

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

MISC. LAND APPEAL NO.70 OF 2022

(Arising from the District Land and Housing Tribunal for Kisarawe at
Kisarawe in Misc. Land Application No.138 of 2021 originating from the
Ward Tribunal of Kiluvya in Land Dispute No.07 of 2021)

NALONGWA ZAKARIA SHILA APPELLANT

VERSUS

SIMON MAMUYA 1ST RESPONDENT

WILLIAM LEVISON 2ND RESPONDENT

JUDGMENT

Date of last Order: 28.10.2022

Date of Judgment: 31.10.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Kiluvya in Land Dispute No.07 of 2021 and arising from the District Land and Housing Tribunal for Kisarawe in Land Application No. 138 of 2021.

The material background facts to the dispute are briefly as follows; Simon Mamuya, the 1st respondent instituted a case at Kiluvya Ward Tribunal against William Levison, the 2nd respondent. The 1st respondent claimed

that he is the lawful owner of the suit land measuring 10 acres. He acquired the suit land from the Village Government in 1990 by that time the land was a forest. In 2020, he noted that the 2nd respondent has constructed a base in his plot when he asked him, the 2nd respondent informed him that he bought the suit land from the appellant. The 2nd respondent claimed that he bought a piece of land in 2015 measuring 30m x 25m from Nalongwa, the appellant. The appellant was summoned to testify and claimed that the 1st respondent is not his neighbour he wondered where he acquired it. The trial tribunal decided the dispute in favour of the 1st respondent.

Dissatisfied, the appellant lodged a revision at the District Land and Housing Tribunal for Kisarawe claiming that he was not joined as a party to the case. The 1st respondent's counsel submitted that the appellant was called to testify in court therefore he was given the right to be heard. The first appellate tribunal decided the matter in favour of the respondent. The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on one ground of appeal as follows:-

- 1. That, the Honourable Chairman erred in law and in fact to hold that it was not necessary to join the necessary party (appellant) to the case.*

When the appeal was called for hearing on 28th October, 2022 the appellant enlisted the legal service of Mr. Elipidius Philemon, learned counsel. The 1st respondent enjoyed the legal service of Mr. Daniel, learned counsel, and the 2nd respondent appeared in person, unrepresented.

In support of the appeal, the appellant's counsel began to narrate the genesis of the matter which I am not going to reproduce in this appeal. Mr. Elipidius contended that the appellant was a necessary party in the case hence this appeal. He argued that the 1st respondent testified to the effect that in 1999, he was allocated ten acres of land by the Village Council while the appellant purchased the suit land in 1996. He asserted that the dispute involved the 1st respondent and appellant. It was his view that to do justice then the matter be determined by involving the vendor who sold the suit land to the 2nd respondent.

He added that the first respondent contended that he was allocated the suit land by the Village Council but the Village Council was not part of the case. He supported this contention by citing the decisions in **Constantine B. Assenga v Elicabeth Peter**, Civil Appeal No. 70 of 2019 CAT (unreported). He submitted that the Court of Appeal of Tanzania discussed the issue of the necessary party and the Court nullified all the

decisions and ordered the necessary party be joined. Mr. Elipidius went on to submit that the in circumstances of the case at hand, there is nowhere the same could be determined without joining the appellant. He insisted that the vendor was required to defend his case. To bolster his argumentation he cited the case of **Constantine B. Assenga** (supra), the Court of Appeal of Tanzania cited with approval the case of **Amon v Raphael Track and Sons** (1956) I ALL ER 273. Mr. Elipidius continued to argue that the vendor's interest was jeopardized, and the tribunal could compel him to give the 2nd appellant another piece of land. To buttress his contention he referred this Court to the case of **Constantine B. Assenga** (supra), the Court of Appeal of Tanzania cited with approval the case **Farida Mbaraka & Farid Ahmed Mbaraka v Domina Kagaruki**, Civil Appeal No. 136 of 2006.

In conclusion, the learned counsel for the appellant beckoned upon this Court to nullify, quash and set aside the trial tribunal Judgment, proceedings remit the file to the trial tribunal to start afresh by ordering necessary parties be joined.

In reply, the 1st respondent's counsel confutation was strenuous. Mr. Daniel came out forcefully and defended the trial tribunal decision as sound and reasoned. He stated that the law is clear as to who is the

necessary party and the circumstances when the necessary party needs to be joined. He stated that a necessary party is a person whose presence of the Court is necessary for its effective and complete adjudicate upon the questions involved in the suit that the Court cannot do so without his presence. Supporting his stance he cited the case of **Christina Jalison Mwalima & another v Henry Jalison Mwalima & 6 others**, Land Case No. 19 of 2017 High Court at Mbeya. Mr. Daniel submitted that the applicant was not a necessary party, hence has no right to claim any relief (s) in the suit land as the land was already been transferred to the 2nd Respondent.

The learned counsel for the 1st respondent contended that the appellant could have been a necessary party to the case only if the 2nd respondent could be the one who instituted the case at the Ward Tribunal. He added that then the 2nd respondent could join the vendor. Mr. Daniel went on to argue that the 2nd respondent called the appellant as a material witness at the Ward Tribunal, he testified to the effect that he sold the suit land to the 2nd respondent. He added that there is no any new fact for the appellant to tell the court, hence, the appellant does not qualify to be a necessary party because he was accorded the right to be heard. To buttress his contention he cited the case of **Felisi Sekaluzwe v Patrick Semkonda**, Land Appeal No. 49 of 2019 at the High Court Mbeya Registry. Mr. Daniel

spiritedly submitted that they maintain that the appellant is not a necessary party and the issue of the Village Council joining as a necessary party cannot stand since he had an opportunity at the early stage to make his prayer joining the Village Council, but he has raised his prayer before the second appellate court. Mr. Daniel distinguished the cited case of **Constantine** from the case at hand, in the cited case, the Court realized that the suit land changed from Plot No. 506 Block 'H' to Plot No. 2164 and the same was allocated to a Judicator Jelly who was not a party to the case, hence the court found that it was necessary for him to join.

On the strength of the above submission, Mr. Daniel beckoned upon this Court to dismiss the appeal.

In his rejoinder, the counsel for the appellant maintained his submission in chief. He stressed that the appellant has an interest in the suit land because he sold it to the 2nd respondent hence the appellant is required to prove how he owned the suit land. Regarding the issue of joining the Village Council, he stated that although the same was not raised as a ground of appeal, it is clear that the Village Council who allocated the suit land to that 1st respondent is also a necessary party to enable the tribunal effectively determine the ground of ownership.

I have subjected the rival arguments by the learned counsel for the appellant to the serious scrutiny they deserve. Having so done, I think, the bone of contention between them hinges on the question of *whether the appellant had good reasons to warrant this court to allow his appeal.*

In the matter at hand, the sole ground of appeal, the appellant is faulting the District Land and Housing Tribunal for failure to hold that the appellant was a necessary party to the case.

I have gone through the trial and appellate tribunals' records and noted that the 1st respondent lodged a suit against the 2nd respondent. The 1st respondent sued the 2nd respondent because he was the alleged owner of the suit land. It is worth noting that the choice of whom to sue, lies on the applicant of the plaintiff who must show the cause of action against the person who she/he sues. In the matter at hand, the respondent chose the appellants as the proper persons to sue. 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].

Applying the above authority in the matter at hand, it is clear that the ownership of disputed land according to the 1st respondent did not feature the necessity of including the appellant. Consequently, since the suit land was transferred from the vendor to the 2nd respondent that means the 2nd respondent was the owner of the suit land and he was the right person to be sued. Consequently, the appellant has no right to challenge the issue of ownership anymore.

For the sake of clarity, the cited cases Constantine (supra) is distinguishable for the reason that in the cited cases, the Court of Appeal of Tanzania found that one Judica Teri was a necessary party to be joined to the case because he was connected in respect of the ownership of Plot No. 214 which was alleged changed from Plot No. 506. While in the case at hand the vendor was not a party to the case but he was called to testify, therefore, the trial tribunal effectually and completely adjudicate the issue of ownership.

I have considered the fact that although the appellant was not a party to the case at the trial tribunal, he was summoned as a material witness to testify at the trial tribunal. For ease of reference, I reproduce the testimony of SM1 as hereunder:-

“Mimi ndiye niliyemuuzia ndugu William Levison eneo lenye ukubwa wa 35m x 25m kwa Tshs. 2,5000,000/=... eneo analodai ni lake sio lake na la jirani yangu mimi sipakani na huyu mdai na sijui amepata eneo hilo wapi.”

In the above excerpts, it shows clearly that the appellant was summoned to testify and he testified in favour of the 2nd respondent, therefore, the appellant cannot claim that he was deprived of his right to be heard. Regarding the issue of joining the Village Council, the counsel for the 1st respondent in his submission strongly opposed this issue for the reason that Mr. Elipidius has raised this ground for the first time at the second appellate Court. I have perused the appellate tribunal records and noted that Mr. Elipidius in his Written Submission dated 8th December, 2021 did not raise the issue of joining the Village Council as a necessary party to the case. Therefore, I respectively agree with the learned counsel for the 1st respondent that it is not proper to raise a ground of appeal in a higher court based on facts that were not canvassed in the lower courts.

As a rule, for the Court to be clothed with its appellate powers, the matter in dispute should first go through lower courts or tribunals. The Court of Appeal of Tanzania in the case of **Haji Seif v Republic**, Criminal Appeal No.66 of 2007 held that:-

*“Since in our case that was not done, this Court lacks jurisdiction to entertain that ground of appeal. We, therefore, do not find it proper to entertain that **new ground of appeal** which was raised for the first time before this court.” [Emphasis added].*

Applying the above authority in the instant appeal it is vivid that the issue of joining the Village Council has been raised for the first time before this Court. Therefore, I am not in a position to entertain a new issue that is raised for the first time before the second appellate Court. Therefore, the issue of joining necessary parties is unfounded.


That said and done, I hold that in the instant appeal there are no extraordinary circumstances that require me to interfere with the findings of both tribunals. Therefore, I proceed to dismiss the appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 31st October, 2022.


A.Z. MGEYEKWA
JUDGE
31.10.2022


Judgment delivered on 31st October, 2022 via video conferencing
whereas both learned counsels were remotely present.

A.Z.MGEYEKWA
JUDGE
31.10.2022

Right of Appeal fully explained.