

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB- REGISTRY OF MWANZA**  
**AT MWANZA**

**MISC. LAND APPEAL NO.9 OF 2022**

*(Appeal from the decision of the DLHT for Ukerewe in Appeal No. 12.2020, originating from Nduruma Ward Tribunal in Land Case No. 1/2020)*

**ZEPHANIA MTWALE MAGESA (Administrator  
of the Estate of late Mtwale Magesa) ..... APPELLANT**

**VERSUS**

**KIONGO FANUELY ..... RESPONDENT**

**JUDGMENT**

*15<sup>th</sup> June and 2<sup>nd</sup> August, 2023*

**ITEMBA, J**

This is the second appeal against the decision of the Ukerewe District Land and Housing herein 'the first appellate court', confirming the decision of Nduruma Ward Tribunal (the trial tribunal), rejecting the appellant's claim of ownership of a suit plot against the respondent. The factual material giving rise to this appeal can be summarized as hereunder.

The appellant sued the respondent at the trial tribunal claiming that the respondent has invaded his plot and even cutting the trees. The respondent admitted to the claims giving his reasons. He explained that he was granted the suit plot by the appellant's son named Zaphania Magesa who owed him 784,000/=. That, the said Zephania Magesa offered the

who owed him TZS 784,000/=. That, the said Zephania Magesa offered the respondent the suit plot as security while he was still looking for money to refund him. That, Zephania Magesa could not get the money so he issued the suit plot to the respondent in the presence of the village chair (SM1). The appellant had mentioned that, by then, he was sick he did not know about the said transaction between Zephania and the respondent. Upon being, aware he sued the respondent at the Trial Tribunal. The Trial Tribunal dismissed the appellant's claims on grounds that family members have agreed to use the suit plot as a security and the appellant's family should have taken steps against their son Zephania Magesa and not the respondent.

In the first appeal the District Land and Housing Tribunal maintained the Ward Tribunal's decision, hence this appeal. There are three grounds of appeal as follows:

- 1. That, the Honourable Chairperson of the Appellate Tribunal erred in law for failure to find that the proceedings before the trial tribunal were marred with illegality hence null and void due to participation of the secretary of the trial Ward Tribunal during trial contrary to the requirements of the law.*

2. *That, the Honourable Chairperson of the Appellant Tribunal erred in law for failure to find the Zephania Mtwale, Magesa Mtwale and Subyeku Mtwale sons and wife of the appellant respectively not being owners of the suit land could neither offer as security nor transfer the same to the respondent in a bid to foot the loss occasioned by Zephania Mtwale to the respondent's M-pesa business.*
3. *That, being a court of law, the Appellate Tribunal erred in law for failure to find that the dispute before the trial tribunal could not be properly determined without joining Zephania Mtwale, Magesa Mtwale and Subyeku Mtwale as necessary parties.*

At the hearing, the appellant was represented by advocate Mashaka Tuguta while the respondent had the services of Advocate Kevin Mutatina, both parties were absent. Mr. Mutatina was quick to briefly inform the court that he supports the appeal due to anomalies which occurred in the trial tribunal. He also prayed for the costs to be exempted. Upon being probed by the court on the details of the anomalies he explained that the trial tribunal did not address the issue of parties to the extent that even the decree, if any, would not be executable.

In reply, Mr. Tuguta agreed with the respondents' counsel that the trial tribunal dealt with the wrong parties. He added that there was

illegality in that, the secretary of Ward Tribunal was part of the quorum an illegality which touches the jurisdiction of the trial tribunal. He cited the cases of **Adelina Koku Anifa v Byarugaba Alex** Civil Appeal No. 6 of 2019 and **Hadija Ibrahim v Magdalena Dedi** land appeal No. 31/2020 High Court Arusha. He finalized by moving the court to nullify both tribunal's decisions with costs.

Upon being questioned by the court on who ought to have been the right parties, the learned counsel stated that Zephania Mtwale was the centre of the dispute and 'some of the relatives' of the appellant testified and agreed that the appellant had used the suit plot as security for the loan, those 'relatives' were the necessary parties but they were not sued. That, the decree cannot be enforced according to **Abdultalif Mohamed Hamis v Mehiboob Yusuf Osman and others** High Court Civil Revision 6/2017a t page 27.

At this stage, the issue is whether this appeal has merit.

The first ground refers to the composition of the Ward Tribunal. Section 11 of the Land Disputes Courts Act Cap 216 R.E 2019 states thus:

*'11. Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act.;*

Looking at the records, it appears that the hearing was done in one day that is, 8/1/2020. At page one of the proceedings there were 7 members including the secretary, one Lilian Lusinzo. Therefore, without the secretary, the Tribunal remains with 6 members which are within the ambits of section 11. I will agree with the chairman of the first appellate court that section 11 require the minimum number of 4 and maximum of 8 member and that requirement was complied with. I have gone through the cited cases, and they have different facts to the present. In **Adelina Koku Anifa v Byarugaba Alex** there were only three members and the secretary while in **Hadija Ibrahim v Magdalena Dedi Land** the composition was only the chairman, the secretary and one member. The first ground has no merit.

In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, according to the facts, it was Zefania Magesa who claimed to be the owner of the suit land. However, he was not part in either side as the tribunal. At the same time,

the appellant testified that he was the owner of the suit plot a fact which was undisputed. If the appellant is the owner as he claims to be, it is trite law that no one can give what they do not have '*nemo dat quod non habet*'. That being the case, the said Zefania Mtwale who offered the suit plot to the respondent, while he was not the owner of the suit plot, he had no good title to pass to the respondent. Therefore, the agreement and transactions between Zefania Mtwale and the respondent would have been *void ab initio* and hence not valid. All in all, it was important to join Zefania Magesa as a necessary party. He was to explain where he trace the powers to give the land to the respondent.

In the cases of **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), and **Juliana Francis Mkwabi v. Lawrent Chimwaga** Civil Appeal No. 531 of 2020 Court of Appeal, Dodoma it was held that, after detecting that the necessary party was not joined into the suit, the Court has to remitt the matter to the trial court with directions that hearing should proceed after joining a necessary party.

Having decided that Zefania Magesa was a necessary party, and he was not joined at the Trial Tribunal, I hereby nullify all the proceedings of both trial tribunal and first appellate tribunal and set aside all the orders thereof. The matter is pushed back to where it was immediately before the institution of the suit. Any interested party may wish to re-institute the suit at a court of competent jurisdiction while joining the necessary parties.

The appeal is allowed to the extent shown.

No orders as to costs as the appeal is based largely on court's own efforts.

It is so ordered.

DATED at **MWANZA** this 2<sup>nd</sup> day of August 2023.



  
**L.J. ITEMBA**  
**JUDGE**