

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 111 OF 2022

*(Arising from the District Land and Housing Tribunal for Kilosa in Land Appeal No. 30 of 2021,
Originating from the decision of Mangoweko Ward Tribunal in Land Dispute No. 10 of 2021)*

BAKARI NGODAE..... APPELLANT

VERSUS

MOHAMED KIMOLO RESPONDENT

JUDGEMENT

Hearing date on: 23/08/2023

Judgment date on: 30/08/2023

NGWEMBE, J.

This is a second instance of appeal from the decision which originates from the ward tribunal. The appellant preferred this appeal after the district land and housing tribunal (DLHT) departed from the ward tribunal's decision entered in his favour. While the ward tribunal declared the appellant a rightful owner of the suit premises, the DLHT quashed such verdict and declared the respondent a rightful owner.

Tracing the genesis of this dispute, parties contest revolved around ownership and possession of a business stall located at Unguu Road Sokoni street, measuring 16 x 13 feet. The appellant purportedly purchased such premise from one Elias James Msanjila at the price of Tshs. 1,400,000/=. But when he wanted to exercise his possession, he found the respondent in the occupancy who declined to render vacant possession even after due notice from the appellant. The appellant therefore, instituted the matter before the ward tribunal.

During hearing at the ward tribunal, the respondent stated that, he resisted the eviction because he was rented the premises by one Jasho Omari Magwati and his lease was still in effect. The lessor to the respondent was not sued hence not party to the case, but was called as a defence witness. This Magwati testified at the ward tribunal that, he was appointed by the family members to supervise the premises. He thus leased the stall to the respondent under that capacity, though he was not the owner of the premises, but a supervisor.

On the other hand, the said Elias who sold the disputed property to the appellant was not the owner of the premises, but he said it belonged to the late Soni. He once stated that, he sold the property acting on behalf of the family of the late Soni. But some other time, he admitted that the family did not authorize the sale, he was therefore planning to repay the appellant. On those facts, the ward tribunal entered its judgment in favour of the appellant and thereby ordered the respondent to render vacant possession.

Upon the respondent's appeal to the DLHT, the question of *locus standi* and nonjoinder of necessary party among other grounds were raised. However, the DLHT determined the appeal in substance and disposed of the matter on one ground regarding the evidence and reached to a finding that, the respondent had the stronger evidence than that of the appellant. The chairman did not consider other grounds, including those which raised points of law regarding non joinder of a necessary parties and *locus standi*.

The appellant was aggrieved by such decision of the DLHT, filed his appeal raising seven grounds of appeal, which on the hearing date, the learned advocate Mr. Jackson Liwewa, purified them into two complaints that: -

- 1) The seller of the suit land was not joined despite being a necessary party.
- 2) The suit was preferred against the respondent who was a tenant instead of suing the landlord who leased the tenant.

During hearing of this appeal, Mr. Liwewa represented the appellant, while Mr. Saul Sikalumba, learned advocate stood for the respondent. Both learned counsels took their position to assist this court by revealing what they believed was fault by the lower tribunals. This court commends them for their candid observations, which all have been taken into consideration in composing this judgment.

Mr. Liwewa presented in his submission, that the said Elias James Msangila, who sold the property to the appellant was required to be part of the case based on the case of **Juma Kadala Vs. Laurent Mnkande [1993] T.L.R 103**. Also, that the appellant sued the respondent Mohamed Kimolo whose testimony was to the effect that, he was just a tenant yet the landlord was never joined. It was the learned counsel's position that, since from the beginning the proper parties were not involved in the case while necessary parties were not joined, then the whole trial in the tribunals were nullity.

In turn Mr. Sikalumba conceded to the submissions made by his fellow counsel. Added that even at the DLHT he raised that point, but the tribunal did not consider it. Added that, even the appellant failed to prove on the one who sold the suit land to him was the true owner of the said land. However, Mr. Liwewa addressed the fact regarding the ownership in rejoinder argued that the seller was proved owner of the land.

This court is now tasked to decide whether or not this appeal has merit. Having considered the arguments and submissions by both learned advocates, I commence by clarifying the legal position as per

the case of **Juma Kadala Vs. Laurent Mnkande** (supra). The appellant's counsel cited the above precedent in support of his argument that, the seller was to be joined as a necessary party from the beginning of trial. From the facts in the proceeding of this case, it was the appellant himself who instituted the case at the ward tribunal. I do not think we can use the holding in **Juma Kadala's** case in this matter regarding the seller, since it was the appellant himself to join the seller, if thought it was important. However, in **Juma Kadala's** case this court ruled that, the buyer who was in occupation of the land was a necessary party and under the circumstance of the case, he was required to be joined with the seller. It was not meant that a seller must be joined in every case, since it is obvious that, for a seller to be necessary party it will depend on the circumstance of a particular case. At page 106 the court held: -

"I now turn to the point which has caused me a lot of difficulty in this matter...this is the appellant's choice to sue the respondent whom he and all the witnesses who gave evidence on his side knew to be no longer in occupation of the disputed piece of land and leave out one Omari Kiziwa whom the appellant and his witnesses also knew to be in actual occupation of the said piece of land after he had, ostensibly, bought it from the respondent. 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"

However, in this case at hand, as earlier observed, it was the appellant who instituted the suit, he did not prefer to join the seller who sold the land to him. And it appears that the seller after the sale had no interest in the land. When making a submission or reasoning that the seller was a necessary party in the case, care must be exercised and inclination be much to the facts of the case and not by way of a general rule that, sellers must be joined. Instead, it was made clear that a buyer (current occupier) must be sued as the court cannot make any order affecting his right without himself being heard.

Another case of similar nature is that of **Jenita Makoba Vs. Ezra Athumani (Misc. Land Appeal 33 of 2021) [2021] TZHC 7160**, where the seller appeared to have sold the same land to both parties, the appellant and the respondent. As to whether he should have been joined in the suit, it was observed as follows: -

"There is evidence showing that both parties claim ownership of the plot from Mzee Venesto Joseph Muzye. Each claim to buy from this Oldman. He being a seller, in my view, as correctly observed by counsel for the appellant, was supposed to be joined as a co-defendant or one of the applicants at the ward tribunal. That was not done. I think the omission made the proceedings and judgement of the ward tribunal illegal for failure to join a necessary party"

The first complaint would not be much stronger on the side of the appellant. This is because traditionally, the appellant is not expected to complain about his own deeds.

The other important question raised by both parties is whether it was proper to sue the respondent alone for ownership. On this I agree with both learned advocates that, it was improper to sue a tenant alone in a case where the appellant was claiming ownership. He should have

instead sued the respondent who is a tenant, together with any person named to be the tenant's landlord.

The DLHT chairman was required to consider these questions of law before dealing with those questions of facts as he did. He misled himself by holding that, dealing with other grounds was not his duty, while not only the advocate advised him accordingly, but also even the assessors opined that, the question of law on propriety of the parties to the suit was glaring.

There are countless precedents which binds the DLHT with a very clear prescriptive instruction that questions of law must be determined first. In this case, the issues of law would have precluded him from determining on matters of facts. This is because irregularities like the one observed ousts even the jurisdiction of the tribunal. Therefore, prudence expected to come from the chairman was to deal with questions of law and get himself satisfied with the propriety of the cases before he could go into analysis of evidence. It would be only when the issues of law were resolved without affecting the case before him, that he would be allowed to proceed with analysis of evidence later on. This position was held in various cases including in the cases of **Shahida Abdul Hassanal Kassam Vs. Mahedi Mohamed Gulamali Kanji, Civil Application No. 42 of 1999** and **Ally Rashid & Others Vs. Permanent Secretary, Ministry of Industry & Trade & Another (Civil Appeal 71 of 2018) [2021] TZCA 460**, where the Court of Appeal made the following guiding observation: -

"There are two types of issues, there are issues of law and issues of fact. These issues are not determinable at random. According to law they must be determined in sequence, the issues of law start and if they are overruled, those of fact follow. Let us hasten to state right here that, if the issues of

law are upheld, the court is precluded from entertaining issues of fact"

This court is satisfied that had the DLHT chairman considered those points of law, he would have resolved the legal issues which the ward tribunal did not manage to detect, and in fact it was not expected for the ward tribunal to detect and decide on those legal issues.

Having so reasoned on those defects, I find merit in this appeal. The proceedings in the ward tribunal were nullity right from the beginning, likewise the hearing and decision by the DLHT fell into nullity, consequently, I allow the appeal, nullify the proceedings and quash the decisions of both tribunals below. All orders are set aside. Any interested person must follow the laid down legal procedures in instituting the suit against proper parties. Each party should bear his own costs.

Order accordingly.

Dated at Morogoro this 30th day of August 2023.


P. J. NGWEMBE
JUDGE
30/08/2023

Court: Judgement delivered at Morogoro in Chambers this 30st day of August, 2023 in the presence both parties.

A. W. MMBANDO
DEPUTY REGISTRAR
30/08/2023

Court: Right to appeal to the Court of Appeal explained.

A. W. MMBANDO
DEPUTY REGISTRAR
30/08/2023

I Certify that this is a true and correct copy of the original

Deputy Registrar
Date 13/9/2023 at Morogoro