IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISC. LAND APPEAL NO. 02 OF 2023

BETWEEN

THOMAS HAMIS..... APPELLANT

AND

MABULA KITOGWA.....RESPONDENT

RULING

Last Order 19/07/2023.

Ruling 15/08/2023.

KS. KAMANA, J.

This appeal has been taken at the instance of the appellant, a losing party, in the District Land and Housing Tribunal (DLHT), the first appellate Court, in which the matter was handled.

The DLHT held that the failure of the appellant to join the necessary part to the suit was fatal consequently, his appeal

was dismissed without costs. The appellant being decertified with the decision appealed to this court seeking to revert the decision. The petition of appeal has four grounds, but, as it shall be apparent soon, I will not reproduce the said grounds of appeal.

When the matter came up for hearing on 16th March, 2023 Mr. Gibson Ishengoma the learned advocate, appeared for the appellant while the respondent was absent. It was ordered that a summons to the respondent be served through a process server. On 23rd March 2023 counsel for the appellant informed the court that summons to the respondent had been issued through publication, and the respondent has failed to enter an appearance as a result this Court ordered the matter to be heard exparte by way of written submissions.

Submitting in support of the appeal the learned counsel for the appellant while submitting on the 1st ground of appeal stated that the DLHT erred both in law and fact by basing its decision solely on the averments presented without requiring tangible evidence to substantiate the respondent's mere contention of hospitalization. He argues that the DLHT ought to have demanded tangible evidence from the respondent to

support his claim for hospitalization. He takes the view that the Burden of proof was not met based on such failure. In support of his arguments, he cited the decision in the case of ***Abdul-karim Haji vs Raymond Nchimbi Alois & Another,*** Civil Appeal No. 99 of 2004.

On the 2nd ground and the 3rd grounds of appeal counsel for the appellant submitted that the learned Chairman of the DLHT overlooked the actual cause of action in the trial which was the trespass rather than the validity of the sale of the plot in question. He kept on contending that the quantum issue in both lower Courts was the alleged trespass and not the validity of the sale of the plot. He blames the DLHT Chairman for according weight on the validity of the sale instead of trespassing saying that it led to an erroneous decision. He argues further that the learned DLHT Chairman grossly erred in his decision by addressing issues that were not raised by either of the parties at trial therefore his decision on a new issue without affording the parties the fundamental right to be heard on that particular issue led to miscarriage of justice in the matter. To bolster his contentions, he cited the decision in the

case of ***Barclays Bank (T) LTD vs Jacob Muro,*** Civil Appeal No. 357 of 2019.

Regarding the last ground of appeal, counsel contended that the first appellate Tribunal erred in law and fact by failing to accord due weight to the tendered evidence adduced by the appellant.

Lastly, he prayed this Court to allow his appeal, declaring that the respondent is a trespasser over the disputed land, declare that the appellant is the lawful owner of the disputed land, and costs of the case.

After a careful review of the grounds of appeal, I shall first deal with the issue of whether the trial Chairman grossly erred in his decision by addressing issues that were not raised by either of the parties at trial.

It is trite law that a denial of the right to be heard in any proceedings would vitiate the proceedings. This position of law has been emphasized in many decisions including the decision in the case of ***Mbeya -Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma,*** Civil Appeal No. 45 of 2000 CAT (Unreported) in which it was stated that:

> *'In this country natural justice is not merely a principle of common law; it has become a*

fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu'.

It was later emphasized in the decision of ***Abbas Sherally &. Another vs Abdul S. H. M. Fazalboy,*** Civil Application No 33 of 2002 (unreported) that:

'The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.'

Looking at page 4 of the typed proceedings in the DLHT it appears that the respondent adreesed on this issue saying '***Nilitaka mjibu rufaa amtafute na kumshtaki aliye muuzia maana shamba ni langu na sio la Adelah'.*** On

page 5 the appellant also had stated that ***'nilipitia viwanja vingi ila nilikuja kuridhishwa na kiwanja kilichokuwa kinamikiwa na Adelah Sylivester ambaye ni mkazi wa eneo hilo, tukakubaliana mbele ya viongozi husika, akiwemo balozi, na mwenyekiti wa kitongoji Pamoja na wazee wa eneo.'*** It cannot be said that the trial DLHT chairman had raised the issue of non-joinder of necessary part *suo motu* in course of composing judgment because the same has been addressed by both parties.

Next question is whether failure to join Adelah Sylivister in the suit vitiated proceeding?. I fully subscribe with the arguments by the learned trial chairman that the dispute revolves sale agreement between the appellant and one Adelah Sylivester and the appellant is the own who instituted the case against the respondent on the ownership of the suit land. Therefore, in these circumstances the saler must be joined so as to prove the issue of ownership before jumping into the trespass. This is per **Order I Rule 3 of the Civil Procedure Code** [Cap 33 R.E. 2022] (the CPC) on who may be joined as a defendant. That rules provides: -

> *'All persons may be joined as defendants against whom any right to relief in respect of or*

arising out of the same act or 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 o f law or fact would arise.'

The Court of appeal in ascertaining whether a party is a necessary party or not in the context of **Order I Rule 10(2) of the CPC,** in the decision of ***Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki,*** Civil Appeal No. 136 of 2006 (unreported) it held thus:

'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) whenf without his presence, 14 the questions in the suit cannot be completely decided'.

This being the case I find no need to deal with other grounds of appeal. As the result, I find there to be no merit in this appeal and I dimiss it for failure to join necessary part to the suit . As the result the decision of the DLHT is hereby upheld. The appeal is hereby dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 15th day of August, 2023.

KS KAMANA.

JUDGE