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

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 230 OF 2020**

*(Arising from Land Application No. 97 of 2016 of the District Land and Housing Tribunal for Kilombero/Malinyi District at Ifakara as per C. P. Kamugisha Chairperson, dated 07/10/2020*

**REGISTERED TRUSTEES OF THE SEVENTH DAY ADVENTIST CHURCH OF TANZANIA.....APPELLANT**

**VERSUS**

**PHILEMON OTIENO.....1ST RESPONDENT**

**DANIEL KILELA.....2ND RESPONDENT**

**JUDGMENT**

*Last order 25/6/2021*
*Judgment 2/7/2021*

**B.E.K. MGANGA, J**

On 10th October 2016 Philemon Otieno, the herein 1st Respondent, filed Application No. 97 of 2016 in the District Land and Housing Tribunal for Kilombero/Malinyi District at Ifakara against ***Sabbath Adventist Church*** as the 1st Respondent and Daniel Kilela as the 2nd Respondent claiming (i) to be the lawful owner of a disputed piece of land situated at Mbingu area within Kilombero District, (ii)that sale agreement between the

Respondents be declared null and void, (iii) eviction and demolition the house built by the 1st Respondent over the disputed land, and (iv) permanent injunction against the Respondents and their agents. In his application, the 1st Respondent alleged that he purchased the disputed land from one Sudi Mwema in June 1993 and built a house thereon. That in **2005** he left the area to Morogoro for schooling leaving the said house to be taken care Pastor Wanjara. He alleged further that, sometimes in ***2005***, the Appellant trespassed on that land, demolished the house and build another house for the pastor.

On 21st May 2016 ***Sabbath Adventist Church*** (the 1st Respondent by then) filed a written statement of defence and two preliminary objections namely; (i) that the application is bad in law and unmaintainable for having no cause of action against the 1st Respondent, and (ii) the suit is bad in law and unmaintainable for the reason of non-joinder of necessary party. In the said written statement of defence, the 1st Respondent (by then) stated that she is the rightful owner of the disputed land as she bought the same from Daniel Kilela (2nd Respondent) and yustina Kilela, the co-owners who, before selling to her, bought it from Peter Maganga. A sale agreement between the 1st Respondent (by then) and the said said co-owners was attached to the written statement of defence.

On 19th December 2016, Daniel Kilela (the 2nd Respondent) filed his written statement of defence together with three (3) preliminary objections

namely; (i) that the Applicant has no cause of action against the 2nd Respondent, (ii) that, the suit is bad in law and unmaintainable for the reason of non-joinder of necessary party, (iii) that, the suit is prejudicial to the 2nd Respondent for not being annexed with annexture stated under paragraph 6(b) of the application. In the said written statement of defence, the 2nd Respondent stated that he purchased the disputed land from Peter Maganga who bought it from Benjamini Ayengo. Copies of sale agreements were also attached to the written statement of defence.

On 6th February 2018 the Chairperson of the Tribunal ordered the preliminary objections be disposed of by way of written submissions, the order which was complied with by the parties. On 23rd march, 2018 the Tribunal scheduled the ruling on the Preliminary objections to be delivered **on 21st May 2018.** I will discuss later on as to what happened on 21st May 2018.

On 30th May 2018 Philemon Otieno, the herein 1st Respondent, as an Applicant, purportedly, ***complying with the order of the Tribunal dated 21/5/2018,*** filed in the Tribunal an amended application No. 97 of 2016 against ***The Registered Trustees of Seventh Day Adventist Church of Tanzania***, the herein Appellant as the 1st Respondent and Daniel Kilela, the herein 2nd Respondent who was also the 2nd Respondent in that application. On 29th June 2018 the Appellant and the 2nd Respondent filed a joint written statement of defence stating *inter-alia* that, **Peter Maganga Ngusa** bought the disputed land from **Benjamin Isaack Ayengo** who had instructions from the Applicant that is to say the herein 1st Respondent to dispose the said land. Information was provided

that the said **Benjamin Isaack Ayengo** is the uncle of the 1st Respondent and that he resides at Gongolamboto, Dar es salaam. After completion of trial, the Tribunal delivered it judgment and decree in favour of the 1st Respondent. In the decree, ***the Appellant was ordered to pay TZS 15,000,00/=(sic) as loss the Applicant (the herein 1st Respondent) incurred as a result of living out of the said suit house and paying rent.*** The appellant being aggrieved by the said judgment, decree and order has filed 7 grounds of appeal to this court namely;

> *That the trial Chairman being informed that the Appellant herein was a 4th purchaser of the suit land he erred in law and fact to entertain the matter while the 1st vendor and the 2nd who were known to the 1st Respondent were deliberately not joined in Land Application No. 97 of 2016 of the district Land and Housing Tribunal for kilombero/Malinyi district at Ifakara.*
>
> *That the trial Chairman being informed that the 1st the vendor of the suit land one Benjamini Ayengo was an uncle of the 1st Respondent he erred in fact and law by failing to condemn the 1st Respondent for not joining the said Benjamini Ayengo to the suit who disposed the land to one another vendor and not to the Appellant.*

*The trial Chairman erred in law and fact by failing to ascertain the exact date and month in 2005 when the 1st Respondent was in occupation of the suit land.*

*The trial Chairman erred in law and fact by failing to record the evidence of the Appellant as adduced by DW1 that they purchased the suit land in 2005 instead of 2014 as per evidence of DW1.*

*The trial Chairman erred both in law and fact as to the identification of the location of the suit land.*

*The trial Chairman erred in law and fact to denounce the validity of the purchase of the Appellant for the suit land by leaving the 1st purchaser, 2nd purchaser and 3rd purchaser's title to the same land unquestioned.*

*The trial Chairman erred in law and fact to decree on reliefs which were not prayed by the 1st Respondent.*

When this appeal was called for hearing, the Appellant enjoyed the service of Isaack Tasinga advocate being assisted by Grady James advocate while the 1st Respondent appeared in person. Mr. Tasinga advocate informed the court that the 2nd Respondent was served but he was unable to appear because he has been sick for a long time. That due to sickness, he didn't testify at trial as a result his wife testified on his

behalf. On the other hand, the 1st Respondent was of the same view and added that during trial, medical documents were tendered to that effect. They therefore prayed to proceed with hearing of the appeal. I went through the proceedings to verify what the parties has informed and find that it was correct. I therefore made an order for this an appeal to proceed in the absence of the 2nd Respondent.

Let me start with ground No. 7 that the trial Chairman erred in law and fact to decree on reliefs which were not prayed by the 1st Respondent. Mr. Tasinga advocate for the Appellant submitted that the application that was filed in the tribunal by the 1st Respondent did not contain general damages. That to the surprise of the Appellant, the decree shows that the 1st Respondent was awarded general damages of ***TZS 15,000,00/=*** (sic) only. He went on that, both parties were not afforded time to argue on it during trial as a result the Appellant was denied right to be heard. He therefore prayed the judgment, proceedings and decree be nullified. On addressing this ground, the 1st Respondent readily conceded that there was no prayer of general damages in his application and that parties were not afforded chance to make submissions thereto.

I have painstakingly perused proceedings of the Tribunal only to find that general damages were neither prayed for by the 1st Respondent in the application he filed on 10th October 2016 with orders mentioned in the first paragraph of this judgment nor in the amended application filed on 30th

May 2018 purportedly ***complying with the order of the Tribunal dated 21/5/2018.*** Proceedings does not show that parties were called to make comments or submissions on this aspect. Worse, this amount is neither reflected in the proceedings nor in the judgment. It is only found in the decree. The proceedings show that ***on 10th August 2020*** the tribunal informed the parties that judgment will be delivered on ***16th September 2020***. Proceedings for 16th September 2020 shows as herender:-

*Date: 16/9/2020*

*Coram C.P. Kamugisha C/man*

*Applicant – present*

*Respondent – present*

*Tribunal – the matter is for the judgment but the same is not ready for today let another date for the judgment be fixed*

*Order-* ***judgment on 7/10/2020***

*Sgn*

*16/9/2020*

Upsettingly, there is no any other date showing that the tribunal dealt with this case. It is not indicated in the proceedings as to when the judgment was delivered and before who. The only inference as to the date the judgment was delivered is the date on the judgment itself. The money amounting to ***TZS 15,000,00/=(sic)*** that the Appellant was ordered to pay the 1st Respondent appearing in the decree ***as loss the Applicant (the herein 1st Respondent) incurred as a result of living out of the said suit house and paying rent*** is not reflected in the judgment. It is

therefore not known as to how it came in the decree. As it was conceded to by both parties during hearing of this appeal that, general damages were not amongst the reliefs that were prayed for by the 1st Respondent, and also conceded that they were not afforded right to be heard, it was wrong for the Tribunal to insert that amount in the decree without even showing in the judgment the reasons thereof. This is irregular and cannot be accepted. For the foregoing, I allow this ground of appeal.

Submitting on grounds No. 1, 2 and 6, counsel for the Appellant said that the trial tribunal erred in law and fact for failure to order to join he 1st and 2nd vendors in the case. He submitted that, practice of our courts is that, when the buyer is sued in court, the seller(s) has to be joined at any stage of the case. He went on that failure of joining them amount to misjoinder of part that vitiates the proceedings. He cited the case of ***Juma B. Kadala V Laurent Mkande [1983] TLR 103*** and that of ***Christina J. Mwamulima and another Vs. Henry J. Mwamulima and others,*** Land case No. 19/2017 (unreported) to bolster his argument. Counsel for the Appellant submitted that on the case at hand, **Benjamin Ayengo,** who is uncle of the 1st Respondent sold the disputed land to Peter Maganga Ngusa and the said Peter Maganga Ngusa sold the same to Daniel Kilela, the 2nd Respondent who sold the same to the Appellant. He concluded that the appellant was the 4th purchaser. But the application was brought against the Appellant and 2nd Respondent only. He prayed these grounds also be allowed.

Submitting on grounds No. 1, 2 and 6, the 1st Respondent argued that both his evidence and that that of his witnesses was strong enough to justify him to be the owner of the disputed land. He submitted that the 2nd Respondent sold the disputed area to the Appellant using forged documents. He conceded that he knows one **Benjamini Ayengo** who is his uncle and the said Benjamini Ayengo resides at ukonga Dar es salaam. He admitted also that in the proceedings, Daniel Kilela (2nd Respondent) showed that he bought the disputed land from **Mr. Peter Ngusa** and that the later that bought from it from **Benjamini Ayengo**. The 1st Respondent conceded further conceded that, he did not join **Benjamini Ayengo** in the land application he filed before the Tribunal. He was quick to submit however, that, the land ***that was sold by Peter Ngusa and Benjamini Anyengo is at Londo area while the disputed area is at Vigaeni area.*** He said that all these persons were mentioned in the proceedings. He was of the view that, the Appellant and the 2nd are the ones who were under duty to join the aforementioned persons as Respondents and not himself. He concluded his submission by praying these grounds be dismissed.

The issue of non-joinder of parties was raised as preliminary objections by ***Sabbath Adventist Church (the 1st Respondent by then)*** on 21st May 2016 at the time of filing the written statement of defence. Throughout hereinabove I was referring to ***Sabbath Adventist Church as "the 1st Respondent by then"*** for reasons nearly to follow. The same preliminary objection was raised by the 2nd Respondent on 19th

December 2016 by the 2nd Respondent. I have examined proceedings of the tribunal and find that on 23rd March 2018 parties were ordered argue all preliminary objections including the one relating to non-joinder of parties by way of written submission. Ruling on the preliminary objections was schedule to be delivered on the 21st May 2018. The proceedings on 21st May 2018 and 18/6/2018 reads:-

***21/5/2018***
*Coram: L. R. Rugarabamu c/m*
*Appl present*
*Resp 1. Richard Mafwili for*
*2. Absent/ yusta Kilela for*
*Tribunal:*

***18/6/2018***
*Coram: L. R. Rugarabamu C/m*
*App/ present*
*Resp 1.*
*2. All present*
*Order: Mn on 2/7/2018*
*c/m*
*18/6/2018*

Proceedings does not show that the said ruling was delivered or not. What is clear is that there is a piece of paper that has no date and is not signed with heading **"RULING".** In the said paper, Mr. Isaack Nassor Tasinga is recorded arguing that the correct name of ***Sabbath Adventist Church as "the 1st Respondent by then"*** is ***Seventh Day Adventist Church of Tanzania*** and that can only be sued through its Registered trustee. It is recorded in the same paper that the applicant was arguing

that misspelling of the name is not fatal. It is not indicated in the so-called ruling how this issue was resolved. The last paragraph of that paper reads:-

> *"As to the second point of preliminary objection the learned counsel for the Respondent has argued that the* ***Applicant has sued the 1st Respondents (sic) who is the ultimate buyer and left behind about two (2) persons who were the immediate vendors of the suit land who is the Applicant's uncle one Benjamini Ayengo and Benjamini Ayengo did sell a suit land to one Peter M. Ngusa also who sold the suit land to the 2nd Respondent and 2nd Respondent sold it to the 1st Respondent".***

As quoted above that is the end of the so-called ruling. In the said paper, it is not indicated as to whether the issue of non-joinder of parties was resolved by the Tribunal. This is irregular. It was not proper for the trial to proceed in absence of a ruling to resolve preliminary objections raised by the parties. The tribunal was supposed rightly or wrongly to dismiss or uphold those preliminary objections before calling parties to proceed with trial as if not preliminary objections were raised. In absence of the ruling, it is not indicated in the proceedings as to when the 1st Respondent was allowed to file an amended application and substitute the name "***Sabbath Adventist Church as "the 1st Respondent*** *with* ***The Registered Trustees of Seventh Day Adventist Church of Tanzania,*** the Appellant. The 1st Respondent filed the said amended Application claiming to so pursuant to the **Tribunal's order dated 21/5/2018.** As pointed herein above, there is no order of the tribunal issued on that date.

This explains as to why I said the amended Application was filed by the 1st Respondent purportedly in compliance with tribunal's order. All in all, this shows how the tribunal mishandled this matter.

In ***Juma Kadala's*** case (supra), this court had an opportunity to discuss the effect of non-joiner of parties in the case involving ownership of land in circumstances similar to the one at hand and held:- in a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant; non-joinder will be fatal to the proceedings"

I also associate myself with that position. All persons who were mentioned to have sold the land in dispute to the other until when it ended in the hands of the Appellant were supposed to be joined as Respondents. That duty was on the 1st Respondent and not otherwise. I therefore me allow grounds No. 1, 2 and 6.

During hearing of this appeal, I asked counsel for the Appellant and the 1st Respondent to address whether the procedure of visiting locus in quo was adhered to or not. I asked the parties to address this issue because there was a debate as to the location of the disputed land. The 1st Respondent was alleging that the land that was sold to the Appellant was at **Londo** and that his was at **Vigaeni** both at **Mbingu area** but the Appellant and 2nd Respondent argued the land in dispute was at **Vigaeni at Mbingu** area. Counsel for the Appellant submitted that the procedure

was not followed as there we no min trial on the locus in quo. He went on that; it is not mentioned in the judgment that there was visit at locus in quo. The 1st Respondent, when asked to explain what happened at the locus in quo, submitted that the trial Chairman asked him to show the disputed area and did so. Thereafter Mafwili and Kyando on behalf of the Appellant responded to questions that were raised by the tribunal. At the end, he (1st Respondent) remained at home as the tribunal Chairperson told them to wait for judgment date. The Tribunal Chairperson left.

I have scrutinized the proceedings and find that the visit was done without focus as it did not resolve the location of the land in dispute i.e Londo or Vigaeni both at Mbingu area. I have also found that after the visit at the locus in quo, the tribunal did not reassemble in the court room to consider the evidence obtained in the visit, it didn't inform the parties as to what facts were gathered in the said visit, parties and their advocates were not given right to give their opinions about the findings gathered from that visit and no notes were taken by the Tribunal. This was in violation of the guideline and procedure pointed out by the Court of Appeal in the case of ***Nizar M.H. Ladak vs. Gulamali Fazal [1980] T.L.R29*** and ***Sikuzani Saidi Magambo and another vs. Mohamed Roble, Civil Appeal No. 197 of 2018, CAT (unreported).*** In the Nizar's case (supra) outlined the guideline and procedure as follows:-

> "***When a visit to a locus in quo is necessary*** *or appropriate, and as we have said, this should only be in necessary in exceptional cases,* ***the***

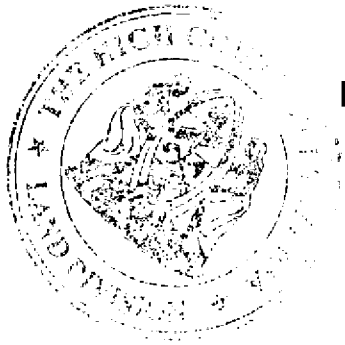
> ***court should attend with the parties and their advocates****, if any, and with much each witnesses as may have to testify in that particular matter...* ***When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts,*** *if they are relevant, and the court only refers to those notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future".*

In **Sikuzani's (supra),** the Court of Appeal after quoting the above passage, examined the proceeding of the Tribunal and found that the Tribunal never reconvened or reassembled in the court room to consider the evidence obtained from the visit and, that notes were not taken. The court held that those irregularities vitiated the trial and occasioned a miscarriage of justice. The court of Appeal nullified the entire proceedings.

For all what I have pointed out herein, I hereby nullify the entire proceedings and quash the judgment, decree and subsequent orders thereof. If parties are still interested are at liberty to institute a fresh application before the Tribunal subject to the Law of Limitations Act. Since

this point has disposed of the whole appeal, I have not considered the ground of appeal filed by the Appellants for an obvious reason that proceedings are nullified. No costs awarded.

It is so ordered.



**B. E.K. Mganga**
**JUDGE**
**2/07/2021**