

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

**(IN THE SUB REGISTRY OF KIGOMA)**

**AT KIGOMA**

**MISC. LAND APPEAL NO. 04 OF 2023**

(Arising from Kigoma District Land and Housing Tribunal at Kigoma in Land Appeal No. 20 of 2022 originating from Land Case No.170 of 2021 of Kazuramimba Ward Tribunal.)

**MUDY JAFARI JUMA.....1<sup>ST</sup> APPELLANT**

**JESTINA FILIPO NTABILIHO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAID SHABANI LUGUSHA..... RESPONDENT**

**Date of last Order: 22/06/2023**

**Date of Judgement: 21/07/2023**

**JUDGEMENT**

**MAGOIGA, J.**

The Appellants, **MUDY JAFARI JUMA and JESTINA FILIPO NTABILIHO** aggrieved by the decision of the District Land and Housing Tribunal for Kigoma dated 17/10/2022 in Land Appeal No.20 of 2022 now appeal against the said whole judgment and decree of the appellate Tribunal to this Court armed with six grounds of appeal couched in the following language, namely:

- 1. That, the District Land and Housing tribunal for Kigoma erred in law and fact in entertaining the respondent's 3<sup>d</sup> ground of appeal that*



*was not raised in the petition of appeal but rather newly raised during the written submission in support of the appeal itself.*

- 2. That, since matters of joinder and non-joinder of parties had been raised by the respondent at the trial ward tribunal but dismissed and then were not subsequently raised on appeal by the respondent, whether in law the District Land and Housing Tribunal could have entertained them when composing judgement without availing the appellants with the right to be sufficiently heard about the point.*
- 3. That, the District Land and Housing tribunal for Kigoma as the first appellate court did not properly re-evaluate oral and documentary evidence as adduced by the parties particularly the appellants in support of the suit thereby abrogating its mandate leading to failure of justice on the part of the appellants.*
- 4. That, having decided to quash and aside the trial ward tribunal's judgement in favour of the appellants thereby restoring the parties to their original positions, the District Land and Housing Tribunal for Kigoma erred in law and in facts in subsequently conferring onto the respondent, usufructuary rights over the suit land and so without giving reasons.*
- 5. That, since the same District Land and Housing Tribunal of Kigoma had declared the suit Land approximately measuring 30 acres as*

*belonging to the first appellate in land appeal No. 92 of 2017 that had originated from the same trial tribunal in Land case No. 69 of 2016 between the 1<sup>st</sup> appellant and one Josephat Mkuyu, then, that the same Tribunal erred in law and in fact in entertaining the respondents 'claims over the same land with an effect of composing give and take judgement.*

- 6. That, in the circumstance of this case, the District Land and Housing Tribunal erred in law and in fact in holding that the joining of venders and or allocating Authorities of disputed lands is always necessary in law and so without regard to limitations and necessity of such parties.*

Facts leading to this appeal are not complicated. Vide Land Case No. 170/2021 in the Ward Tribunal of Kazuramimba, the appellants successfully sued the respondents Said Shabani Lugusha and Maswata Kalima for unlawfully entering and destroying crops into the disputed land. Aggrieved with the said decision, respondents herein appealed to the District Land and Housing Tribunal which reversed the trial Tribunal's decision and ruled against the appellants.

Against the above back ground, the appellants preferred this appeal, hence, this judgement moving this court to allow the appeal with costs by



quashing and setting aside the decision of the District Land and Housing Tribunal.

When this appeal was called on for hearing, the appellants were present and represented by Mr. Ignatus Kagashe, learned advocate whereas the respondent was as well present unrepresented and both ready for hearing.

The respondent, however, prayed this appeal be argued by way of written submission which prayer was not objected on the part of the appellants and I granted the same. I truly recommend them for their inputs on the matter. I will not be able to reproduce each and every argument taken, but it suffices to say their respective contributions are accorded the weight they deserve.


On the first ground of appeal, Mr. Kagashe submitted that the gist of the complaint is case law which is to the effect that parties are bound by their pleadings and should always confine themselves to the pleadings properly filed or objections properly raised instead of raising new issues without seeking the leave of the court to do amendments, substitution, among others.

In this appeal, the counsel submitted that, there was no ground in the petition of appeal raised by the respondent relating to the non-joinder of the village council and by the time orders for disposing the appeal by way

of written submissions were passed, no amendment of petition and leave to add a new ground had been sought and granted and therefore according to Mr. Kagashe, the respondent could not have raised such a new ground of complaint during submission without an order allowing the inclusion of the said newly raised ground.

It was further submission by the counsel that, the District Land and Housing Tribunal could have not entertained the new issue without affording the parties the right to be heard. The learned counsel cited the case of **CRDB Bank LTD vs George M. Kilindu and the Hon. A.G Civil Application No. 74/2010** (unreported) in which new matters not contained in pleadings were raised during submission. The counsel argued this court to discard the respondent's written submission in support of a new ground of appeal not contained in the petition of appeal and quash the 1<sup>st</sup> appellate tribunal's findings and decision.

On the other hand, the respondent urged this court that the matter was not newly raised in the written submission because it was included in the third ground of appeal in the District and Housing Tribunal and that the same was raised as preliminary objection in the Ward Tribunal which overruled the said preliminary objection. It was his prayer that this court maintains the judgement of the District Land and Housing Tribunal and the appellants pay the costs.



On the second ground of appeal which is couched on the legality of the District Land and Housing Tribunal to entertain the new issue when composing judgement without availing the appellants with the right to be sufficiently heard, Mr. Kagashe submitted that, the 2<sup>nd</sup> ground of appeal relates to the 1<sup>st</sup> one save that, the same expounds the former in showing the cumulative effects of entertaining the new ground of appeal not properly raised in the petition of appeal save on written submissions amounts to a denial to a fair hearing and right to be heard.

The learned counsel for the appellants cited the cases of **Jimmy David Ngonya vs National Insurance Corporation LTD [1994] T.L.R 28**, **Omary Farouk Karamaldin vs Justinian Kahwa [1996] T.L.R 100** as well as **Arcopar (O.M) S.A vs Harbert Marwa and Family Investments Co. LTD and 3 others** [Unreported] all of which the court loudly stated the principle of natural justice and “**audi alteram partem**” On that note Mr. Kagashe insisted that since the appellants were not sufficiently heard, then, the first appellate court decision was partly reached in breach of tenets of fair trial and principles of natural justice, hence, urged this court to quash and set aside the said decision.

On the other hand, the respondent in his filed written submission had nothing to submit on this ground.





On the next grounds 3<sup>rd</sup> and 5<sup>th</sup>, the counsel for the appellant submitted that they are interrelated to one another where the complaint is that the 1<sup>st</sup> appellate tribunal did not properly evaluate oral and documentary evidence adduced by the parties particularly the appellants in support of the case leading to failure of justice.

To support his stance, Mr. Kagashe cited the case of **The Standard chartered Bank Tanzania LTD vs National Oil Tanzania LTD and Another, Civil Appeal No. 98 of 2008** where it was ruled that on first appeal, the court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusion reached by the trial court stand.

Following that note, the counsel argued this court to rule that the appellants adduced strong and credible evidence in support of the claims to the suit land to the balance of probability than the respondent hence entitled to victory. He again referred this to the case of **Hassan Mzee Mfaume vs R [1981] TLR 167** to support that the 2<sup>nd</sup> appellate court can re-evaluate the evidence where the first appellate court failed to do so. He invited this court on second appeal to do that was not done by the first appellate tribunal and come up with own findings in favour of the appellants. He cited the case of **Hemedi said vs Mohamed Mbilu**



**[1984] TLR 113** by Sisya J.to show that the appellants had proved the case to the balance of probabilities.

In the 4<sup>th</sup> ground, Mr. Kagashe faulted the 1<sup>st</sup> appellate tribunal for conferring the usufruct right over the suit land onto the respondent after the same being nullified by the lower court's decision. He strongly pointed out that the 2<sup>nd</sup> appellant was in actual use and possession of the suit land having obtained a lease from the 1<sup>st</sup> appellant in 2016. Mr. Kagashe invited this court to quash the proceedings of the 1<sup>st</sup> appellate court whose effects is to put the parties in the same position as it there had never been any proceedings. He referred the case of **Village Chairman, K.C.U Mateka vs Antony Hyera [1988] TLR 188.**

On the part of the respondent, on this ground, nothing was submitted too.

In the last ground, Mr. Kagashe submitted that the first appellate tribunal is faulted in holding that the joining of the village council was necessary as the vendor of the suit land to the respondent who alleged to have acquired the suit land from the village while there was no evidence to support the said claims. The counsel prayed the appeal be allowed with cost.

On the other hand, the respondent who generally answered the grounds of appeal in his reply stated that, the District Land and Housing Tribunal



was correct to order the joining of the village council because of what he reasoned that, without the village council and the seller Salumu Baruani Kashika it could not be easy to know who exactly the village council gave the land in dispute and at which place. He therefore, invited this court to support, maintain the judgement of the District Land and Housing Tribunal.

Having carefully gone through the grounds and reply of appeal and also the submissions for and against the appeal, and after going through the evidence on record in the trial proceedings, I find the central issue for determination in this appeal is whether the appeal has merit or not.

Coming now to the merits of this appeal, in particular, the first ground of appeal, having carefully followed the rivaling arguments of the counsel for the appellants and that of the respondent himself, and considered all arguments and the record of appeal, in my considered opinion, I found the argument by Mr. Kagashe that the issue of non-joinder of the parties was a new issue raised during the written submission by the respondent misconceived because, without even going into the trial tribunal's decision, I have seen in record of appeal specifically 3<sup>rd</sup> ground of appeal in the memorandum of appeal at the District Land and Housing Tribunal and I quote **"Baraza lilikataa Kijiji cha MWAMILA na Bwana SALUMU BARUANI KASHIKA wasiwe wadaiwa katika hayo..."** To



my understanding, this matter cannot be considered to be new issues raised to the surprise of the appellants because, it was also raised at the trial tribunal and overruled. Having gone further in the record of appeal, I have found the respondent rejoined his written submission by insisting that the issue of non-joinder is not new issue as it was raised at the preliminary stage of the case.

In the case of **Nuta Press Limited vs Mac Holdings & Another** (Civil Appeal 80 OF 2016) [2021] TZCA 665 (03 November 2021, reported in **www.tanzlii.go.tz** the Court of Appeal of Tanzania, when determining the impact of not joining the company as a necessary party ( THB) alleged to have sold the disputed property observed among other things that, I quote;

*"In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the THB as prayed by the appellant without availing her opportunity to be heard. It is thus our considered view that, the nonjoinder of THB in the suit before the High Court amounted to a fundamental*

*procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing and determining the appeal as suggested by the appellant's counsel."*

Therefore, guided by the above stance, and being guided by quoted observation of the Court, I find that non joinder of the Village Council and Salumu Baruani Kashika was a great error as it raises the issue of non-joinder of a necessary party, hence, the proceedings before the trial tribunal were improper and leading to a miscarriage of justice as there were necessary parties who were denied the right to be heard. As correctly decided by the first appellate court, I have no justifiable reasons to depart from it.

The trial Tribunal was duty bound to scrutinize and make sure that all necessary parties are joined in the proceedings so that effective decree can be passed as provided by Order I Rule 10 (2) of the Civil Procedure Code, Cap 33 [R. E. 2019].

On the foregoing reasons, I fully concur with the respondent that matter of non-joinder was not newly raised in the written submission but it was included in the third ground of appeal in the District and Housing Tribunal



and that the same was, as well, raised as preliminary objection in the Ward Tribunal.

That said and done, the first ground of appeal is found with no iota of merits and is accordingly dismissed.

On the second ground of appeal which main complaint was that, the District Land and Housing Tribunal entertained the new issue when composing judgement without availing the appellants with the right to be sufficiently heard. This ground cannot detain me much because as rightly submitted by the counsel for the appellants this ground interrelates to the first ground. Much as the first ground is answered in the negative, this ground too fails because the issue of non-joinder was included in the petition of appeal.

Without much ado, this ground too, stands to fail and is dismissed for want of merits.

This takes this court to the 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal which were argued together by the counsel for the appellants. The main complaint being that the 1<sup>st</sup> appellate tribunal did not properly re-evaluate oral and documentary evidence adduced by the parties particularly the appellants in support of the case leading to failure of justice.

I have gone through the records of appeal and found that in the trial Tribunal's decision there are some documents referred to by the said

Tribunal in reaching its decision these are Land case no. 07 of 2013 of Kazuramimba Ward Tribunal and Misc. Land Application No. 69 of 2014. To my considered opinion, these two documents were supposed to be attached in the record of appeal in the 1<sup>st</sup> appellate Tribunal because these were the centers of determination at the trial tribunal which were proving that the land in dispute was the same land which the 1<sup>st</sup> appellant won in those cases. However, since the District Land and Housing Tribunal in deciding the appeal dealt mainly on the issue of non-joinder and failed to evaluate other evidence, to my view, even dealing with other grounds resulting from the nullified proceedings is just a wastage of time because the first ground sufficed to dispose the suit.

This trickles down to the fourth ground which the main complaint was that the 1<sup>st</sup> appellate tribunal conferred the usufructuary right over the suit land onto the respondent after the same being nullified by the lower court's decision. As I have held in the first ground above, this ground is equally with no merits and is hereby dismissed.

The last but not least ground was ground six which was couched that the joining of venders and or allocating authority of disputed lands is always necessary in law and so without regard to limitations and necessity of such parties. As I have found in the first ground of appeal as correctly argued by the respondent, the District Land and Housing Tribunal was

correct to order the joining of the village council because without the village council and the seller Salumu Baruani Kashika it could not be easy to know who exactly the village council allocated the land in dispute and since both parties allege to have got the land in dispute through allocation by the village council. To avoid the allocating authority audience is to deny justice to the adverse party. I have gone through the evidence in the trial tribunal and found that, not even the appellants who were claimants in that tribunal, invited the village council representative to support their assertion that the 1<sup>st</sup> appellant was allocated the said land by the village council leave alone the 2<sup>nd</sup> appellant who only had usufructuary rights over the land in dispute.

In the case of **Abdulatif Mohamed Hamis vs Mehboob Yusuf** Civil Revision No. 6 of 2017 (unreported) the court held that:

*"... on the other hand, under Rule 3 of-Order 1, all persons may be joined as a defendant against whom any right to relief which is alleged to exist against them arises out of the same act of transaction; and the case is of such a character that; if separate suits were brought against such a person, any common question of law or fact would arise."*



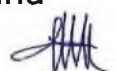


Guided by the same principle, while considering the arguments by the respondent that the village council being the allocating authority and one Salumu Baruani Kashika who sold the disputed land to the respondent herein, are necessary and indispensable in the circumstances of this appeal.

In the circumstances, I find this appeal to have been brought without merits and same is hereby dismissed with costs to the respondent.

Consequently, I uphold the decision of the District Land and Housing Tribunal by quashing and setting aside the proceedings and judgement of the Ward Tribunal and order that this case file upon inclusion of the all necessary parties and complying with mandatory legal requirements before its institution be filed in proper forum with jurisdiction to try the same.

However, before I pen off this judgement, I noted some disturbing order of the 1<sup>st</sup> appellate Tribunal that the disputed land be under the possession of the respondent without assigning any reasons. I find this irregular and amounts to deciding the case at the detriments of the appellants. Exercising my powers conferred to me under section 43(1) (b) of the Land Disputes Courts Act, [Cap 216 R.E.2019), I hereby quash the said order of handing over the disputed land to the respondent and



instead order that for the interest of justice to be seen to have been done and maintain peace, I direct that all parties to this dispute refrain from using the land until when the competent court will determine their dispute. It is further directed that if there are any crops therein, then, this order will apply after harvest by either parties’.

It is so ordered.

Dated at Kigoma this 21<sup>st</sup> day of July, 2023.



A handwritten signature in blue ink, consisting of a series of vertical lines followed by a horizontal stroke.

**S. M. MAGOIGA**  
**JUDGE**  
**21/07/2023**