

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPEAL NO.99 OF 2021

(Arising from the District Land and Housing Tribunal for Ilala at Ilala in
Land Appeal No.77 of 2020, originating from Ward Tribunal for Zingiziwa in
Land Case No.214 of 2020)

SALEHE SALUM MWIMBA APPELLANT

VERSUS

HULUKA SAID JUMA RESPONDENT

JUDGMENT

Date of Last order: 08.11.2021

Date of Judgment: 16.11.2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Zingiziwa in Land Dispute No. 214 of 2020 and arising from the District Land and Housing Tribunal for Ilala in Land Appeal No. 77 of 2020. The material background facts to the dispute are briefly as follows; Salehe Salum Mwimba, the appellant instituted a case at the Ward Tribunal quarantine against Huluka Said Juma claiming that the

respondent has invaded his land, demolished his fence, and uprooted the appellant's vegetables and they constructed a tank. The matter was reported to the trial tribunal whereas the Ward Tribunal determined the matter *ex parte* against the respondent. In the process of executing the order of the Ward Tribunal at the District Land and Housing Tribunal, it was noted that the name of the respondent was different. The matter was remitted back to the Ward Tribunal for rectification of the respondent's name. At the hearing of the case at the trial tribunal the Huluka Said Juma appeared at the tribunal and defended his case. He claimed that he is the lawful owner of the suit land. The trial tribunal decided in favour of the respondent.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Ilala at Ilala vide Land Appeal No.77 of 2020 complaining that the trial tribunal contravened the directives of the District Land and Housing Tribunal. He also complained that the trial tribunal faulted itself to determine the matter without involving a necessary party in the suit. The District Land and Housing Tribunal upheld the decision of the trial tribunal and maintained that the respondent is the lawful owner of the suit land.

The first appeal irritated the appellant. He thus appealed to this court through Land Appeal No. 87 of 2021 on three grounds of grievance, namely:-

- 1. The Honourable Tribunal erred in law and fact for failure to consider that the said Tribunal had directed the Zingiziwa Ward Tribunal on 19th February, 2019, to conduct the suit of the parties afresh whereby the respondent had to bear the name of Huluka S. Juma.*
- 2. The Honourable trial Tribunal erred in law and fact by confusing contents submission filed by the applicant in respect of directives of the same Tribunal in line with the respondent's name that is Huluka S. Juma which had to appear in the suit instituted at Zingiziwa Ward Tribunal.*
- 3. The Honourable Tribunal erred in law and fact for failure to consider that non joinder of the seller of the suit land was incurable defect for the whole proceedings adjudicated by Zingiziwa Ward Tribunal.*

When the appeal was called for hearing on 06th October, 2021, both parties appeared in person unrepresented. By the court order, the appeal was argued by way of written submissions whereas, the appellant filed his submission in chief on 06th October, 2021 and the respondent was

supposed to file his reply on 15th October, 2021 but he did not comply with the court order.

The settled position that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the respondent, the consequence is to order that the matter be heard ex-parte. This position is consistent with the Court of Appeal's holding in **National Insurance Corporation of (T) Ltd & Another v Shengena Ltd**, Civil Application No. 20 of 2007 (unreported), the Court of Appeal of Tanzania held:-

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

See also the cases of **Tanzania Harbours Authority v Mohamed R. Mohamed** [2002] TLR 76; **Patson Matonya v. Registrar Industrial Court of Tanzania & Another**, Civil Application No. 90 of 2011 Court of Appeal of Tanzania; **Oiam Tanzania Limited v Halawa Kwiiabya**, Civil Appeal No. 17 of 1999; and **Geoffrey Kimbe v Peter**

Ngonyani, Civil Appeal No. 41 of 2014 Court of Appeal of Tanzania (all unreported). In consequence of the foregoing, it is ordered that the matters be determined *ex-parte* against the respondent.

In his submission, the appellant opted to combine and argue the first and second grounds of appeal together and the third ground separately.

On the first ground, the appellant challenged the decision of the 1st appellate tribunal for upholding the decision of the trial tribunal which in his view failed to comply with the directives of Ilala District Land. the appellant submitted that the trial tribunal delivered an *ex-parte* judgment in favour of the appellant and against one Agawa. He went on to submit that during execution No. 69 of 2018 at the District Land and Housing Tribunal the respondent Agawa appeared at the tribunal and claimed that his name was Mr. Huluka S. Juma. It was the appellant's further submission that the District Land and Housing Tribunal through its letter dated 19th February, 2019 with Ref. No. IDLHT/CR2019/06, directed the trial tribunal to conduct trial *de novo*.

From the applicant's contention, the issue for determination is whether the appeal is meritorious. I have opted to combine the first and second grounds. The appellant is challenging the decision of the DLHT for failure

to comply with the directives of Ilala District Land and Housing Tribunal which directed the trial tribunal to conduct a trial denovo.

I have revisited the District Land and Housing Tribunal for Ilala records and noted that Hon. Mgulambwa, the Chairman of the District Land and Housing Tribunal for Ilala wrote a letter dated 19th February, 2019 to the Chairman of Ward Tribunal of Zingizwa. The Chairman quashed the decision of the trial tribunal and ordered the matter to be heard afresh. The records further reveal that the Ward Tribunal in Land Cause No. 241 of 2020 determined the matter and the parties were Salehe Salum Mwimba v Huluka Said Juma. The main concern of the appellant is the second name Said instead of using initial S only. In my view, the appellant's concern was supposed to be raised at the trial tribunal before the hearing of the case.

Moreover, the respondent himself did not dispute his name, and the matter was decided in favour of the respondent. Therefore he is the one who will execute the trial tribunal order. I do not find any reason to differ from the appellate tribunal findings. Therefore, this ground is devoid of merit.

On the third ground, the appellant is complaining that the trial tribunal erred in law to proceed with the hearing without joining the seller who

was a necessary party. The Court of Appeal of Tanzania in the Abdullatif Mohamed Hamisi v. Mehboob Yusuf Othman and Another, Civil Revision No. 6 of 2017, CAT at Dar es Salaam (unreported) defined a necessary party in the following words which I quote for a readymade reference:

*"...a necessary party is one in whose absence no effective decree or order can be passed. Thus, 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 the relief claimed as well as **whether or not, in the absence of the party, an executable decree may be passed.**"*

Applying the above authority in the instant appeal, the question is whether it was necessary to join the seller in this case. It is worth noting that the choice of whom to sue, lies on the applicant of the plaintiff who has the duty to show the cause of action against the person who she/he sues. In the matter at hand, the appellant chose the respondent as the proper person to sue. Before and during the hearing the appellant did not raise his concern that the seller was a necessary party to be sued.

The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action. In the

matter at hand, the respondent was a necessary party to the suit since he is the one alleged to have trespassed the appellant's piece of land. He is the one who was bound by the result of the action but not the seller. In the case of **Amon v. Raphael Tuck and Sons** (1956) 1 ALL ER. 273. The Supreme Court observed that:-

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party...it is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally- that is by curtailing his legal rights." [Emphasis added].

In my further view, the rationale for the holding in **Amon's** case is that the only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action. In the instant case apart from the first reasoning that the appellant is the one who instituted the case at the trial tribunal and opted not to use the seller, the seller was not bound by the results of the action. Therefore, the

appellant cannot come before this court and claim that the seller was a necessary party to be joined. His claims are an afterthought and cannot be considered by this court.

Following the above findings and analysis, I find that there is no merit in these grounds of grievance. That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with both tribunals' findings. Therefore, I proceed to dismiss the appeal without cost.

Order accordingly.

Dated at Dar es Salaam this date 16th November, 2021.




A.Z.MGEYEKWA

JUDGE

16.11.2021

Judgment delivered on 16th November, 2021 in the presence of the appellant in the absence of the respondent.




A.Z.MGEYEKWA

JUDGE

16.10.2021

Right of Appeal fully explained.