

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

LAND APPEAL NO. 25 OF 2023

*(Originating from Application No. 80 of 2018 in the District Land and
Housing Tribunal for Arusha at Arusha)*

EMMANUEL L. OLE KOKAN.....APPELLANT

VERSUS

ISAYA SAITERIE LUKUMAY..... RESPONDENT

JUDGMENT

14/3/2024 & 18/4/2024

KIWONDE, J.:

The appellant in this appeal was dissatisfied with the decision of the District Land and Housing Tribunal for Arusha in Application No. 80 of 2018, thus, this appeal based on three (3) grounds of appeal namely: -

1. That, the trial tribunal erred in law and fact to rely on Exhibit D-1 which is in contravention with the mandatory provision of Stamp Duty Act, [Cap 189 (R.E 2019)].
2. That the trial tribunal erred in law and fact by making its decision in favour of the respondent who never filed the written statement of defence as required by the law.



3. That, the trial tribunal erred in law and fact by making its decision on the basis of defence (W.S.D) which introduces a new party to the proceedings and whose name is not in the records of the tribunal.

The appellant asked this court to allow the appeal with cost and the decision of the trial tribunal be quashed and set aside.

During the hearing of the appeal, the appellant was represented by Mr. Alpha Ng'ondya, advocate, while the respondent enjoyed the legal service of Mr. Lengai, advocate.

In his submissions in-chief in support of the 1st ground of appeal, Mr. Alpha Ngo'dya learned counsel said that the trial tribunal wrongly admitted and to relied on exhibit D1, the sale agreement which had no stamp duty in violation of section 47 (1) of the Stamp Duty Act, Cap. 189. Thus, he prayed for the appeal to be allowed with costs.

Regarding the 2nd and 3rd grounds of appeal, the counsel for the appellant stated that at the trial tribunal the respondent filed the defence (W.S. D) against the wrong person who is Emmanuel L.O Kokan, which is a different name from that of the appellant herein. So, that means no defence was field against the appellant herein and it was wrong for the trial tribunal to proceed with the hearing of the application based on the



wrong defence. The counsel stated further that although the respondent made some changes, it was done without the leave of the court which was also wrong. To support his arguments, he referred this court to the case of **Salim Amour Diwani versus The Vice Chancellor Nelson Mandela African Institution of Science and Technology and Another**, Civil Application No. 116/01 of 2021, (Court of Appeal of Tanzania at Dar es Sallam, (unreported)). He thus, prayed for the appeal to be allowed and the decision of the trial tribunal be quashed and set aside.

In reply, Mr. Lengai argued that as the issue of stamp duty was not raised at the trial tribunal. To raise it at this stage will be just an afterthought which is also based on technicalities. He stated further that the issue of stamp duty cannot nullify the proceedings and that had it been raised at the trial tribunal, the respondent could have been allowed to go and put stamp duty so as to proceed with the application. He supported his arguments with number of cases including the case of **Alliance one Tobacco Tanzania Limited and Another v. Mwajuma Hamisi (as the administratrix of the estate of Philemon R. Kilenyi) and Another**, Miscellaneous Civil Application No. 803 of 2018 (High Court of Tanzania at Dar es Salla, (unreported)).



As to 2nd and 3rd grounds of appeal, Mr. Lengai conceded that it was true when they filed a defence (W.S.D), the name of the appellant was omitted which is a technical one. However, the same was also not raised at the trial tribunal but it can be cured as it does not go to the root of the case. He was of the view that as the issue was not raised at the trial tribunal, it is violating article 13 (6) (a) of the Constitutional of the United Republic of Tanzania, 1977. He referred this court to the case of **William Sakinoi Versus Musee Leng'olaa**, Land Appeal No. 28 of 2020 (High Court of Tanzania at Arusha, (unreported)). He prayed the appeal be dismissed with costs.

In his brief rejoinder, Mr. Alpha Ngo'ndya stated that the issue of the stamp duty is not technicality but a requirement of the law which can be raised at this stage, though it was not raised at the trial tribunal. As for the issue of names, he stated that as they used a different name, it means the defence was not filed before the court and the same was not raised at the trial court. He distinguished the cited cases by the counsel for the respondent above saying they are not useful in our case at hand. He maintained his prayer for the appeal to be allowed with costs.

Having considered the rival submissions from both parties, this court is mainly called upon to determine whether the appeal is merited or not.



I have opted to start with the 2nd and 3rd grounds of appeal. They are about misspelling and or omission to write proper names of the appellant. The name of the appellant was wrongly spelt. Instead of writing Emmanuel L. Ole Kokan, it was written Emanuel L. O. Kullene. This is a matter of fact which was not raised at the trial tribunal. In law, matters of facts which were not raised and dealt with by the trial court or tribunal cannot be entertained by an appellate court. See the decision in **Hood Transport Co. Ltd Versus East African Development Bank**, Civil Appeal No. 262 of 2019, Court of Appeal of Tanzania at Dar-es salaam (unreported),

Also, in the case of **Jafari Mohamed vs Republic**, Criminal Appeal No. 112 of 2006 [2013] TZCA 344 (15 March 2013) it was stated that, I quote:

"We take it to be settled law, which we are not inclined to depart from, that "this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

Apart from that, the error does not go to the root of the case to the extent of nullifying the whole proceedings of the trial tribunal. The parties are the same and it is not stated how the appellant was prejudiced. This is



curable defect under the oxygen principle. Therefore, these grounds of appeal lack merits.

Reverting to the 1st ground of appeal, it is rightly argued by the counsel for the appellant that the trial tribunal wrongly admitted and acted on inadmissible document, the sale agreement which had no stamp duty in violation of section 47 (1) of the Stamp Duty Act, cap 189 (R. E 2019). The law requires the sale agreement to be duly stamped for it to be admissible in evidence. This was a position in the cases of **Josephat L.K Lugaimukamu v. Father Canute J. Muzuwanda** [1986] T.L. R 69 and **Transport Equipment Ltd v. D. P Valambhia** [1993] T.L .R 91.

It should be borne in mind that this is a matter of law which, in my view, can be dealt with even on appeal even if it was not raised at the trial. In **Hood Transport Co. Ltd Versus East African Development Bank**, Civil Appeal No. 262 of 2019, Court of Appeal of Tanzania at Dar-es salaam (unreported), it was stated that the appellate court cannot entertain matters not canvassed and or dealt with by the trial court unless it is on a point of law.

However, the remedy where the document bears no stamp duty is to allow a party seeking to tender it to pay the amount chargeable and then the matter proceeds. This is per proviso to section 47 (1)(a) of the Stamp



Duty Act, Cap 189 (R. E 2019) and the case laws cited above, especially that of **Lugaimukamu** (supra).

Guided by the cited authority, it is clear that had this matter been raised at the trial, the respondent would have been allowed to pay for the stamp duty and the case to proceed. Therefore, it would not change anything in the decision of the trial tribunal. Since it was not raised at the trial and the appellant had the service of an advocate, so, I regard the matter an afterthought and ignore it.

Having said so above, I find no merit in the appeal. Consequently, it is hereby dismissed with cost. The decision of the trial tribunal remains undisturbed.

DATED at **ARUSHA** this 18th April, 2024.


F.H. KIWONDE

JUDGE

18/04/2024

Court: Judgment is delivered in chamber in the presence of Mr. Lengai Loita for the respondent and Maryciana (RMA) but in the absence of the appellant this 18th April 2024 and the right of further appeal is explained.


F.H. KIWONDE

JUDGE

18/04/2024

