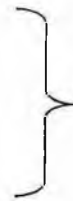


**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO.139 OF 2021**

(Arising from the District Land and Housing Tribunal for Ilala n Land
Appeal No.57 of 2018, originating from Ward Tribunal for Pugu in Land
Case No.52 of 2017)

1. PASTORY HENRY
2. YOHANA KILAVE
3. RUMISHA NGOWO



..... APPELLANTS

VERSUS

WEMA GEMA RESPONDENT

JUDGMENT

Date of Last order: 16.11.2022

Date of Judgment: 23.11.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Pugu in Land Dispute No.52 of 2017 and arising from the District Land and Housing Tribunal for Ilala in Land Application No. 57 of 2018. The

material background facts to the dispute are briefly as follows; the appellant instituted a suit at the trial tribunal against the respondent. The appellants requested the trial tribunal to order the respondent to demolish a wall that blocked the access to pass through. They claimed that the respondent be ordered to leave 2 ½ meters open as a passway to the citizens. The trial tribunal decided the matter in favour of the appellants and the respondent was ordered to demolish the said wall.

The appellant lodged an Execution Application before the District Land and Housing Tribunal in the course of executing the decree of the trial tribunal the respondent's counsel submitted to the effect that the suit land is surveyed. Among other things, the District Land and Housing Tribunal in its decision stated that there is no evidence that the suit premises is surveyed. The Chairman *suo motu* determined the matter and ended up nullifying the decision of the trial tribunal.

The decision of the District Land and Housing Tribunal did not amuse the appellant. He decided to challenge it by way of appeal before this court on six grounds of appeal as follows:-

1. *That, the District Land and Housing Tribunal erred in law and fact by quashing and setting aside the proceedings and decision of Pugu*

Ward Tribunal without considering the whole evidence adduced before Pugu Ward Tribunal.

- 2. That, the Chairman of the District Land and Housing Tribunal erred in law and fact he failed to considering that Respondent closed a pass way 21/2 meter which is being used by Appellants since 1985.*
- 3. That, the District Land and Housing Tribunal erred in law and fact by declare the first Applicant only who testified before the Ward Tribunal and Ward Tribunal determine the case in contravention of law.*
- 4. That, the District Land and Housing Tribunal erred in law and fact by misunderstanding that the same Chairman Bigambo determine application No. 508 of 2017 for execution and Application No. 57 of 2018 for execution which it gave the parties right to file a fresh case before Court with competent jurisdiction for anybody still having interested as the Appellants did.*
- 5. That, the District Land and Housing Tribunal erred in law and fact by declare that first Applicant and 8 others to file a case on behalf of the other 103 people without prove.*
- 6. That, the District Land and Housing Tribunal erred in law and fact by declare that anybody still having interested to pursue case let him file a fresh case so that the dispute can be resolved while the matter was resolved by Ward Tribunal since 2017 in application No. 52 of 2017.*

When the appeal was called for mention on 18th October, 2022 before me, the appellants were absent and the respondent enlisted the legal service of Mr. Godian Mugusi, counsel. This court issued an order to the parties to argue the appeal by way of written submissions. Pursuant to Court order, the appeal was determined by way of written submission.

In support of the appeal, the appellant began to narrate the genesis of the matter which I am not going to reproduce in this appeal. The appellant opted to combine and argue the second, third, and fourth grounds together because they are interrelated. Except for the first and fifth grounds, he argued them separately.

On the first and fourth grounds, the appellant contended that the appellate tribunal ordered the parties to file a fresh case before this Court. The appellant stated that the appellant filed a Land Case No. 52 of 2017 before the Ward Tribunal which was determined on 10th October, 2017 in favour of the Plaintiff and he filed a Land Application No. 57/2018 before the District Land and Housing Tribunal at Ilala to enforce the Ward Tribunal decision in Land Application No. 52/ 2017. He added that the District Land and Housing Tribunal on 8th October, 2018 dismissed the Land Application No. 57 of 2018.

He went on to submit that the proper forum for the respondent was either to file an appeal or revision before the High Court or to file a review before the District Land and Housing Tribunal to challenge the illegality of the trial tribunal decision. The counsel went on to submit that Chairman Bigambo in Land Application No. 57 of 2018 *suo motu* determined the matter instead of proceedings with execution process as a result he nullified the Ward Tribunal proceedings and quashed the decision of the Ward Tribunal while the same tribunal dismissed the Land Application No. 57 of 2018. He claimed that at Pugu Ward Tribunal composed an *ex parte* Judgment. He stated that the parties are bound by their pleadings and are not allowed to raise new issues which are not backed by their pleadings.

On the second, third, and fourth grounds, the appellant simply argued the records at the Ward Tribunal show that the respondent closed a passway 21/2 meter which is being used by the appellants since 1985. He went on to submit that the four witnesses testified against the respondent to unblock the passway.

On the fifth ground, the appellant contended that the District Land and Housing Tribunal for Ilala erred in law and fact by declaring the first applicant and 8 others to file a case on behalf of 103 while the Ward Tribunal delivered an *ex parte* Judgment against the respondent and

allowed two witnesses to testify on behalf of the two others who were present during the hearing of the case.

In reply, Mr. Godian, the respondent's counsel contended that

On the strength of the above submissions, the appellant's counsel started to narrate the historical background of the appeal which I am not going to reproduce.

The counsel for the respondent also opted to argue the second, third, and fourth grounds together. Except for the first and fifth grounds which he argued separately.

On the first ground, Mr. Godian submitted that the grounds that it improper for the Chairman to act suo motu in Execution No. 57 of 2018 has no leg to stand on since the proceedings and Judgment at the Ward Tribunal was tainted with irregularities. He added that the Chainman scrutinized the records of the trial tribunal and noted the said irregularities. He added that at the trial tribunal the appellant and eight others disclosed that the appellant he and 8 others lodged the application on behalf of 103 others that was a serious illegality. He added that the Chairman noted that the trial tribunal determined the matter contrary to sections 13 (1) (3) and 16 (2) (a) of the Ward Tribunal Act, Cap. 206.

The counsel for the respondent continued to submit that apart from the fact that the Land Application No. 57 of 2018 was heard *ex parte* but the appellant and 8 others filed the suit without applying for leave to file a representative suit hence the Chairman found that the applicant as per the requirement of section 18 (2) of the Land Dispute Act, Cap. 216 was required to obtain leave to file a representative suit. To support his submission he referred this Court to section 95 of the Civil Procedure Code, Cap. 33 [R.E 2019] and case of **John Magendo v Govan** (1973) LRT 268.

Submitting on the second, third, fourth, and sixth grounds, the learned counsel for the respondent contended that there is no evidence that in the land in dispute there was an easement and that is why the appellants failed to file a fresh suit to join the Registrar of Title and the Registrar of Title issued a title to the respondent after being aware through Land Case No. 344 of 2019 and withdrew the application for the reasons to join the Registrar of Title, he added that the appellants for the best reason known to themselves decided to proceed with an appeal.

As to the fifth ground, the learned counsel for the respondent contended that there is no any proof supporting the allegation that at the trial tribunal the eight people were called to testify instead only the person who lodged

the suit testified at the trial tribunal and he was not among the eight people. He added that the appellant was among the respondent. To support his submission he referred this Court to page 2 of the trial tribunal Ruling in Misc. Application No. 57 of 2018. The learned counsel went on to submit that Yohana Kilave was willing to demolish his fence wall thus, it proves that he was one of the respondents because they are neighbours and they share the said fence in dispute.

In conclusion, Mr. Godian urged this Court to find that the District Land and Housing Tribunal decision was proper and dismiss the appeal with costs.

In their rejoinder, the appellants reiterated their submission in chief. They added that at the trial tribunal, the 3rd appellant was a party in the dispute, his name appeared as Rumisha Ngoloo instead of Rumisha Ngowo. He urged this Court to correct the 3rd appellant's name and the same was corrected

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 *whether the appellant had good reasons to warrant this court to allow his appeal*. In my determination, I will combine the first, fifth, and sixth grounds because

they are intertwined. Except for the second, third, and fourth grounds will be argued separately as they appear.

On the first and sixth grounds, the appellant is faulting the District Land and Housing Tribunal for quashing and set aside the proceedings and decision of the trial tribunal, and they also faulting the District Land and Housing Tribunal for determining the matter which was before Pugu Ward Tribunal.

I have gone through the records and noted that the matter before the Chairman of the District Land and Housing Tribunal for Ilala was related to the execution with respect to Land Case No. 52 of 2017 filed at Pugu Ward Tribunal. During the hearing of the application, the respondent raised an objection on the ground of jurisdiction that in the first place, the Ward Tribunal had no jurisdiction to determine the matter because the suit land was surveyed in 2011. The Chairman overruled the objection by stating that the respondent has adduced mere words since at the Ward Tribunal he did not tender any proof that the suit land was a surveyed area.

The Chairman did not end there, he *suo motu* determine the matter and in his findings, he noted that the Ward Tribunal determined the matter in contravention of sections 13 (1) (3) and 16 (2) (a) of the Ward Tribunal

Act, Cap. 206 [R.E 2002]. As rightly pointed out by the appellant, the Chairman erred in law for determining the matter as an appeal while the application before him was related to execution.

Moreover, the Chairman did not afford the parties' right to be heard before he reached his decision. Thereafter, the Chairman proceeded to compose a ruling based on his own opinion/ findings without involving the parties. It is trite law that a party must be afforded a right to be heard failure to afford a hearing before any decision affecting the rights of any person. In the case of **Tan Gas Distributor Ltd v Mohamed Salim Said** Civil Application for Revision No. 68 of 2011, the Court of Appeal held that:-

" No decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

The consequences of a breach of this principle is to the effect that, its breach or violation, unless expressly or impliedly authorized by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard. The same was held in the case of **Abbas Sherally & Another vs Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) **Patrobert D Ishengoma v Kahama Mining Corporation Ltd and 2**

others, Civil Application No. 172 of 2016 which was delivered on 2nd day of October 2018, and **Abbas Sherally and Another v Abdul S/H.M Fazalboy**, Civil Application No.33 of 2002 (unreported). In the case of Abbas Sherally (supra), the Court of Appeal of Tanzania held that: -

" The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

The parties to the land dispute ought to be heard before District Land and Housing Tribunal so as to uphold one of the attributes of equality before the law. Failure to accord the appellant and respondent an opportunity to be heard was a breach of natural justice and a violation of the fundamental right to be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

It is therefore, my respectful view that there is considerable merit in the submission by the appellants that the District Land and Housing Tribunal for Ilala was wrong to proceed to determine the matter *suo mottu* without affording the parties the right to be heard. In my view, these grounds of

appeal suffice to dispose of the matter and I feel that it is not necessary to dwell on discussing the remaining two grounds of appeal.

Having reached this finding of the appeal, I deem it superfluous to deal with the remaining ground as by so doing amounts to deal with a sterile exercise.

In the circumstances and based on the above findings, I allow the appeal. Consequently, I nullify and quash the decision and proceedings of the District Land and Housing Tribunal for Ilala in Misc. Application No. 57 of 2018. In the circumstances of this appeal, it calls for a retrial before the District Land and Housing Tribunal for Ilala and to accord parties the right to be heard. I remit the file case to the District Land and Housing Tribunal for Ilala before another Chairman to proceed with hearing the Misc. Application No. 57 of 2018 in accordance with the law. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 23rd November, 2022.




A.Z.MGEYEKWA
JUDGE
23.11.2022

Judgment was delivered on 23rd November, 2022 via video conferencing whereas Mr. Godian Mgusi, counsel for the respondent was remotely present.




A.Z.MGEYEKWA
JUDGE
23.11.2022

Right of Appeal fully explained.