

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA SUB -REGISTRY)**

**AT TANGA**

**LAND CASE APPEAL NO. 2 OF 2023**

*(Arising from the judgment and decree in Land Application No. 6 of 2015 of the District Land and Housing Tribunal for Tanga at Tanga.)*

**THERESIA GABRIEL ..... 1<sup>ST</sup> APPELLANT**

**BUNDALA NGOBO..... 2<sup>ND</sup> APPELLANT**

**SALOME ZEBEDAYO ..... 3<sup>RD</sup> APPELLANT**

**HATIBU JUMA MAHUNDA..... 4<sup>TH</sup> APPELLANT**

**BERNARD KASSIAN BAHATI (As Administrator of the estate of the late BAHATI MJUMBE) ..... 5<sup>TH</sup> APPELLANT**

**VERSUS**

**BERNARD HENRY KITANGE ..... RESPONDENT**

**JUDGMENT**

*22/05/2024 & 05/06/2024*

**NDESAMBURO, J.:**

The appellants, aggrieved by the judgment and decree in Land Application No. 6 of 2015 delivered by the District Land and Housing Tribunal for Tanga at Tanga, (DLHT) on the 21<sup>st</sup> of August 2023, which was in favour of the respondent, have filed this appeal.

Before delving into the merits of the appeal, I find it appropriate to provide a brief background of this case, as gleaned from the records of the appeal.

On the 30<sup>th</sup> of January 2015, the respondent initiated a suit against the appellants along with other two persons who are not party of this appeal before the DLHT, asserting that he is the rightful owner of plots No. 2 and 3, Block D, Kange, Tanga City. He claimed that these plots were allocated to him by the Tanga City Council in 2008. Subsequently, he received a letter of offer for the two plots in 2009, and in June 2014, he was issued title deed No. 437884. The respondent began construction on the plots but had to halt the process when he went abroad to study. Upon returning in 2014 to resume construction, he found that his plots had been invaded by the appellants.

The appellants disputed the respondent's assertion, claiming that the disputed land belonged to them and had been in their possession since 1975. They argued that they held the land as their

farm under a deemed right of occupancy granted by the village council's authority.

After adjudication, as previously mentioned, the DLHT ruled in favour of the respondent. Dissatisfied with the DLHT's decision, the appellants are now seeking recourse through this appeal, citing eight grounds which will not be detailed here for reasons that will be explained shortly.

At the hearing, parties were being represented whereas, the appellants had the service of Mr. Kitundu, a learned counsel and the respondent enjoyed the service of Mr. Chanjarika also a learned counsel. The hearing proceeded by way of written submission. The set scheduling order was adhered to by the parties. However, while this court was preparing the judgment, it found it necessary to recall the parties to address the propriety of the proceedings before the DLHT regarding the following issues:

- 1. Whether the Chairperson of the DLHT complied with Section 23(3) of the Land Disputes Courts Act, Cap 216 R.E 2019, which was invoked.*



2. *Whether it was proper to proceed with the matter in the absence of the first respondent or his duly appointed administrator after the Respondent had been reported deceased.*
3. *Whether the suit was properly instituted against the seventh respondent who passed away during the proceedings, and whether his administrator was subsequently joined in the suit in accordance with the law.*
4. *Whether the provisions of Regulation 11(1)(b) and 11(2) of GN No. 174 of 2003 were correctly invoked and applied by the DLHT when the appellant's case was closed and subsequently reopened.*

Consequently, the court summoned the parties to address these issues, and they duly appeared before the court. It was agreed that they would file written submissions. Unfortunately, only Mr. Kitundu submitted his written submission.

In his submission on the first issue, the learned counsel asserted that, as per page 8 of the typed proceedings, the hearing of Land Application No. 6 of 2015 before the DLHT commenced on the 29<sup>th</sup> of March 2016 before Hon. F. Mdachi, Chairperson, assisted by two assessors namely Mrs. Mkomwa and Mrs. Mwanajohari as per

the requirement of Section 23(1) and (2) of Cap. 216. However, on the 7<sup>th</sup> of February 2019, the subsequent Chairperson ordered the hearing to proceed without the assessors under Section 23(3) of Cap 216 without providing reasons for this decision.

The hearing of the respondent's witnesses, AW2 and AW3, continued without the assessors' participation, and the respondent's case was closed for the second time. However, during the defence case on the 8<sup>th</sup> of November 2021, the respondent's witness, RW1, was questioned by Mrs. Makala and Mr. Hanafi, who had not been present during the initial hearings. These assessors asked critical questions titled "Questions from Tribunal for clarification." The learned counsel argued that allowing these two assessors, who did not participate in the trial from the beginning, prejudiced the appellants' case by introducing unnecessary clarifications.

The learned counsel cited the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, where the Court stressed that such omissions vitiate proceedings. Similarly, in **Elibariki Malley v Salimu H. Karata**, Civil Appeal No. 67 of 2022,

the Court of Appeal emphasized the necessity of a chairman who sits with assessors to ensure that *"the assessors actively participate in the trial, that at the end of the hearing, each of the assessors files a written opinion, that the written opinion filed must be read over to parties before the judgment is composed and that those written opinions must be part of the record"*.

Applying the above principles, the learned counsel submitted that these omissions vitiated the proceedings of the DLHT and urged this court to nullify the proceedings, judgment, and decree, and order an expedited hearing before a new Chairperson.

Concerning the second point, Mr. Kitundu contended that Land Application No. 6 of 2015 of the DLHT is incurably defective for being instituted against a deceased person. The 1<sup>st</sup> respondent's death was reported on the 19<sup>th</sup> of August 2021, yet the trial continued on the 8<sup>th</sup> of November 2021 without his legal representative. This vitiated the proceedings from that date onwards, including the resultant judgment and decree.



Mr. Kitundu, further submitted that, according to Order XXII Rule 4 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E. 2022, (Cap 33) the suit could not proceed without joining the 1<sup>st</sup> respondent's legal representative. Additionally, under the Law of Limitation Act, Cap. 89 R.E. 2019, this application should have been made within 90 days, expiring in November 2021. After 90 days, the suit against the 1<sup>st</sup> respondent abated per Order XXII Rule 4(3) of Cap 33, rendering all subsequent proceedings null.

The learned counsel asserted that legally, only the deceased person's legal representative can sue or be sued on their behalf, as stipulated by Section 71 of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019. He cited the case of **Idd Nanda Bakari & Another v Kassimu Hamisi Nyantaba**, Misc. Land Application No. 63 of 2020, which reinforces that proceedings against a deceased person without a legal representative are null.

In **Singida Sisal Production & General Supply v Rofal General Trading Limited & 4 Others**, it was held that a non-juristic person cannot participate in legal proceedings. Similarly, in

**The Registered Trustees of the Seventh Adventist Church v Wazani Athumani (as Administrator of the Estate of the Late Athumani Siraji)**, Land Appeal No. 13 of 2022, the court nullified proceedings held after a defendant's death.

In **Mabongolo Luma and Khadija Abubakari Mwinyi v Peter A. Mlangi**, Civil Appeal No. 45 of 2019, the Court of Appeal emphasized the necessity of joining a legal representative in place of a deceased respondent. The Justices of Appeal held, the omission rendered the proceedings null and void.

Similarly, in **Godwin Charles Lemila v Slim Ndikoko and Likimbalonye Sereiyo**, Civil Appeal No. 20 of 2016, the Court of Appeal held that actions taken after the death of a respondent without joining their legal representative are null and void. The court exercised its revisional powers to quash such proceedings.

Given these precedents, the learned counsel concluded that the 1<sup>st</sup> respondent lacked the legal capacity to be sued. Since the application remained against a deceased person unable to defend himself, the proceedings were vitiated. The learned counsel



beseached this court to nullify the trial DLHT's proceedings, judgment, and decree, and order an expedited hearing before a new chairperson.

On the third issue, Mr. Kitundu submitted that originally, this suit before the trial Tribunal was instituted against the 7<sup>th</sup> appellant Bahati Imbe. However, he argued that the name Bahati Imbe is incorrect and does not refer to the then 5<sup>th</sup> appellant. After the death of the purported Bahati Imbe, the amended written statement of defence, WSD listed Benard Kasian Bahati as the administrator of the estate of the late Bahati Mjumbe. However, both names are incorrect, and the application was not amended to correctly include the administrator's name, contrary to Section 71 of Cap. 352, which requires administrators to sue or be sued on behalf of the deceased.

He further submitted that, according to the death certificate, the correct name of the deceased is Martin Bahati Mtimbe, which should have been impleaded in the application by the respondent. Mr. Kitundu submitted that the respondent was required to conduct due diligence and ascertain the correct names of the persons he

intended to sue. Consequently, no remedies or reliefs can be issued to Martin Bahati Mtimbe who was not a party to that suit. Furthermore, the decree issued cannot be executed against Martin Bahati Mtimbe or his legal representative because he was not a party to the suit. Despite the appellants' counsel drawing attention to this issue on the 19<sup>th</sup> of October 2022, the Tribunal chairperson overlooked these arguments and entered judgment against a non-existing person.

It is a fundamental legal principle that parties are bound by their pleadings. The respondent, incorrectly named the 7<sup>th</sup> appellant as Bahati Imbe. Consequently, any decree issued could not be executed against Benard Kasian Bahati, Martin Bahati Mtimbe, or his legal representatives.

The learned counsel cited the case of **Ally J. Mkokoya v Mohamed Bakari Matepwe**, Land Appeal No. 42 of 2019, which emphasized the necessity for the plaintiff to correctly identify the parties in a suit. The case emphasizes that the plaintiff must have the

proper *locus standi*, and the defendant must inform the court if a wrong person is sued.

The learned counsel therefore concluded that since the respondent sued the wrong person who had no capacity to be sued, there was no valid suit before the DLHT. This omission is fatal and vitiates the entire proceedings since 30<sup>th</sup> January 2015, along with the resultant judgment and decree. Consequently, he urged this court to strike out the application for being incompetent, allowing the parties to initiate a fresh application with the correct names if they wish to pursue their rights further.

On the last issue, Mr. Kitundu contended that the DLHT committed a significant anomaly by allowing the respondent to bring witnesses after his case had already been closed on the 15<sup>th</sup> of August 2017 and the defence case had been opened. He further submitted that the DLHT improperly invoked the provisions of Regulation 11(2) of the Land Disputes (The District Land and Housing Tribunal) Regulations, 2003.



He argued that Regulation 11(2) of the Land Disputes (The District Land and Housing Tribunal) Regulations, 2003 pertains to setting aside dismissal orders or *ex-parte* hearings, not to reopening a party's case that has already been closed and the opposite case being opened. Consequently, the evidence of AW2 and AW3 was improperly admitted and should be nullified and expunged.

For these reasons, the learned counsel prayed for this court to allow the appeal with costs, quash and set aside both the judgment and decree of the DLHT and declare the appellants as the lawful owners of the suit land.

Having reviewed the record and the submissions made by Mr. Kitundu, the primary question for determination is the propriety of the proceedings before the DLHT.

I would like to start with the first raised issue of whether the chairperson of the DLHT complied with Section 23(3) of the Land Disputes Courts Act, Cap 216 R.E 2019, which was invoked.

The records of the DLHT indicate that when the hearing commenced on 29<sup>th</sup> of March 2016, Mr. F. Mdachi presided over the

proceedings with two assessors, Mr. Said and Mrs. Mwanajohari, as required by Section 23(1) of Cap. 216. On that date, Goodluck Obed Lema testified as PW1. However, on the 3<sup>rd</sup> of January 2017, a new chairperson took over the proceedings, and on the 7<sup>th</sup> of February 2020, the matter was ordered to proceed under Section 23(3) of Cap 216. This section allows the proceedings to continue with one or without assessors if either or both members of the DLHT who were present at the commencement of proceedings are absent. On that date, two witnesses, Joyce Joseph Kibunga, AW2 and Sudi Rashid Maulid, AW3 testified, and no assessors were present. The respondent's case was closed.

On the 8<sup>th</sup> of November 2021, despite the absence of assessors in attendance, the appellants' witness, Ngobo Bundala RW1, was questioned by Mrs. Makala and Mr. Hanafi under what was termed as questions from the tribunal for clarification. Notably, these assessors were not present during the initial hearings and were not part of the quorum.

The composition of the DLHT typically includes a chairperson and at least two assessors, who are empowered to participate by asking questions and providing written opinions before the chairperson reaches a judgment, as stipulated by Section 23(1) and (2) of Cap 216. The Court of Appeal's decision in **Peter Makuri v Michael Magwega**, Civil Appeal No. 107 of 2019, reinforces this principle too.

However, as noted above, the chairperson is also allowed, under Section 23(3) of Cap 216, to proceed with the proceedings with one or without assessors if either or both members of the DLHT who were present at the commencement of proceedings are absent. On the 7<sup>th</sup> of February 2020, the chairperson invoked this section without providing reasons or informing the parties why she made this decision, however, in her judgment, she cited the transfer of the former chairperson as the reason for invoking this section. Subsequently, during this proceeding, when Ngobo Bundala, RW1 was testifying, she invited the two assessors, (Mrs. Makala and Mr.



Hanafi) who were not even recorded in the quorum, to seek clarifications.

This action raises concerns regarding the propriety of the proceedings. Mr. Kitundu argued that this omission vitiated the proceedings of the DLHT and urged this court to nullify the proceedings, judgment, and decree, and order an expedited hearing before a new chairperson.

However, despite invoking the provision of section 23(3) of Cap 216, the chairperson erred by allowing two assessors to participate in the proceedings by seeking questions for clarification. Complicating matters, these assessors did not participate in the proceeding when other witnesses presented evidence, and they did not participate further thereafter. Allowing their participation in this instance was an error on the part of the chairperson, deviating from the prescribed provision and potentially undermining the fairness and integrity of the proceedings. Despite lacking written opinions, their involvement was not sanctioned by law. Moreover, their inquiries, lacking a comprehensive understanding of the case, may have adversely

affected the parties' positions. Consequently, I concur with Mr. Kitundu's view that their involvement vitiated the proceedings.

Given these findings, the chairperson's decision to allow the assessors' participation and who were not present from the initial proceeding, contrary to the provisions of Section 23(3) of Cap 216 which she had invoked, tainted the proceedings. Since this issue suffices to determine the matter before this court, I will not address the other issues raised.

Therefore, this court invokes its revisional powers under Section 43(1)(b) of Cap 216. The proceedings, judgment, and decree of the DLHT are nullified. The matter is ordered to be remitted to the DLHT for an expedited hearing before a new chairperson and a set of assessors. Each party is to bear its costs.

It is so ordered.

**DATED** at **TANGA** this 5<sup>th</sup> day of June 2024.



  
H. P. NDESAMBURO

**JUDGE**