

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

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**LAND APPEAL NO. 33 OF 2021**

(Originating from Katavi District Land and Housing Tribunal at Mpanda in Application No. 17/2020)

**MASHAKA MRISHO ..... APPELLANT**

**VERSUS**

**MOHAMED ABASI (Administrator of the  
estate of the late Abas H Kanoni) ..... RESPONDENT**

**JUDGMENT**

**MWENEMPAZI, J**

The appellant herein named is aggrieved by the Judgement and decree of the District Land and Housing Tribunal for Katavi at Mpanda in Application No. 17 of 2020 delivered by Hon. G. K. Rugalema (Chairman) on the 16<sup>th</sup> November, 2021.

In the District Land and Housing Tribunal, it was alleged that in 2013, specifically on the 14<sup>th</sup> April, 2013, the Respondent's family entered into an agreement with the appellant herein that the latter constructs nine rooms at the Respondent's family plot which rooms will be utilized as shop frames and

that for each room the appellant will be paying rent per month at the rate of Tshs. 50,000/= per room.

The appellant managed to construct only six rooms instead of nine rooms as agreed. Since then, the appellant managed to pay Tanzania shillings three hundred thousand only (Tshs. 300,000/=), the which amount was paid in 2014 being rent for one month only. At the time of filing an application in the District Land and Housing tribunal, the respondent was claiming Tshs. 22,500,000/=. Thus, the respondent prayed to be paid the outstanding amount of rent to the tune of Tshs. 22,500,000/=, damages for disturbance Tshs. 1,000,000/=, vacant possession of the rooms, cost of the case and any other relief the tribunal would deem fit to grant. In conclusion after hearing, the trial tribunal granted the application granted with costs. The appellant was ordered to pay outstanding rent for four rooms commencing on the 2014 up to the date of handing over vacant possession of the house in dispute. That the appellant hand over the rooms to the respondents family and that the respondent herein was advised to institute civil claims against an administrator of the estate of the late Bakari Paulo Nkonu or any other person benefiting on the remaining two rooms. The decision aggrieved the appellant hence this appeal.

He has filed an appeal raising grounds of appeal as follows:

1. That the trial tribunal erred in law and fact by entertaining a contractual dispute under the umbrella of rent payment dispute something which is contrary to its jurisdiction.
2. That the trial tribunal erred in law and fact by entertaining the application which didn't join necessary parties something which vitiated the whole proceedings.
3. That the trial tribunal erred in law and fact by delivering the judgment and decree in favour of the respondent without considering the material contradictions on the witness testimonies and it was(sic) ought to disbelieve the said witnesses who lied.
4. That the trial tribunal erred in law and fact after delivering a judgment which was unjustifiable, exaggerated and not genuine for being contradictory, misconceived and overlooked after ignoring the material explanation by the appellant on the completion dates of the said business frames.

The appellant prays for the judgement and decree in appeal allowing the appeal with costs.

At the hearing of the appeal, the appellant was being represented by Ms. Nyanza, learned advocate and the respondent was unrepresented. However, although at the beginning of the hearing of the appeal he informed the court that he is ready to proceed, he later, after the counsel for the appellant had finished to submit in chief, informed this Court that he would like to consult his lawyer and or advocate with a view of narrating the story of what had transpired in court and then prepare a written submission.

The prayer was objected to by the counsel for the appellant. Hearing of the appeal was briefly adjourned to allow the respondent consult his advocate. This was in application that at the time the respondent was unrepresented. When the session resumed, the respondent came back with the position that he will proceed with the submission as he is knowledgeable on the matter; of course, that was after he had the blessing of his lawyer.

Coming back to the substantive appeal, the counsel for the appellant submitted that she will submit on the grounds of appeal as numbered in the petition of appeal. On the first ground of appeal the counsel submitted that the appellant is contesting that the District Land and Housing Tribunal

entertained a contractual dispute under the umbrella of rent payment which is contrary to its jurisdiction.

The counsel for the appellant submitted that the origin of the current dispute is a contract which was entered into by the appellant with another person and the respondent's family. The respondent filed a case in the Primary Court of Urban Mpanda. It was registered as Civil Case No. 144 of 2018. It was heard and determined by the Primary Court. The respondent was dissatisfied and filed a new suit in the District Land and Housing Tribunal for Katavi at Mpanda. The case is based on the same contract, this time under the umbrella of rent payment. That suit was objected to by the appellant but the objection was ignored and the matter was heard and determined.

The record shows, in order to arrive at the decision, the District Land and Housing Tribunal had to rely on the contract. The District Land and Housing Tribunal made a translation of the contract in general which is outside the jurisdiction of the District Land and Housing Tribunal. That had already been done by a competent court, the Primary Court.

Therefore, filing of the new suit in the District Land and Housing Tribunal claiming for rent was contrary to the law and outside the jurisdiction of the

District Land and Housing Tribunal as provided for under section 33 of the Land Disputes Court's Act, Cap. 216 R.E 2019 and that rendered the application in the District Land and Housing Tribunal *res judicata*.

In order to reinforce the point, the counsel has cited the decision in the case of **Felician Credo Simwela Vs. Quamara Massod Battezy and another**, Civil Appeal No. 10 of 2020, High Court of Tanzania at Sumbawanga (Hon. C. P. Mkeha, J.) wherein the trial judge in his decision considered a situation which attracted application of the doctrine of *res judicata*. The counsel for the appellant also cited the case of **Theonest Kamuhabwa versus Diocles Kamuhabwa**, Land Case Appeal No. 04 of 2021, High Court of Tanzania at Bukoba (Hon. KilekaMajenga, J.) where he enlisted the principles of *res judicata* in cases of the same nature being filed in two courts with similar jurisdiction including not punishing a person twice basing on the same fact.

At the center of the decisions cited above, the Honourable High Court Judges observed in their respective decisions that for the doctrine of *res judicata* to apply the following conditions must be proved, namely: -

- (i). The former suit must have been between the same litigating parties or between parties under whom they or any of them claim.
- (ii). The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit either actually or constructively;
- (iii). The party in the subsequent suit must have litigated under the same title in the former suit;
- (iv). The matter must have been heard and finally decided;
- (v). That, the former suit must have been decided by a court of competent jurisdiction.

In the current appeal, the Counsel for the appellant had the view that the District Land and Housing Tribunal had no jurisdiction to deal with the application in regard to the issue of breach of contract as the same had already been decided in the Primary Court. If the respondent was not satisfied, he ought to have appealed against the decision of the Primary Court and not to file another application in another Court.

On the second ground of appeal the counsel for the appellant submitted that according to evidence tendered in court it is clear that there was another person who also was a party to the contract, that is Bakari Paulo Nkonu who together with the appellant had a contract with the Respondent's family to construct business frames at the family plot situate at Plot No. 96 Block S, Mjimwema at Mpanda at the consideration of payment of monthly rent of Tshs. 50,000/=. It is the argument of the appellant that although the said Bakari Paulo Nkonu is deceased, he was survived with beneficiaries. They are necessary parties to the transaction thus they ought to have been joined in the suit. That was not done; even after an objection had been raised by the appellant on the point of law. The counsel cited Order I Rule 10(2) of the Civil Procedure Code, Cap. 33 R.E.2019. The same provides that:

*"The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."*



The counsel also cited the case of **Mussa Chande Jape Versus Moza Mohamed Salim**, Civil Appeal No. 14 of 2018, Court of Appeal of Tanzania at Zanzibar where the court observed that the plaintiff is not obliged to join a person, he does not wish to sue but if that person is a necessary party, in consideration that there won't be other disputes on the same facts, that party must be joined.

In this case, the District Land and Housing Tribunal advised the Respondent to file a Probate Cause for Bakari Paulo Nkonu which is contrary to the principle of joining a necessary party as it promoted there being many cases on the same set of facts.

On the third ground of appeal the appellant submitted that the trial tribunal did not consider contradictions in the evidence by the applicants in presenting their case. The first witness Mohamed Abas Kanone said the business rooms were constructed according to the contract started to be utilized in 2014 while the witness Mariam Abas testified that the rooms were in use since 2013. The District Land and Housing Tribunal ought to have doubted on such testimonies on the use of 'rooms for business'. That renders the evidence not to be credible for being relied in the decision.

On the last ground of appeal that the District Land and Housing Tribunal ordered that the appellant to pay rent commencing 2014 without considering that the rooms were not yet ready for use until in 2016. That was not right to the appellant as the appellant would pay rent for rooms which were not ready for business. The counsel for the appellant prayed that the appeal be allowed.

The respondent in his submission, in most cases, reiterated on how they came into an agreement to construct nine (9) rooms for business. That the appellant after he had started to utilize the rooms for business was not interested to pay rent as agreed until when the respondent and his relatives decided to file the application in the District Land and Housing Tribunal (trial Tribunal). They first filed a case in the primary Court where the Court did not make any determination but advised them to settle their differences amicably. However, the appellant was not ready that is why they went and filed a complaint to the District Land and Housing Tribunal for resolution.

In rejoinder the appellant's counsel Ms. Pendoveera Nyanza Learned Advocate has submitted that the dispute is founded in contract entered into by the parties and the District Land and Housing Tribunal acted outside its

jurisdiction. According to him the contract had first to be translated before determining matters on rent.

The counsel also insisted that the primary Court had determined on the issue in Civil Case No. 144 of 2018 at Mpanda. He also insisted that there was a necessary party not joined as per Order I Rule 10 of the Civil Procedure Code. She proposed that the wife of Bakari P. Nkono would have been joined.

Also that the decision of the District Land and Housing Tribunal was made basing on contradicting evidence. She prayed the appeal be allowed.

I have heard the submission as well as read the record of the appeal before this Court it is true that the appellant and another person approached the family of Abas Abdalaman Kanoni looking for a space to construct rooms for shop frames. They entered into an agreement whereby the appellant and another person Bakari P. Nkono constructed six (6) rooms. Apparently, the respondents were not being paid rent thus they filed a suit in the primary Court. The primary Court delivered a judgment in which the Court made a determination on the issues raised on the agreement. The decision was in Civil Case No. 144 of 2018. That decision has never been appealed against.

The respondent, instead of appealing against that decision, filed an application in the District Land and Housing Tribunal, the same is application No. 17 of 2020. This appeal is against the decision in Application No. 17/2020.

In my view, the respondent ought to have appealed against the decision in Civil Case No. 144 of 2018 on the grounds that the Primary Court had no jurisdiction and then file an application in the proper forum.

Under the circumstances, it was not proper to shift forum from Primary Court to District Land and Housing Tribunal without first making good what had been done wrongly by the Primary Court which acted without jurisdiction on land matters.

The appeal therefore has merit and is allowed. The decision of the District Land and Housing Tribunal is quashed and orders emanating therefrom set aside. In circumstances of the case, each party to bear his or her own costs.

It is ordered accordingly.

Dated and delivered at Sumbawanga this 04<sup>th</sup> day of July, 2023.



  
**T.M. MWENEMPAZI**  
**JUDGE.**