

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

LAND APPEAL NO. 102 OF 2022

*[From Application No. 351 of 2019 of the District Land
and Housing Tribunal for Mwanza at Mwanza]*

RICHARD MAJENGA-----APPELLANT

VERSUS

JOHN PAUL -----1ST RESPONDENT

WILLIAM MAGOHA-----2ND RESPONDENT

SHUKRANI KIHANDO-----3RD RESPONDENT

JUDGEMENT

Aug. 14th & Sep. 8th 2023

Morris, J

Mr. Richard Majenga, the appellant herein, is dissatisfied with the judgment of the Mwanza District Land and Housing Tribunal (DLHT or Tribunal) in Application No. 351 of 2019. He now appeals to this Court marshalled with five grounds of appeal. At commencement of the hearing, he abandoned two grounds of appeal but added one more ground of appeal. In the interest of brevity, I merge them into three major grounds.

In a paraphrased architecture, the trio-bases are that; the DLHT erred in law by determining the matter without being properly constituted; it erred in law in determining the matter on issue raised *suo-motu* without

affording the parties the right to audience; and that it erred by failure to analyze evidence on record.

In brief, the record reveals that the appellant above sued the three respondents for trespass to his land. The said property is located at Plot No. 538 Block 'B' Ilemela, Mwanza. He accused the latter of demolishing his house found thereon. It was alleged further that the appellant is the rightful owner of the house which he built effective 7/9/2002. And further that, on 8/10/2019 the respondents trespassed thereon and demolished the said house without any colour of right or justifiable cause.

The respondents' joint written statement of defence reveals that they were all employees of Ilemela Municipal Council. They allegedly entered into the suit land in their public/official capacity. The respondents also filed three points of Preliminary Objection (PO). *Inter alia*, they asserted that the application contravened section 12 (1) (b) of ***the Local Government (Urban Authorities) Act***, Cap 288 R.E. 2002 for them being sued individually instead the Ilemela Municipal Council. However, strangely, the PO was not pursued any further.

On 16/11/2022, the trial Tribunal framed two issues for determination. That is, whether the respondents trespassed onto the applicant's (now appellant) suitland and demolished the appellant's



premise. The other one was whether the latter party deserves payment of damages. The appellant testified on the same date in the presence of the respondents' counsel, Mr. Ringia. However, the second applicant's witness proceeded in the absence of the respondents (*ex parte*) following their default to enter appearance. Nevertheless, the trial Tribunal struck out the application for the applicant's failure to sue the Ilemela Municipal Council. The appellant became disgruntled. Hence, this appeal.

In this appeal, the affidavit of the court process server revealed that the respondents were untraceable; and the advocate who represented them at the subordinate Tribunal, refused service on the ground of lacking instructions from his clients. Consequently, service was done through publication (Mwananchi Newspaper of 5/8/2023). Still, the respondents did not appear. I accordingly ordered the appeal to be pursued in their absence.

During hearing the appellant was represented by Advocate Arnold Katunzi. I will consider his submissions in the course of determining the grounds of appeal. Regarding the first ground, it was the submissions for the appeal that the composition of the trial Tribunal contravened section 23(2) of ***the Land Disputes Courts Act***, Cap 216 R.E 2019 (***the Act***). The said provision requires the tribunal to be presided over by a



chairperson and two assessors. He, however, was quick to admit that in case of absence of assessors, the chairman may proceed with one assessor (if any).

Faulting the affairs subject this appeal, he argued that the original assessors were **LUBASA** and **METHUSELA** (25/2/2020). But, when SM1(appellant) testified on 30/1/2020; assessors were **CHENEKO** and **METHUSELA**. Further, he stated that on 17/8/2022, SM2 testified in absence of both assessors. Nevertheless, the Tribunal's judgment (pages 4 &3) indicates that the assessors who gave opinion were Cheneko and Lubasa. Yet, although Cheneko gave his opinion, he was absent when SM2 gave his testimony. On the other hand, Lubasa never heard any witness but rendered his opinion.

To the appellant's advocate, the effect of changing assessors renders the proceedings and judgement therefrom a nullity. I was referred to the case of ***Erica Chrisostom v Chrostom Fabian and another***, Civil Appeal No. 137/2020(unreported).

I have considered the submissions of the appellant regarding this ground. I have also carefully read both typed and handwritten proceedings of the DLHT. From the latter proceedings, indeed, on 25/2/2020 the assessors were Messrs. Lubasha and Methusela. However,



on that date, the matter was adjourned. SM1 - the appellant herein, testified on 16/11/2020 while the Chairman was assisted by two assessors: Mr. Lubasa and Mr. Cheneko. On 17/08/2022 SM2 (Theresia Simon) testified, *ex parte*, while the Chairman was assisted by the same pair of assessors (Lubasha and Cheneko).

The matter was then adjourned to 15/9/2022 for the assessor's opinion. Accordingly, the two-same assessors who heard the witnesses in the trial are the ones who rendered their respective opinion as stated in the judgement. Seemingly, the records relied upon by the counsel for the appellant are the typed proceedings. Admittedly, the subject proceedings are at a slight variance with the handwritten ones. Therefore, for the typed proceedings differ with the counterpart, handwritten proceedings; the latter take precedence. That is, the typed proceedings are accordingly disregarded in so far as such inconsistency is concerned. The first ground is accordingly disallowed.

Regarding the second ground of appeal, it was the submissions for the appellant that the Tribunal erred in law to determine a new issue which was raised *suo-motu* and parties were not heard on it. That is, two issues only were framed for determination by the DLHT. However, in composing the judgement, the tribunal added a third issue (*to what reliefs*



are parties entitled). Yet, all the three issues were not discussed and determined. A completely new/additional issue (*whether Ilemela Municipality was a necessary party*) was added and parties were not summoned to argue for and/ or against it. This is the issue which was used in final determination of the application. The matter was then struck out.

The appellant maintained that, although the PO was originally raised in such regard, the respondents abandoned it midway. He argued further that, determining the issue without the parties being heard is illegal per ***Kumbwandumi Ndemfoo Ndossi v Mtei Bus Services Ltd***, Civil Appeal No. 257/2018(unreported).

As I have stated hereinabove, the DLHT, on 16/11/2022, raised two issues for determination. However, as correctly submitted by the appellant, (at page 2 of the judgement) another ground as to the rights of parties was added. Again, all three grounds were not determined by the Tribunal. The Chairman, instead, sided with the assessors to hold that Ilemela Municipal Council was a necessary party. Therefore, the matter was struck out basing on that ground. Also, as correctly argued, the same issue was once raised as Preliminary Objection but on 30/01/2020 Advocate Ringia (for respondents) prayed to abandon it. Consequently, it



was marked abandoned. Therefore, if the DLHT formed a firm opinion that the issue was important to be determined; it was required by law to summon the parties to address it before entering the judgement.

It is a cardinal principle of the law that, a decision reached without affording parties right to be heard is a nullity. The omission is fatal. It goes to the root of the decision even if the decision would have not changed upon hearing them thereof. This matter falls in no exception. Reference is made to cases of ***Alisum Properties Limited v Salum Selenda Msangi (administrator of the estate of the late Selenda Ramadhani Msangi)***, Civil Appeal No. 39 of 2018; ***The Registered Trustees of Arusha Muslim Union v the Registered Trustees of National Muslim of Tanzania @ BAKWATA***, Civil Appeal No. 300 of 2017; and ***Kumbwandumi Ndemfoo Ndossi v Mtei Bus Services Limited***, Civil Appeal No. 257 of 2018 (all unreported).

Therefore, the second ground of appeal has adequate merit. For it suffice to dispose the appeal I find no need to determine the last ground of appeal. In upshot the appeal is merited. I allow it. I, therefore, quash and set aside the judgement and proceedings of DLHT in Application No. 351 of 2019. Parties to shoulder own costs. It is so ordered.



Right of Appeal fully explained to the parties.



C.K.K. Morris

Judge

September 8th, 2023

Judgement delivered this 8th day of September 2023 in the presence of Advocate Maligisa Sakila holding the brief of Advocate Arnold Katunzi for the appellant.

C.K.K. Morris

Judge

September 8th, 2023