

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

**LAND APPEAL NO. 36 OF 2021**

*(Arising from DLHT of Mwanza at Mwanza in Appeal No. 77 of  
2018 originating at Mkuyuni Ward Tribunal in Land Application No  
13/2018)*

**NEEMA MAKWAIYA-----APPELLANT**

**VERSUS**

**HASNA MUHENGA ----- RESPONDENT**

**JUDGMENT**

*Last Order: 19. 05.2022*

*Judgement Date: 27.05.2022*

**M. MNYUKWA, J.**

The Appellant Neema Makwaiya is a loser before Mkuyuni ward tribunal in respect of Land Application No 13/2018 in which, the respondent Hasna Muhenga was declared a winner. Consequently, the appellant was ordered the following; to compensate the respondent Tsh 600,000/= as a monetary compensation for her act of removing the respondent's mango tree without her consent, to remove one room



building structure that encroached the respondent's premise and to demolish the foundation that encroached the respondent's premise.

Dissatisfied with the above decision, the appellant appealed before the District Land and Housing Tribunal (the appellate tribunal) in Land Appeal No 77 of 2018. When the petition of appeal was served to the respondent, she filed three (3) preliminary objections together with the Reply to the Petition of Appeal. When the matter was coming for mention and ready for scheduling the hearing date of the preliminary objection, the appellant conceded to the preliminary objection and prays the matter to be struck out. On his part, the respondent joined hands with the appellant's prayer that the matter be struck out as the preliminary objection was conceded. Upon such concession, the chairperson of the appellate tribunal gave an Order to dismiss the appeal.

Aggrieved further by the Order of appellate tribunal, the appellant come to this court with two grounds which are: -

- 1. That, the appellate tribunal erred both in law and fact having dismissed an appeal while it was improper before the appellate tribunal.*
- 2. That, the appellate tribunal erred both in law and fact by dismissing an appeal which was not heard on merit.*



The appellant prays the appeal to be allowed, the Order of the appellate tribunal be quashed and set aside and any other reliefs that the court may deemed fit to grant.

During the hearing of this appeal which was argued orally, the appellant was represented by Mr. Kessy Abdallah, learned counsel while the respondent was afforded the legal services of Mr. Antony Nasmire, learned counsel.

In arguing the appeal Mr. Kessy submitted that, the matter before the appellate tribunal was land appeal originated from the decision of ward tribunal. That, the chairperson of the appellate tribunal did not hear the appeal on merit and erroneously dismissed the appeal instead of striking it out. He refers this court to the decision of the Court of Appeal of Tanzania in the case of **Cyprian Mamboleo Mizza v Eva Kioso and Mrs. Semwaiko**, Civil Application No 3 of 2010 which draw a distinction between struck out and dismissed. He insisted that, the appeal before the appellate tribunal was improper and incompetent as it was not heard on merit and therefore the remedy was to struck out and not dismiss it.

In responding the counsel for the respondent submitted that he was instructed by his client to oppose the appeal and that the appellant conceded the preliminary objections raised. He added that, on 18/9/2018,



the respondent raised three preliminary objections. He avers that if the preliminary objections concerned only the first two preliminary objections, then he could have prayed this court to remit the records to the appellate tribunal for necessary orders including striking out the appeal. He went on that, he hesitated to do so because the respondent conceded to the third point of preliminary objection which touches the issue of jurisdiction and its remedy is to dismiss the appeal. He therefore prays the appeal to be dismissed.

Rejoining, Mr. Kessy Abdallah argued this court to invoke its inherent power to note that jurisdiction from the ward tribunal goes to the appellate tribunal and the court should have a look on the Order of the appellate tribunal.

I have carefully given thought to the contending arguments of the counsel for the parties in respect to the present appeal. In determining this appeal, I will have one issue to determine as to whether the appeal is meritorious. In determining this appeal, I will start to dispose the first ground of appeal and for the reason that will be revealed later on the fate of the second ground will be known.



In determining the first ground of appeal, in the first place, I have no doubt that when the respondent was filing his Reply to the petition of appeal, he also raised three preliminary objections which are;

- 1. That, the appellant petition of appeal is incompetent for being improperly filed before the Tribunal.*
- 2. That, the appellant petition of appeal is the abuse of court process.*
- 3. That, the Tribunal has no jurisdiction to entertain appellant petition of appeal.*

When the matter was coming for mention before the appellate tribunal on 2/11/2018, the respondent prays the appellate tribunal to have scheduled the hearing of the raised preliminary objections. However, before the appellate tribunal set the day for hearing, the appellant prayed to concede the preliminary objections and asked the matter to be struck out. The appellant joined hands to the respondent's prayer and further asked the appellate tribunal to struck out the appeal. On his part, the chairperson of the appellate tribunal blessed the prayer and dismissed the appeal instead of striking out.

For the sake of clarity, I better let the record bear testimony on what transpired before the appellate tribunal in regard to the preliminary objections raised. It goes that: -



**Date:** 2/11/2018

**Coram:** Hon. Masao E. – Chairman

**Appellant:** Present

**Respondent:** Miss. Dorothea advocate for

**Respondent:** That the matter is for mention we pray for preliminary objection hearing date

**Appellant:** Your honour I pray to concede with the preliminary objection and the appeal be struck out with no order as to costs.

**Respondent:** Your honour since the appeal has conceded to the preliminary objection, we pray for the Appeal be struck out with costs.

**Appellant:** I pray for the costs be waived

**Court:** that since the appellant has conceded to the preliminary objection the appeal is dismissed basing on the nature of the case and the parties I order for no costs.

*It is so ordered*

**Sgd. E. Masao – Chainman**

**2/11/2018**

From the above record, it is uncertain as to which preliminary objection was conceded and which preliminary objection the Order of the appellate tribunal has been relied on. In his submission, the counsel for



the respondent was of the view that, since the remedy on the issue of jurisdiction was conceded it was proper for the appeal to be dismissed.

Having gone through the proceedings of the appellate tribunal, I don't subscribe to the respondent's argument that the preliminary objection that was conceded was that of the jurisdiction in which its remedy was to dismiss. I hold that view because, the record is silent as to which preliminary objection was conceded among the three preliminary objections raised by the respondent because each one had its own remedy. Perhaps, the appellant conceded to the first two preliminary objections that's why she asked the court to struck it out which was also in the mind of the respondent who joined hand for the appeal to be struck out.

As a matter of practice, it was expected by the appellate tribunal chairperson to have inquired and get some explanation as to which preliminary objection among the three preliminary objections was conceded since the appellant did not particularize on his concession from the three preliminary objections raised by the respondent.

As I have earlier on noted, each of the raised objection had its remedy, if the chairman of the appellate tribunal made its decision based on the preliminary objection on issue of jurisdiction as it was submitted



by the counsel for respondent, he could have clearly stated so and on face of record should be clearly seen that the appellate tribunal had no jurisdiction to entertain that appeal. I say so because, the issue of jurisdiction is the creature of statute as parties cannot by their consent give jurisdiction to the court which it does not possess. Likewise, parties cannot by their consent deny the court jurisdiction which it does possess. (See the case of **Frank Marealle v Paul Kyauka Njau** [1982] TLR 32).

Before I conclude, I would like to put it clear that, it is the practice of the court that the preliminary objection to be decided by Ruling and reasoning contrary to what has been done by the chairperson of the appellate tribunal.

In the result, I allow the first ground of appeal. Ultimately, I nullify the Order of the appellate tribunal and set it aside, I subsequently invoke the power given to this court by virtue of section 43 of the Land Disputes Courts Act, Cap 216 R.E 2019 and order that the case file be remitted to the appellate tribunal of Mwanza at Mwanza for it to proceed with the determination of the preliminary objections on merit and the fate of appeal in accordance with the law before another chairperson. Since the first ground of appeal dispose of the suit, I will not entertain the second ground of appeal.






Given the fact that the appellant is enjoying the legal services under the pro bono basis, this court ordered that, each party shall bear its own costs.

It is so ordered



  
**M. MNYUKWA**  
**JUDGE**  
**27/05/2022**

**Court:** Judgment delivered on 27/05/2022 in absence of both parties.

  
**M. MNYUKWA**  
**JUDGE**  
**27/5/2022**