

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 122 OF 2022

(Arising from Land Case no. 47 of 2014 District Land and Housing Tribunal for Kilosa)

SALEHE ABDALLAH SALUM.....APPELLANT

VERSUS

ABDALAH MOHAMED SULUMWARESPONDENT

JUDGEMENT

Date of last order: 26/09/2023

Date of judgement: 09/02/2024

BEFORE G. P. MALATA.

This appeal originates from Land Application No. 47 of 2014 of the District Land and Housing tribunal for Kilombero where the respondent as he then was the applicant instituted the said case against the appellant, the then the respondent, claiming for two (2) acres of land located at Malui Mlegeni in Kilosa District.

In nutshell, the present dispute is respect of land measured two (2) acres located at Kidago hamlet within Malui Mlegeni village of within Kilosa District in Morogoro region. The respondent, being the administrator of his late mother's estate one Sheila Shaban found the appellant using the farm which belonged to his Sheila Shabani. The respondent asked the appellant as to why he had trespassed over estate of the late Seila Shaban, in return he replied that, he purchased the farm from one Omary Saidi Shaweji.

The respondent sued the vendor, Omary Saidi Shaweji at the ward tribunal who admitted to have sold the land up to the boundary of tuta la Mzee Kipili and denied to sell the land in dispute. Thus, the land in dispute was found to have been encroached by the appellant himself far beyond what he bought from Omary Saidi Shaweji.

Following that dispute, the respondent instituted Land Application No.47 of 2014 at the DLHT praying for the following reliefs;

- i. The tribunal declaration that the disputed land is the estate of late Sheila Shabani.
- ii. Permanent injunction restraining the respondents from using, harassing, evicting, threatening and or interfering the applicant from peaceful administration of the disputed estate.

- iii. Costs of the suits be provided for.
- iv. Any other reliefs the tribunal deems fit and just to grant.

At the DLHT the respondent testified as AW1 and stated that he is the administrator of the estate of late Sheila Shaban. That the appellant herein invaded the farm of the late Sheila Shaban. The AW1 stated that, the disputed land on the western part is bounded with Mohamed Kipili who is deceased on the northern side is encircled with Salehe and on the northern side is adjacent to forest. He testified that, the land belonged to the late Sheila Shaban, his late biological mother.

AW2, Salehe Said Nakete testified that, his farm is neighboring with the respondent's farm who inherited the land from his late mother Sheila Shaban. He further testified that, he is cultivating the said land and that he knows his neighbor is the respondent. He testified that another neighbour is Mohamed Hamis Kipili. He narrated that at the ward tribunal the appellant alleged to have bought the land in dispute from Omari Said Shaweji. That at tribunal, Omari Said Shaweji testified that, he did sell another piece of land and not the land in dispute.

AW3, Mohamed Hamisi Kipili testified that, what he knows is that, Omari Shaweji leased the farm to the first respondent (Salehe Abdallah Salum),

the appellant exceeded the boundaries of the leased farm and trespassed into other people's farm including that of the respondent.

The appellant (DW1) at the DLHT testified that, in 2000 he went to Malui village seeking for land to lease, he met Omari Said Shaweji who told him that, he had a farm to lease. He went to see the farm and upon asked for boundaries, on the eastern side there was Mzee Mohamed Juma (deceased), on the western side is Mzee Mpingi also deceased, northern side Mohamed Kipili, southern side there was a river. He met all people who verified the boundaries.

In June, 2012 the appellant purchased the same farm and the village meeting consented the survey of the area which was done on 02/09/2013, as can be evidenced by exhibit DE1.

DW2, Ramadhani Salum testified that Sheila Shabani was given the land with his father for farming only, and he added that Mohamed Juma the father of DW2 was the lawful owner of the land in dispute, the respondent trespassed the farm of the appellant.

Following the testimonies, the DLHT entered decision in favour of the respondent herein that the land in dispute belonged to the late Sheila Shabani, thus part of her estate. Other prayers were also granted.

Aggrieved thereof, the appellant is now challenging the decision on the grounds that;

1. That, the District Land and Housing Tribunal of Kilosa erred in law and facts by adjudicating the matter in favour of the respondent without joining necessary party, one Omary Saidi Shaweji who sold the land in dispute to the appellant.
2. That, the District Land and Housing Tribunal of Kilosa erred in law and fact by determining the matter in favour of the respondent herein while the second respondent to the trial tribunal lacks locus standi and was wrongly joined to the case contrary to the order of the tribunal.
3. That, the District Land and Housing Tribunal of Kilosa erred in law and facts by not assessing and evaluate the evidence, hence the vague judgement.
4. That, the trial proceedings and decision thereto contain serious irregularities that goes to the root of the matter.

The appellant prayed to this court to quash the decision and decree of the DLHT of Kilosa and allow the appeal with costs.

By consensus parties agreed the appeal to be heard by way of written submission. As such, both parties filed their submission timely according

to the court's order. The appellant's submission was filed by Mr. Niragira learned counsel who represented the appellant while the respondent's submission was prepared and filed by himself.

Submitting in support of the first ground, the learned counsel stated that, the District Land and Housing Tribunal erred in law and in facts by entertaining the matter without joinder of the necessary party which rendered the proceedings a defective and nullity. The appellant's argument is that, when lodging the application at trial tribunal, it was very crucial for one Omari Shaweji Saidi to be party to the case, since he is the one who sold the land to the Appellant.

That, failure to join the mentioned vendor of the disputed piece of land as necessary party made whole proceedings a nullity. In attaining interest of justice, it was so necessary for join Omari Saidi Shaweji the vendor of the land in dispute.

To bolster his submission, he cited the case of **Juma B. Kadala vs Laurent Mkande** TLR 1983 [103], **Godfrey Kuzungala Vrs Abdulrahim Peter Shangashi**, Misc. Land Appeal No. 120 of 2019, Land Division, DSM **Juliana Francis Mkwabi vs. Lawrent Chimwaga**, Civil Appeal No. 531 OF 2020, **Farida Mbaraka and Farid Ahmed**

Mbaraka v. Domina Kagaruki, Civil Appeal no. 136 of 2006 (unreported).

Moreover, he stated that from the above quoted decisions, non -joinder of party is fatal to the proceeding and the judgment and proceedings will be null and void.

He citing the case of **Juliana Francis Mkwabi Vs Lawrent Chimwaga**: Civil Appeal No. 531 Of 2020, **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported). **Christina Jalison Mwamlima & Another vs. Henry Jalisqn Mwamlima & Six Others** and **Jumuiya ya Wafanyakazi Tanzania Vs Kiwanda Cha Uchapishaji Cha Taifa** [1988] TLR.146.

He finally submitted and asked the court to nullify the decision of the DLHT on that the non-joinder of necessary party.

In support of the second ground that, he submitted that, the District Land and Housing Tribunal for Kilosa erred in law and facts by determining the matter in favour of the respondent herein while the second respondent to the trial tribunal lacks locus stand and was wrongly joined to the case contrary to the order of the tribunal.

The appellant submitted that the 2nd respondent at trial tribunal had no locus standi, to sue or be sued in his name on the disputed land since he is neither the administrator of the estates of the late Omary Said Shaweji nor the vendor of the land in dispute. The position of the law is very clear that one cannot sue or being sued in a court of law unless they show that they are entitled to bring the matter before it., commenting on the doctrine of locus standi in the case of **Lujuna Shubi Balonzi vs. Registered Trustees Of Cham A Cha Mapinduzi** (1996) T.L.R 203, And in the unreported case of **Petro Zabron Sinda & Another Vs Zabron Mwita** Civil Case Number 176 Of 2017 Lady Judge Zainab G. Muruke; at page 04 of the judgment, reflecting on the above cited case of LUJUNA SHUBI BALONZI.

Moreover, Section 100 of the Probate and Administration of Estates Act, Chapter 352 clearly provides that

An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased.

The learned counsel also cited the case of **Omary Bakari vs. Zalika Mwalimu**. Misc. Land Appeal No. 8 of 2022 and detailed that, the trial tribunal way back in 2015 as per proceedings, the respondent herein was ordered by the trial tribunal to join the vendor one Omary Said Shaweji to

the case but the respondent did not honor the said order of the trial tribunal and he decided to sue a stranger who is neither a vendor of the land in dispute nor an administrator of the estates of one Omary Shaweji Saidi.

It was extracted from the judgement that, the trial tribunal directed the respondent herein to join the vendor in this dispute but the respondent ignored the order and joined another person. The position is very clear that, order of the court must be obeyed, see the case of **Karori Vs Waithache Mereng**. Civil Appeal No. 164 of 2018 CAT at Mwanza at page 7, citing the High Court Decision in **TBL vs. Edson Dhobe**. Misc. Civil Application No. 96 of 2006

He submitted that, the Respondent's failure to comply with the trial Tribunal's order to join the vendor in this dispute as so ordered should not be condoned.

Finally, he prayed to this honorable Court to allow the appeal with costs. Submitting in opposition of the appeal, on the first ground on the failure to join the necessary party, the respondent stated that, this ground is baseless and need to be disregarded, due to the fact that, the person who ought to be joined as a necessary party one Omari Saidi Shaweji was called at the Ward Tribunal to testify and he gave his evidence by stating

that, it is true he sold a certain piece of land to the appellant herein but it is not the disputed land which the respondent claims to be his land following the death of his mother. Therefore, the appellant's submission is misconceived. That, following Omary Said Shaweji testimony, there was no need to implead him in the present case, thus no non-joinder of party.

As to the cited cases he submitted that, they are good law but not applicable in the circumstances of this case.

Regarding the second ground, the appellant claimed that, the tribunal erred in law and facts by determining the matter in favour of the respondent herein while the second respondent to the trial tribunal lacks locus stand and was wrongly joined to the case contrary to the order of the tribunal. He submitted that, the said ground is baseless and needs to be thrown away by this court. He submitted that, the 2nd Respondent to the Trial tribunal was a son of Omari Said Shaweji whose father sold the land in question to the appellant and that he was managing and with interest on the land. Therefore, saying that the respondent herein sued the stranger is an afterthought.

By way of conclusion, he argued that, the evidence adduced by the respondent was heavier than that of the appellant herein hence deserved

to win the case as it was decided in the case of **Hemed Said vs. Mohamed Mbilu**, [1984] TLR 113.

Having summarized the rival submission by the parties for and against the appeal, I am now placed to the position to determine the present appeal.

To start with, this being the first appellate court, its duty is to re-evaluate the evidence and satisfy itself that the trial tribunal correctly evaluated and arrived to the decision according to evidence and law. The above legal position is gathered from the case of **Hassan Mzee Mfaume v. Republic** [1981] T.L.R. 167 where the Court held that,

"Judge on first appeal should re-appraise the evidence because an appeal is in effect a rehearing the case; Where the first appellate court fails to re-evaluate the evidence and consider material Issues Involved. In a subsequent appeal, the court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court"

This being a civil matter the burden of proving existence of any alleged fact lied on the respondent who was applicant before the tribunal. The respondent did bear the burden to prove that Sheila Shaban was lawful owner of land in dispute. This legal requirement is echoed by sections

110, 112 and 115 of the Evidence Act, Cap.6 R.E.2022. The sections read that;

Section 110.-

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

section 112 provides that

'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person

Section 115 provides that;

In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

The burden of proof does not shift unless stated by the law to that effect.

In the case of **Paulina Samson Ndawavya vs. Theresla Thomas Madaha**, Civil Appeal no. 45 of 2017, unreported the court of appeal held that;

"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge is burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.'

This position was repeated in the case of **Lamshore Limited & another vs. Bazanje K.U.D K, [1999] T.L.R 330**, the court held:

"The duty to prove the alleged facts is on the party alleging its existence"

This court has in a number of cases held that, proof of ownership of land must be strict. The rationale behind has been stated in numerous cases including,

1. **Ramadhani Rashidi Kuhuka Vs Jela Maiko Meja And 44**

Others Land Case No.25/2022 and,

2. **Hadija Adam Said Maliwata Vs Asiga Abas and 4 others,**

Land Appeal No. 101 Of 2022

In the case of **Hadija Adam Said Maliwata Vs Asiga Abas and 4 others**, Land Appeal No. 101 Of 2022, this court had these to say;

"Land as an utmost object to the eyes of God. Spiritually God's first fundamental work of creation started with "Heaven and Earth". This is gathered from the Holy Bible in the Book of Genesis, verse 1:1-3 and 1:9-10 state what God created first, I quote;

*1. In the beginning God created Heaven and **Earth**.*

Based on the above reference, one can agree without hesitation that, God valued land (Earth) as the first and most important item as without it, there could be no place for living and non-living organism, human being inclusive. As the Earth was empty and unoccupied, God

continued placing on the Earth all what he created from time to time. The confirmation comes from the Holy Bible in the Book of Genesis 1:2,3, 9 and 10 which provide that;

*2. But the Earth was **empty and unoccupied** and darkness were over the face of the abyss; and so, the spirit of God was brought over the waters*

3. And God said, "let there be light" And light became.

Further, in Genesis 1:9-10 it is stated that;

9. Truly God said "let the waters that are under heaven be gathered together into one place; and let the land appear" And so it became.

*10. And God called the dry land, '**Earth**,' and he called the gathering of the waters, '**Seas**', And God saw that it was good."*

The above cited verses from the Book of Genesis proves how God proceeded after creation of Earth and what he placed thereon. In other words, who we are, what we see and use is reflection of God's accomplishment of mission towards creation.

This makes land as first and most important item, God created for the holy work on the Earth as without it, there could be no place to lay the God's work of creation. Therefore, Land is a sensitive and valuable item even in the God's eyes.

In that regard, since the issue of land touches all living and non-living organisms, human being inclusive regardless of their wealth, status or impoverishment and that, no development can be effected without land, thus, land has become nothing but the first and most important thing to any living and non-living creature and human development. In other words, no Earth no living and non-living organism, and therefore no life.

Given the afore stated position from the Bible, Tanzania as country has taken such sensitivity and put land as special thing in which its ownership, use, management and conservation are Constitutionally and legally regulated."

It is on that basis, courts have also taken similar root of ensuring that, all issues pertaining to land dispute have to be given special attention. This

is due to its sensitivity and unbecoming behaviour of some of the people pampering into fraud, forgery, trespassing and encroaching one's land or reserved lands.

Thence, this court has in plethora of authorities held that disputes on ownership of land must be proved strictly. The above position is intended to satisfy the court beyond sane of doubt as to who is really owner of land in dispute. Placing such proof to the balance of probability alike any other normal civil suit leaves unscrupulous people to win cases through weak evidence.

In the absence of such standards, the inferior one's or poorer will be whipped out and left landless by haves and dishonest men. The sensitivity of land led to this court's legal position that, proof of ownership shares similar legal position with cases involving special damages.

In the case of **Bamprass Star Service Station Limited vs. Mrs Fatuma Mwale**, [2000] T.L.R 390 **Hon. Rutakangwa J**, as he then was a High Court Judge, had these to say.

"It is trite law that special damages being "exceptional in their character" and which may consist of "off-pocket expenses and loss of earnings incurred down to the date

of trial" must not only be claimed specifically but also "strictly proved".

The afore stated legal position sounds similar with that of the England law propounded by via the case of **British Transport Commission v. Courley** [1956] AC 185 at 206 where it was held that:

*"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as **special damages, which has to be specifically pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of the trial and is generally capable of substantially exact calculation.** Secondly there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such that as to lead continuing or permanent disability, compensation for loss of earning power in the future."*

Echoing therefrom, this court has established seven formal and informal ways through which one can prove ownership of land. These

are; **one**, by purchase, **two**, gift, **three**, allocation by Government authority, **four**, inheritance, **five**, clearing of unowned bush, **six**, adverse possession and **seven**, proceeds from division of matrimonial property.

This court has gathered two pertinent issues for resolving the land dispute between the parties herein. These are;

1. whether there was non-joinder of one Omary Said Shaweji, the vendor of the land to the appellant, thus rendering the proceeding incompetent,
2. whether the evidence on record by the respondent proved ownership of land to the late Sheila Shaban as opposed to the appellant.

On the first ground, I wish to start by defining who is the necessary party. Necessary party was defined by the Court of Appeal in the case of **Abdi M. Kipoto vs. Chief Arthur Mtoi**, Civil Appeal no. 75 of 2017 it held that;

Secondly, even if we were to agree with the appellant that the village council ought to have been joined, we have serious doubts if it was a necessary party. A party becomes

necessary to the suit if its determination cannot be made without affecting the interests of that necessary party.

In ascertaining whether a party is a necessary party or not in the context of Order I Rule 10(2) of the CPC, the court of appeal in **Farida and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), stated that;

"Under this rule, a person may be added as a party to a suit

i). when he ought to have been joined as plaintiff or defendant and is not joined so; or

(ii) when without his presence, the questions in the suit cannot be completely decided".

In the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 (unreported), when faced with an akin situation, the court stated that: -

"The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or

not, in the absence of the part, an executable decree may be passed"

Further, it is evident that the issue of non-joinder of parties is governed by Order 1 Rules 9 and 13 of the Civil Procedure Code, Cap.33 R.E.2019.

Rule 9 provides that;

"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."

Rule 13 provides that;

"All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all case where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen; and any such objection not so taken shall be deemed to have been waived."

Based on the afore stated principles of law, it is with no iota of doubt that, factors for consideration on whether a party ought to be joined or not has to be weighed through inter alia that; **one**, nature of relief sought against the non-joined party, **two**, reliefs sought must be

affecting directly or impliedly that party and **three**, execution of the decree passed must be affecting the party.

Further should there be a misjoinder or non-joinder of party to case, the same must be raised at the earliest stage of the proceeding, if not done then, it shall be deemed to have been waived.

In the present case, the issue of non-joinder of party of one Omary Said Shaweji has been introduced at the appellate stage, thus legally it is deemed to have been waived as stated by Order 1 Rule 13 of the Civil Procedure Code, *supra*.

Assuming the issue of non-joinder of a party was raised, the question is whether there was ground for upholding it. It is undisputed that, the respondent herein had once filed land dispute which resulted to Land Appeal No. 8 of 2022. It is stated that, one Omary Saidi Shaweji testified and admitted to have sold the land up to the boundary of *tuta la mzee Kipili* and denied to sell the land in dispute. Thus, the land in dispute was found to have been encroached by the appellant himself far beyond what he bought from Omary Saidi Shaweji.

In view thereof, the respondent instituted Land Application No. 47 of Land Case No. 47 of 2014 in the District Land and Housing Tribunal for Kilosa against the appellant, thence the present appeal.

Undeniably, the testimony by Omary Said Shaweji eliminated him from being accountable to anything in relation to the land in dispute that he never sold the land in dispute to the appellant herein. This alone made Omary Said Shaweji to have no issue with land in question, thus non-joinder of Omary Said Shaweji is non stater and untenable evidentially and legally.

In the present case, there is no relief or order by this court which can associate one Omary Said Shaweji to the land in dispute. Thus, the issue of non-joinder is a futile ground.

As to the second issue, it is undisputed that, the respondent claimed the land as administrator of the estate of the late Sheila Shaban who owned the land dispute before her demise which land was acquired by inheritance. The appellant herein claimed to have acquired title over the land in dispute by purchase from one Omary Said Shaweji.

The evidence on record including the testimony by Omary Said Shaweji indicates that the appellant bought land from Omary Said Shaweji but not to the extent of the disputed land. The vendor Omary Said Shaweji admitted to have sold land to the appellant but not to the extend of the land in dispute. That being the case, there is no evidence disproving the that the land do not belong to Sheila Shaban. The evidence by the

respondent is supported by testimony of Omary Said Shaweji that the land in dispute was not sold to the appellant. The appellant did not table any plausible evidence to prove otherwise.

It is trite law that, the burden of proof lies to one who alleges, however that does not mean that, the appellant was estopped from proving his ownership of land in dispute. The proof in civil case is on the balance of probability, meaning that the parties to case have to prove by evidence the issue in controversy. It is through the said evidence the court decides the case as to who is the lawful owner of the land in dispute notwithstanding that, the burden of proof still remain to he who alleges. Section 110,112 and 115 of the Evidence Act, Cap.6 R.E.2022 provide for such legal position.

Moreover, none of DW1, DW2 and DW3 and Exhibit DE1 had assistance in disproving the evidence by the respondent presented through AW1, AW2 and DW3 including that of Omary Said Shaweji given at the Ward tribunal of which he was sued by the respondent. The appellant did not tender anything oral or documentary evidence proving that he purchased such land from Omary Said Shaweji. Exhibit DE1 ought to have been preceded with evidence that, the village council had good title over the

land in dispute for it to allocate to the appellant. DE1 yielded nothing fruitful.

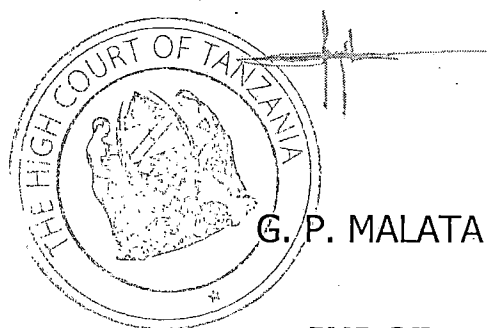
In the event therefore, this court found nothing to base on faulting the DLHT's decision, thus the issue of ownership is resolved in favour of the respondent.

The two grounds suffice to dispose the present appeal before this court.

In the upshot, I found no reasons to interfere with the trial tribunal's findings and decision. Consequently, I hereby hold that the appeal is devoid of merits and is accordingly dismissed with costs.

IT IS SO ORDERED.


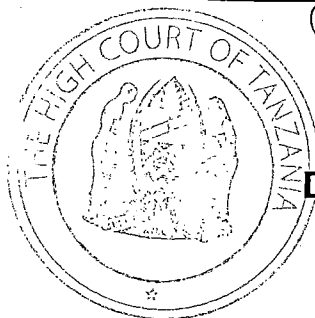
DATED at **MOROGORO** this 09th February 2024.



JUDGE

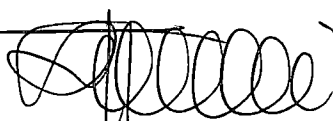
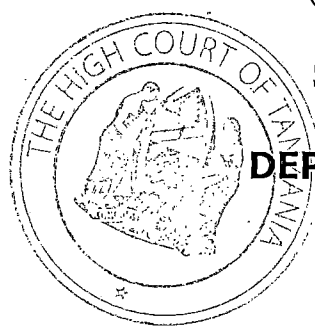
09/02/2024

JUDGEMENT delivered at **MOROGORO** in chambers this 09th February 2024 in the absence of both parties.

S. P. KIHAWA
DEPUTY REGISTRAR
09/02/2024

Right of appeal explained.

S. P. KIHAWA
DEPUTY REGISTRAR
09/02/2024