required standards and prayed for this Honourable Court to quash with costs the decision of the trial tribunal and thereupon substitute it with any other order(s) as it deem just and fit to grant.



Having carefully gone through the records of the trial tribunal and further heard the rival submissions of both parties presented by their learned advocates in support of their position and the petition of appeal presented by the appellant before this Court, I now endorsed proceed to determine the matter whether this appeal has merit or otherwise.

I will commence with ground one, on which the appellant's complaints is that, failure to implead the Morogoro Municipal Council, and the trial tribunal failing to order the Municipal to be joined as a necessary part has occasioned a miscarriage of justice to the appellant. According to Mr. Asifiwe, he assigned some reasons to the effect that, the applicant was granted the disputed parcel of land by the Morogoro Municipal Council, therefore failure to join the Municipal as a necessary party has denied the Municipal an opportunity to be heard on legality of the process of surveying the land.

In view of the above submission, the main issue on the first ground of appeal that I will address is, whether there was any adverse effect for non-joinder of Morogoro Municipal Council as a necessary party to the case. The term necessary party has been defined by the Court of Appeal of Tanzania in various cases including the case of **Food and Packing Ltd Vs. Tanzania Sugar Producers Association and Another,** Civil Appeal No. 91 of 2003 (unreported) sitting at Tanga, where it was stated that:

> *"A necessary party is one whose presence is prescribed by law and, in whose absence, no effective decision can be given, without such a party, the action appeal or proceedings in not properly constituted......".*

Having that principle in mind, I can now be in a position to dispose of this issue. I will start with deep diving on Order 1, Rule 3 of the CPC (supra) on who may be joined as a defendant. That rule provides: -

> *"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same actor transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise.*

In ascertaining whether a party is a necessary party or not in the context of Order 1, Rule 10 (2) of the CPC, in **Farida Mbaraka and Farid Ahmed Mbaraka V. Domina Kagaruki,** Civil Appeal No. 136 of 2006 (unreported), the Court observed that:

> *"Under this rule, a person may be added as a party to a suit: -*
>
> *(i) when he ought to have been joined as plaintiff or defendant and is not joined so; or*
>
> *(ii)* ***when without his presence, the questions in the suit cannot be completely decided".*** *[Bold is mine].*

It is evident on record that the applicant, John Andrew Denghe was allocated the suit land on Plot No. 435c, Block "D" situated at Tungi area, within

Morogoro Municipality by the authority namely, Morogoro Municipal Council which surveyed the disputed parcel of land and allocated to him. The evidence of the appellant as it was taken and recorded by the Hon. Chairperson of the trial tribunal shows that:

> *"The suit area is mine; I was legally endorsed on 16/8/1996 by the Morogoro Municipal Council, the suit area is Plot No. 435 TUNGI B. I know the suit area, its mine. I have an offer of the area".*

His evidence was corroborated by the testimony of Mcharo Kihadu Mbega, Land Officer from Morogoro Municipal Council whose testimony displays that:

> *"As per records at Morogoro Municipal Council, Plot No. 435 Block "D", Tungi; is in ownership of John Andrew Denge... I know the area of Block "D" Tungi, the area was surveyed by the municipal council in early 1990's... after the survey, the Plots were given to individuals."*

In the light of evidence highlighted herein above, it is plainly clear that the dispute between the parties cannot be resolved without joining the Morogoro Municipal Council. In my considered view, in order to facilitate effective and complete adjudication and resolution of all issues of controversy presented before it, the trial tribunal was supposed to have required the respondents to join the authority that granted land to it, or else, the trial tribunal would have taken matters in its own hands and joined the Morogoro Municipal Council to the proceedings.

Flowing from the foregoing discussion, it is my settled view that, upon making a determination that a necessary party was not joined in the suit, the proper remedy is not to completely struck out the appeal, but to refer back the matter to the trial tribunal with a direction that, a necessary party be joined, and the suit proceed afresh. I am fortified in this view by the decision of the CAT in **Farida Mbaraka and Farid Ahmed Mbaraka V. Domina Kagaruki,** (supra) wherein, after detecting that the necessary party was not joined into the suit, the Court remitted the matter to the trial Court with directions that hearing should proceed after joining a necessary party.

In the upshot, I allow the appeal and proceed to quash the entire proceedings of the trial tribunal, and set aside the Judgment and Decree delivered on 14th day of September, 2021 and all orders issued by the trial District Land and Housing Tribunal for Morogoro, at Morogoro. I order the matter to be remitted to the District Land and Housing Tribunal to be tried *de-novo* with no order as to costs. Order accordingly.

DATED at **MOROGORO** this 30th day of November, 2022.

M. J. CHABA

JUDGE

30/11/2022