

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

LAND APPEAL NO. 09 OF 2017

*(Arising from the judgment of the District Land and Housing Tribunal for Kigoma in
Land Appeal No. 124 of 2013 originating from Land Case No. 35 of 2013 before Kasulu
Ward Tribunal)*

RODA NKABA APPELLANT

VERSUS

DAUDI NTUMILIGWA RESPONDENT

JUDGMENT

*Date of Last Order: 05.12.2023
Date of Judgment: 06.02.2024*

KADILU, J.

The appellant was a successful party at the Ward Tribunal of Kasulu Urban in Land Application No. 35 of 2013 which was instituted by the respondent. On appeal by the respondent vide Land Appeal No. 124 of 2013, the District Land and Housing Tribunal (DLHT) for Kigoma quashed the judgment of the Ward Tribunal and declared the respondent the lawful owner of the suit property. Though she was aggrieved, the appellant could not immediately appeal against that decision to the High Court. Therefore, she successfully applied for an extension of time within which to do so, and time was extended.

In granting the prayer, the High Court (Rumanyika, J., as he then was) observed that although the appellant had not managed to account for each day of the delay for two years nor had she pleaded illegality, the submissions

by her Advocate indicated that there was failure or omission to evaluate evidence that constituted an illegality. The learned judge also took the view that the suit was bad for non- joinder of parties. For those reasons, the appellant was given an extension of time. Then the appellant appealed to the High Court in Land Appeal No. 9 of 2017 raising five grounds as follows:

- 1. That, the Chairman of the DLHT erred in law and fact for failure to evaluate evidence adduced and exhibits tendered by the appellant before the Kasulu Ward Tribunal hence, it reached to unfair decision.*
- 2. That, the Chairman of the DLHT erred in law and fact for failure to recognize that the appellant was granted the disputed plot by the land authority.*
- 3. That, the Chairman of the DLHT erred in law and fact by failure to ascertain that there was a contradiction in evidence concerning how the respondent got the disputed plot.*
- 4. That, the Chairman of the DLHT erred in law and fact for failure to recognize that the respondent was advised to see the land authority so that he could be given another plot as the disputed plot had already been allocated to the appellant.*
- 5. That, the Chairman of the DLHT erred in law and fact by failing to recognize that there was a misjoinder of necessary party that is Kasulu Land Office.*

On the strength of these grounds, the appellant prayed for the appeal to be allowed with costs and the decision of the Ward Tribunal to be upheld. At the hearing of the appeal, the appellant was represented by Ms. Flavia Francis, learned Advocate. The learned Advocate addressed the court to the effect that since the extension of time was granted mainly based on the ground of illegalities in the decision appealed against, she would concentrate

on that point. Thereafter, the High Court considered only the 5th ground of appeal, to wit, that the appellate Chairman of the Tribunal erred in law and in fact for failure to recognize that there was a misjoinder of a necessary party, that is, the Land Officer of Kasulu.

After referring to the arguments by the parties, the learned Judge found that Order I rule 13 of the Civil Procedure Code (CPC) which requires an objection as to non-joinder or misjoinder of parties to be raised at the earliest possible opportunity, had not been complied with, therefore it was taken to have been waived. He then dismissed the appeal with costs. Still aggrieved, the appellant appealed to the Court of Appeal. The Court found that the learned Judge of the High Court misdirected himself for limiting the grounds of appeal to illegality alone. The Court of Appeal explained that where there are points of law as well as points of fact, the court must, first, determine points of law and if not upheld determine points of fact.

The Court allowed the appeal by quashing the judgment of the High Court in Land Appeal No. 9 of 2017 and setting aside the orders therefrom. It remitted the record to the High Court for determination of the remaining grounds of appeal as per law which I hereby do. On the day of hearing this appeal before me, Advocate Kelvin Kayaga represented the appellant whereas Mr. Saikon Justin, learned Counsel represented the respondent. Before the hearing, Mr. Kelvin prayed to add the 6th ground of appeal to wit, that the proceedings and decision of the DLHT were a nullity for lack of participation of the assessors.

Mr. Kelvin submitted that the Chairman of the DLHT erred in law and fact for not involving the assessors in giving their opinion as per the law. He referred to Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2002 which requires the Chairman of the DLHT to sit with assessors and allow them to give an opinion. He also cited the case of ***Edina Adam Kibona v Absolom Swebe (Sheli)***, Civil appeal No. 286 of 2017 in which the Court of Appeal stated that disregard of this requirement is fatal.

He then continued to submit on the 1st, 2nd, 3rd, and 4th grounds of appeal jointly arguing that the DLHT failed to analyze evidence properly hence, it reached a decision which is not supported by evidence on record. He explained that the appellant was allocated the land in dispute by Kasulu District Council, but the tribunal did not consider it henceforth, it ended up nullifying the decision of the Ward Tribunal. Concerning the 5th ground of appeal, Mr. Kelvin submitted that the District Council of Kasulu which allocated land to the appellant was not joined to the suit though it was a necessary party. In his views, the non-joinder of Kasulu District Council vitiated the whole proceedings. The learned Advocate implored the court to allow the appeal with costs.

When the court gave the floor to Mr. Saikon, he started by informing the court that he was conceding to the ground of appeal added by Mr. Kelvin. He reasoned that the record is clear that the learned Chairman of the tribunal did not allow the assessors to give their opinion as required by the law.

According to him, the point alone is sufficient to determine the appeal as it has the effect of nullifying the proceedings of the DLHT. Regarding the 1st, 2nd, 3rd, and 4th grounds of appeal, the learned Advocate submitted that the DLHT was correct to decide the case in favour of the respondent because his evidence was heavier than that of the appellant.

About the 5th ground of appeal, Mr. Saikon stated that there was nothing wrong in not joining Kasulu District Council to the suit because the respondent was justified to sue the appellant who was a trespasser on his land. He added that if at all it was necessary to sue the District Council, it was the appellant's obligation to join it. He expounded further that Section 5 of the Ward Tribunal Act provides that Ward Tribunals are not bound by the rules of evidence. He referred to Order I, Rule 9 of the CPC which stipulates that non-joinder of the parties does not render the proceedings a nullity. He urged the court not to disturb the findings of the DLHT except on the ground concerning the participation of the assessors.

By rejoinder, Mr. Kelvin maintained that the appellant's evidence was stronger as she demonstrated that she was a bonafide purchaser of the land in dispute. Regarding the 5th ground of appeal, he added that the non-joinder of a necessary party is not a mere technicality, but a crucial aspect. He conceded that Ward Tribunals are not bound by the rules of evidence, but he elaborated that it does not include an omission to join a necessary party. He urged the court to find that the appeal at hand is meritorious.

Having gone through the submissions by the learned Advocates and the records in the case file, I find the main issue for consideration is whether this appeal has merit. I will start with the 6th (added) ground of appeal in which the parties are in agreement that the assessors did not give their opinion before the learned Chairman of the tribunal composed the judgment. This ground of appeal will not detain me so much as I will let the records speak. It is on record that in the DLHT, the case was heard on 21/05/2014 and the assessors participated effectively. It is also apparent that after the trial, the Chairman of the tribunal pronounced the date of judgment without requiring the assessors to give their opinion.

Notwithstanding, on 09/09/2014 Mrs. Hope Mutabazi gave her opinion, and on 22/07/2014, Mr. Msechu gave his opinion as well. Moreover, in the judgment of the tribunal, the learned Chairman considered the opinion of the assessors on page 3 where he stated:

"Having seen the submissions of both parties, the tribunal invites the two lay assessors who sat with me to opine over this case. The lay assessors namely, Mzee Msechu Kanifikati and Miss Hope Mutabazi, both of them opined that the problem was on the side of the Land Officer of Kasulu who created the problem so, they opined that the appellant should be compensated by being given another plot by Kasulu Land Office and the respondent remain on the disputed plot."

On the last page of the judgment, the learned Chairman stated that he differed with the opinion of the assessors. In the circumstances, I am of

the firm view that the learned Chairman made an uncalculated omission when writing the proceedings and skipped to record that the assessors were allowed to give their opinion. I hold this view because if at all the assessors were not allowed to give their opinion, they could not have given the opinion found in the case file duly dated and signed by each of them. In this regard, I find the 6th ground of appeal devoid of merit.

Concerning the 1st, 2nd, 3rd, and 4th grounds of appeal, I find that the centre of contention in these grounds is the evidence adduced by each party before the Ward Tribunal. The appellant claims that she is the lawful owner of the disputed land because she was allocated two plots by Kasulu District Council. To prove her claim, she presented two letters of offer issued by the Kasulu District Land Office in 2003 and 2009 bearing the names of her children; Zawadi and Innocent. On the other hand, the respondent complains that the disputed plots belong to him because they were surveyed from his farm and that, he paid for the survey.

He alleges that between 2010 and 2011, he made an application to Kasulu District Council to have his farm surveyed. According to him, after the survey, he got three plots. He contended as well that he was the one who paid for survey expenses. To support his point, the respondent presented a sale agreement between him and Godriva Andrea from whom he claims to derive his ownership of the land in dispute. He also presented an application letter that he wrote to the Kasulu District Council requesting it to survey his farm. During the hearing of the dispute before the Ward Tribunal, the

respondent testified that after he inquired from the Land Office about the invasion of his land, he was informed that Kasulu District Council had allocated the land in dispute to the appellant.

A thorough examination of the records reveals that the learned Chairman of the DLHT analyzed the evidence from page 3 to page 5 of the judgment. With respect, after examining the record I failed to see the reason why the honourable Chairman is being blamed for not analyzing properly the evidence presented before him. Therefore, the 1st, 2nd, 3rd, and 4th grounds of appeal have failed. This finding takes me to the 5th ground of appeal in which the appellant complains that Kasulu District Council was supposed to be joined to the suit as a necessary party since each party was contending to obtain the suit property from the Council. It is pertinent to point here that this point was the basis for granting an extension of time to the appellant by Rumanyika, J. after having considered the non-joinder of a necessary party in this case as illegal. He observed:

"The appellate Chairman of the Tribunal erred in law and in fact for failure to recognize that there was a misjoinder of a necessary party, that is, the Land Officer of Kasulu."

Back to the case at hand, the question is whether or not Kasulu District Council being an allocating authority needed to be joined as a necessary party as alleged by the appellant. From the facts as may be deduced from the proceedings of the Ward Tribunal, there is no doubt that the Council was involved in the acquisition of the disputed land by both the appellant and the

respondent being the allocating authority under the Land Act, [Cap 113 R.E 2019]. Based on these facts, it is my considered view that the Council needs to be joined as a necessary party for the court to determine the legal rights or relief over the disputed land. Order I, Rule 3 of the CPC stipulates that:

"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 of law or fact would arise."

The provision above infers that for two or more persons to be joined as defendants in a suit, there must be a right to relief against them which if separate suits were to be filed, the same question of law or fact would arise. In the case of **Abdi M. Kipoto v Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017, the Court of Appeal held that a party becomes necessary to the suit if its determination cannot be made without affecting the interests of that necessary party. Thus, for a party to be necessary in a suit, his rights don't have to be at stake. It is sufficient if he is bound by the result from the question to be settled, the question which the court cannot effectively answer without his presence in that suit.

See **Robert Mashine v Godfrey Msoka**, Land Appeal No. 16 of 2021, High Court of Tanzania at Mwanza in which it was observed that a necessary party is a party without him or her the court cannot be in a position to pass an effective decree. This is imperative because the court should make

specific and enforceable orders and when making its orders, it must ensure that they are capable of enforcement without recourse to further litigation.


In the matter at hand, Kasulu District Council is not only important for clarification of some issues about the dispute, but also a key player in the correct solution to the questions involved in this case. As hinted earlier, the dispute between the parties herein cannot be effectually and completely settled unless Kasulu District Council is a party. More so because the appellant alleges to have acquired the disputed land from the land authority (Kasulu District Council) as compensation for her previous plots, and at the same time the respondent blames the appellant for having trespassed on his plots that he had already paid for survey expenses to Kasulu District Council.

I am mindful that a suit cannot be defeated only because of the misjoinder or non-joinder of parties. Still, I think the involvement of the Kasulu District Council can bring a positive impact since a losing party can be compensated or allocated another plot by the Kasulu District Council. The CPC is clear that it is not necessary for every defendant joined to the suit to be interested in the reliefs claimed against him. Nonetheless, it is my humble opinion that this case will not be effectively ended without a multiplicity of suits if the District Council is not joined. Therefore, I allow the 5th ground of appeal for being meritorious.

Consequently, the appeal is partly allowed to the extent stated above. I quash and set aside the proceedings and judgments of the two tribunals


together with their consequential orders. I further direct Land Application No. 35 of 2013 to be tried afresh by the court of competent jurisdiction after joining Kasulu Town Council, a predecessor of Kasulu District Council as the necessary party. Each party shall bear its own costs.

Order accordingly.


KADILU, M.J.
JUDGE
06/02/2024.

Judgment delivered in chamber on the 6th Day of February 2024 in the presence of Mr. Kelvin Kayaga, Advocate for the appellant, and Mr. Saikon Justin, Advocate for the respondent who is also present.




KADILU, M.J.,
JUDGE
06/02/2024.