

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

LAND APPEAL NO. 118 OF 2022

(Arising from the District Land and Housing Tribunal for Kilosa in Land Appeal No. 19 of 2021, originating from Dumila Ward Tribunal, Land Dispute No. 46 of 2021)

AUGUSTINE MATIA TRUWAY APPELLANT

VERSUS

ELIUD MAGOLA RESPONDENT

JUDGMENT

Hearing date on: 17/03/2023

Judgment date on: 31/03/2023

NGWEMBE, J.

This appeal originates from the concurrent decision of the District Land and Housing Tribunal for Kilosa and Dumila Ward Tribunal in a land dispute revolving around demarcation between two neighbours who own respective neighbouring non surveyed land. The main contest between them was a complaint by the appellant that, his neighbour the respondent, has extended his occupation beyond the known boundaries to the appellant's land by building a toilet, whose structure encroaches over the appellant's land. In his evidence he stated that, he bought the said land since 1993 from one Mzee Kundukulu and brought witnesses who witnessed the sale without tendering any documentary evidences.


In turn, the respondent defended that he bought the suit land measuring 33½ x 14 Metres from one Godfrey M. Nhambo in 2004. This

Godfre M. Nhambo along with the hamlet chairman one Piason Elia Mauya, among other witnesses, testified before the tribunal on the fact that Mr. Nhambo sold his land to the respondent with boundaries. He also tendered a sale agreement effected on 11/06/2004 without objection.

The trial tribunal visited the disputed land and ruled that the respondent's land is demarcated, the same way as shown in the sale agreement and the condemned toilet is within the boundaries. Old trees planted in a line demarcating between the parties sketched a clear old boundary between the parties and the respondent had been building toilets several times in his occupation without any contest all along. It also observed that, the appellant purchased his land without verifying the boundaries, that is why he was not conversant with the boundaries of his land. The respective land plots were clear, none of them trespassed to the other, then dismissed the claim with costs.

The appellant was aggrieved by such decision. He appealed to the District Land and Housing Tribunal on two grounds; *First:* that the Ward tribunal erred in law and in facts for failure to join necessary party. *Second:* that the trial Ward tribunal erred in law and facts for failure to properly determine and consider the strong and firm evidence adduced by the appellant.

The appellate tribunal ruled in favour of the respondent based on the circumstance that, the seller of the suit land was not a necessary party as he had no interest in the land, that would be affected by the decision. Alternatively, it was the duty of the appellant himself, being the plaintiff before the trial tribunal, to join the said seller. Considering also that the said seller appeared and testified for the respondent. At the end the appeal was blessed by a dismissal.



The appellant still believing that, he deserved the reliefs he had sought, knocked the doors of this house of justice seeking to subject the decisions below under scrutiny of this court. He raised five grounds of appeal, but as it will be seen in the course, he abandoned all save only the first ground that; *the trial court erred in law by disregarding the presence of the necessary part (the seller of the piece of land) despite the fact that the circumstances of matter is in need of.*

On 27/02/2023 this matter was called for hearing. Mr. Kisawani Mandela advocate appeared for the appellant, while Mr. Bahati Kashoza who earlier appeared for the respondent did not appear. For convenience purposes this court ordered parties to address the appeal by way of written submissions. Each party was given date of filing his written arguments. The appellant was scheduled to file his submission on or before 06/03/2023; while the respondent was ordered to file on or before 13/03/2023; rejoinder if any on 17/03/2023; and judgment on 24/03/2023. The appellant's submission was filed early on 03/03/2023. Unfortunately, the respondent despite being effectively served with the appellant's written submission, but failed to respond.

It is on that reason this court failed to prepare the required judgment for 24/03/2023. Another date was appointed and determination made only on the appellant's submissions. The justification for proceeding to determine this appeal in absence of the respondent's submission is purely legal as will be disclosed in due course. In the cases of **Godfrey Kimbe Vs. Peter Ngonyani, Civil Appeal No. 41 of 2014**, **Khalid Mwisongo Vs. M/S UNITRANS (T) Ltd., Civil Appeal No. 56 OF 2011** and **National Insurance Corporation of (T) Ltd & another Vs. Shengena Limited, Civil Application No. 20 of 2007**, among others. Generally, the position of




law is clear that failure to file written submission is tantamount to failure to appear on the hearing date, hence the appeal seems to be unopposed.

Equally the law stands to its position that even if the respondent has failed to oppose the appeal, yet the duties of the appellant to prove merits of his appeal remain. Likewise, the court before which the appeal is being determined, must stick to the principles as failure to oppose or even in some cases conceding to the grounds does not tell correctly on merits of the appeal. Instead, the court must study the grounds and determine each of them. This reasoning is much relevant in this appeal where the ground raised is based purely on the point of law.

The issue for determination in this appeal is whether the appeal is meritorious. In the course of determining this issue, I have in mind that this is the second appeal on which the two lower tribunals had concurrent findings. Thus, the court is enjoined to address the relevant principle governing duties of the second appeal, which will guide in actual determination of this appeal.

The principle has been stated and followed by our courts that, the second appellate court should not interfere with concurrent findings of facts by the lower courts, unless there are strong reasons to do so. In many occasions this court and the Court of Appeal have strongly reasoned of how the second court may depart from the concurrent findings of the lower courts. When the lower courts have misdirected or misapprehended valid evidences or legal principles affecting the ends of justice and or resulted into miscarriage of justice. Among those cases are **Bushangila Ng'oga Vs. Manyanda Maige [2002] T.L.R. 335, Demay Daatia and 2 others Vs. [2005] T.L.R. 132;** and **Musa Hassani Vs. Barnabas Yohanna Shedafa (Civil Appeal 101 of**




2018) [2020] TZCA 34, where the Court of Appeal restated this rule as follows: -

"It is our considered view that the Court will only interfere with findings of fact of lower courts in situations where a trial court had omitted to consider or had misconstrued some material evidence; or had acted on a wrong principle, or had erred in its approach in evaluation of the evidence."

In this second appeal, Mr. Mandela, contends that Mr. Godfrey M. Nhambo, seller of the suit land whose boundary is disputed was a necessary party. In order for the court to satisfy itself on the effectiveness of the sale and capacity of the seller, the said Nhambo had to be joined. To his perception, the seller was therefore a necessary party before the trial tribunal. Having studied the submission by the appellant's counsel, I am sure that this ground is a question of law. The same was raised and decided by the first appellate tribunal.

As earlier alluded, the District Land tribunal in determining this issue found that the seller was not a necessary party. However, the learned advocate stood firm that, such verdict by the first appellate tribunal was wrong.

In our jurisdiction it is settled that failure to join a necessary party is fatal. This was so decided in many precedents including the case of Juma **B. Kadala Vs. Laurent Mnkande [1983] T.L.R. 103** on which Mr. Mandela seem to base his submission. However, taking all principles aboard, the decisive questions in this are two; One - *Who is a necessary party*. Two - *Whether the seller in this case was a necessary party*. To answer these questions, I should dutifully peruse several other precedents. To begin with I have visited **The Black's Law Dictionary, 9th Edition (2009)** and found three much related entries - *necessary*



party, necessary joinder and indispensable party. The paramount interpretation that will relax the discussion is the latter; *indispensable party* is much relevant to our question. The dictionary gives the following interpretation: -

"Indispensable party - A party who, having interests that would inevitably be affected by a court's judgment, must be included in the case. If such a party is not included, the case must be dismissed."

The same meaning has been assigned to the *necessary party* in our jurisdiction. In the case of **Juma B. Kadala Vs. Laurent Mnkande**, this court had these attributes in mind when it partly observed: -

"This present occupant of the disputed piece of land ought to have been sued jointly with the respondent for recovery of the piece of land in dispute. Failure to do so was fatal to the proceeding because on the facts of the case, most of which do not appear to be disputed, it is impossible to make any orders in this matter without affecting the rights of Omari Kuziwa who has not had any chance of being heard in this matter at all."

Other cases that followed the same consideration are **Tang Gas Distributors Limited Vs. Mohamed Salim Said & 2 Others, Civil Application for Revision No. 68 of 2011**; and **Mussa Chande Jape Vs. Moza Mohammed Salim, Civil Appeal No. 141 of 2018, (CAT – Zanzibara)** where it was partly held: -

"Therefore, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed."



From the above the acceptable interpretation of a necessary party comprise two necessary attributes; *one* - a party should have interest in the matter in dispute; *two* - that such interest will inevitably be affected by the court's judgment. I presume that the learned counsel for the appellant had this interpretation in his mind when argued this appeal.

The question that follows is whether Mr. Nhambo, the seller of the land was a necessary party? To answer this question, I find inevitable to brief depict some facts relevant to the question.

The appellant was an undisputed the owner of a land neighbouring to the land of one Godfrey Nhambo who had effective occupation and built a house therein. In 2004 Mr. Nhambo sold the said land with all its improvements to the respondent. The respondent occupied same until 2021, when the appellant filed a dispute before the trial tribunal.

The seller appeared before the trial tribunal and confirmed that, he sold the suit land with the same boundaries to the respondent. There was no dispute of the seller's capacity in this case and no interest remained to the suit land after selling it to the new owner. The dispute is related to boundaries. Even the appellant in his testimony during trial recorded that: -

"Nilikuta choo kimejengwa katika eneo langu ambapo choo hicho kimeingia sehemu ya kiwanja changu na chake"

In this court's language, the appellant meant that, he found a toilet built in his area, where that toilet had occupied the respondent's land and part of the appellant's land. In a proper interpretation, no doubt the dispute is one of demarcation. As earlier alluded, there is no question concerning the seller's capacity would arise in the circumstance of this dispute.


Having studied the submissions advanced by Mr. Mandela also the legal authorities cited by him, which I have had a grace to go through, I have noted one point misapprehension by the learned advocate. Since the question under scrutiny is one on point of law, I find it appropriate to entertain an extended discussion in order to cure the misinterpretation.

This error by the learned counsel was conceived in his reference to this court's decision in **Bakari S. Gonza (as administrator of the estate of the late Omary Mbomo) Vs. Swalehe R. Kitulike, Land Appeal No. 118/2018**. True as Mr. Mandela quoted, in that decision it was *inter alia* ruled: -

*"Failure to join sellers was considered to be fatal in the case of **Juma B. Kadala Vs. Laurent Mnkande [1983] TLR**. I also find the appeal before me to be incompetent for failure to join the seller."*

From his argument, I am satisfied Mr. Mandela did not read the **Bakari Gonza's** case contextually. This is because in that case, legality of the sale agreement was among the issues as there was a serious dispute on the capacity of the seller.

I admit, when nature of the dispute so dictates like in **Bakari's** case, the seller becomes a necessary party. Other situation is where the plaintiff is seeking, among other reliefs for nullification of the agreement or a declaratory order affecting the transaction so made between parties. Under that circumstance the court cannot nullify the agreement or that other act to be void when that other party was not joined. Such circumstance is very different from this appeal.



The **Bakari Gonza** case, apart from not binding this court, it would not be persuasive either for another reason that such decision


altered the interpretation of **Juma B. Kadala's** case. Unfortunately, the learned advocate does not seem to have studied well the case of **Juma Kadala**.

I am holding the view that Juma Kadala's case was misunderstood because the honourable Judge in **Bakari Gonza's** case observed *inter alia* that "*Failure to join sellers was considered to be fatal in the case of Juma B. Kadala Vs. Laurent Mnkande*". But in that case, it was the seller who was sued without joining the buyer (the present owner) as at page 106 earlier quoted, it held that the present occupant of the disputed piece of land ought to be joined as respondent for recovery of the suit piece of land.

In all dimensions, the buyer who was the then current owner of the land had all rights over the suit land which would be affected by the court decision. Such position was totally different from the situation in this appeal. Mr. Nhambo was neither necessary party nor proper party as opposed to the cases of **Kadala or Bakari Gonza's** case.

In any event and for the above reasoning, I am satisfied that, the seller Mr. Godfrey Nhambo was neither a necessary party to the case nor having any interest over the suit land. I would join hands with the appellate tribunal on this aspect. The chairman had a perfect interpretation of a necessary party along with the cited precedents.

I reiterate that there was neither facts nor law which would affect his right. Above all he appeared as a witness which was more than enough for a person had no interest over the sold land. Alternatively, and without prejudice to the above reasoning, the appellant had every opportunity to join Mr. Nhambo if he so believed him to be a necessary party.



Under the circumstance the appellant cannot be allowed to lament on such points. Also considering that the matter was before the ward tribunal, where the law has expressly provided that technicalities and other rules of procedure will not apply as per section 15 of **The Ward Tribunals Act, Cap 206, R.E 2002** which is quoted hereunder: -


Section 15 (1) *"The Tribunal shall not be bound by any rules of evidence or procedure applicable to any court.*

(2) A Tribunal shall, subject to the provisions of this Act, regulate its own procedure.

(3) In the exercise of its functions under this Act a Tribunal shall have power to hear statements of witnesses produced by parties to a complaint, and to examine any relevant document produced by any party."

The Court of Appeal has insisted in several occasions that unless there are illegalities prejudicial to parties, technicalities should not be applied to dismantle the proceedings of the ward tribunals, which follow their own procedure relaxed from technicalities, looking boldly to the substantive justice (See the cases of **Yakobo Magoiga Gichere Vs. Penina Yusuph, Civil Appeal No. 55 of 2017** and **William Stephen Vs. Ms. Leah Julius (Administratrix of estate of the late Neema Saboro), Civil Appeal No. 64 of 2013**) where it was held: -

"We are aware of the need to free tribunals such as the Ward Tribunal, from legal technicalities and allow them to administer substantive justice. Indeed, justice may be done in substance without impeding it with technicalities. However, where it is in the opinion of the court that the irregularities and illegalities detected on the record lead to a miscarriage of justice and offend the very basis of justice, they cannot be ignored."



Likewise, this court as well has followed the above position in many of its decisions including the cases of **Adrian Christian Matimla Vs. Salvatory Lucas Nambagile (Land Appeal 15 of 2021) [2022] TZHC 14613** and **Gunguli R. Maungo Vs. Wilson Ruhumbika (Misc. Land Appeal 28 of 2021) [2021] TZHC 5745**.

For the above reasoning, I find no merit of this appeal. The concurrent findings of the two tribunals below were proper in law and in fact, they deserve to remain intact. I therefore abstain from interfering with them. Consequently, the whole appeal lacks merits, same is dismissed entirely. Considering that the respondent's counsel did not file his submission, I order each party to bear his own costs.

Dated at Morogoro this **31st day of March, 2023**.



P. J. NGWEMBE

JUDGE

31/03/2023

Court: Judgement delivered at Morogoro in Chamber this 31st day of March, 2023 **before Hon. A.W. Mmbando, DR** in the presence of Mr. Pancras Ligombi, Advocate holding brief for Mr. Mandela Kisawani for the appellant, and in the presence of Respondent.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

31/03/2023

Right to appeal to the Court of Appeal explained.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

31/03/2023

