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

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPEAL NO. 266 OF 2022**

*(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Ilala District dated 22nd November, 2021, in Land Application No. 14 of 2021 Originating from the decision of the Ward Tribunal for of Buyuni in Land Case No. 229 of 2020)*

**SOPHIA CHITUNDI ..... APPELLANT**

**VERSUS**

**FREDNAND A. CHAMI ..... RESPONDENT**

**JUDGMENT**

Date of last Order: 16.02.2022

Date of Judgment: 23.02.2022

**A.Z. MGEYEKWA, J**

This is a second appeal, it stems from the decision of the Ward Tribunal of Buyuni in Land Case No.229 of 2020 and arising from the District Land and Housing Tribunal for Ilala in Land Application No. 14 of 2021. The material background facts of the dispute are not difficult to comprehend. They go thus: the respondent complained to the Ward Tribunal against

the appellant. The material facts as may be gleaned from the record of both tribunals are as follows: Frednanda A. Chami, the respondent claimed that Sophia Chitundi, the appellant invaded his piece of land and demolished his water well pillars and hived off the pathway to his land. When the respondent asked the appellant, she simply told him that the suit land belongs to her and she wants to develop it. Hence the respondent decided to lodge a complaint at the trial tribunal to be declared the lawful owner of the suit land and to order the appellant to open the alleyway.

On her side, the appellant claimed that she bought the suit land from Dunia Mnana. The trial tribunal visited the locus in quo and heard the testimonies of both parties' witnesses and neighbours and decided in favour of the appellant.

The findings and decision of the trial tribunal prompted the respondent to lodge an appeal before the District Land and Housing Tribunal for Ilala complaining that the Ward Tribunal faulted itself to decide in favour of the appellant hived off the pathway, thus, there is no right to the pathway and it did not consider the respondent's witnesses evidence. The appellate tribunal determined the appeal and allowed the appeal. The holding of the trial tribunal did not amuse the appellant hence this appeal.

In this appeal, the appellant has accessed the Court seeking to impugn the District Land and Housing Tribunal decision through a memorandum of appeal premised on two grounds as follows:-

1. *That the appellate tribunal erred in law and facts for not availing the appellant the right to be heard.*
2. *That the appellate tribunal erred in law and facts for concluding that the disputed land is not owned by the appellant.*

When the matter was called for hearing on 20th December, 2022, the appellant enlisted the legal service of Mr. Nickson Ludovick, learned counsel, and the respondent appeared in person unrepresented. The Court ordered the matter be disposed of by way of written submissions. Both parties complied with the court order.

In his written submission, Mr. Nickson started to submit on the first ground, he contended that the appeal at the appellate tribunal was heard in the absence of the appellant and no summons was served to the appellant instead she was served with a summons of the execution. He added that the appellant was not served with any summons to appear on the date of judgment, thus she was unaware that the judgment was delivered.

The learned counsel for the appellant submitted that the law and practice require that before delivering a judgment the other party who was not

present during the hearing be summoned to appear in court. He contended that failure to notify the appellant led to the violation of the fundamental principle of natural justice and the appellant was deprived of his right to be heard. Mr. Nickson stressed that it was a mandatory requirement to summons the appellant to attend and appear in Court on the date when the judgment was delivered. To support his submission he referred this Court to Order XX Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019] and the case of **Ms. Casco Technologies Co Ltd v Kal Holding Co Ltd**, Misc. Civil Application No.8 of 2021.

The learned counsel for the appellant continued to submit the Court has emphasized time and again that a denial of the right to be heard in any proceedings would vitiate the proceedings and it is also an abrogation of the Constitutional guarantee of the basic right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. Fortifying his submission he cited the cases of **Danny Shasha v Samson Masoro and Others**, Civil Appeal No. 298 of 2020, and **Abbas Sherally & Another v Abdul S.H.M. Fazalboy**, Civil Application No.33 of 2020 (both unreported).

Submitting on the second ground, Mr. Ludovick contended that it is the duty of the person who alleges to prove his case how he owned the suit land and prove his ownership of the suit land. To bolster his submission

he referred this to sections 110, 111 and 112 of the Law of Evidence Act, Cap. 6 [R.E 2019] and the case of **National Agricultural and Food Corporation v Mulbadaw Village Council and Others** (1985) TLR 88. The learned counsel for the appellant claimed that the appellate tribunal Chairman was wrong to conclude that the suit land did not belong to the appellant since the evidence adduced in Buyuni Ward Tribunal was credible and proved that the suit land is owned by the appellant. He contended that the evidence adduced at Buyuni Ward Tribunal was credible and enough to show and prove that the appellant is the lawful owner of the suit land.

Mr. Ludovick went on to submit that there was no cogent evidence to prove that there was a pathway since the road was surveyed hence there must be a map to show the pathway, and the appellant has a right to access the pathway.

In conclusion, the learned counsel for the appellant urged this Court to allow the appeal and quash the decision of the District Land and Housing Tribunal for Ilala and order retrial to accord the appellant the right to be heard.

In his submission against the appeal, on the first ground, Mr. Rimoy, the respondent's counsel submitted that the appellant was aware of the matter and she was duly been served with the summons to appear at the appellate tribunal and the evidence on record shows that the appellant prayed for an adjournment so that he can engage an advocate and hearing was scheduled for hearing on 20th May, 2021. To support his submission, he referred this Court to page 2 paragraph 1 of the typed judgment. Mr. Rimoy insisted that the records show that the appellant attended the Land Appeal No.14 of 2021. He added that the appellant refused to appear in the tribunal when the matter was scheduled for hearing on 26th November, 2021 hence the appellate tribunal determined the appeal *exparte* against the appellant.

The learned counsel for the appellant continued to argue that the argument that she was not served to appear on the date of judgment is baseless because the appellant was aware that there was an appeal thus she had the duty to attend his case until the judgment date. He added that the appellant was given right to be heard, she prayed for an adjournment then she disappeared. The learned counsel for the respondent submitted that the appellant misconstructed Order XX Rule 1 of the Civil Procedure Code Cap.33 since no provision requires the Court to notify the parties before the pronunciation of an exparte Judgment. He distinguished the

cited case of Ms. Casco (supra) from the case at hand that the cited case was pronounced after the tribunal's decision. He claimed that the appellant failed to appear in court and defend his case when the court issued a scheduling calendar. To buttress his submission he cited the case of **Brighton Mponji (Administrator of the Estate of the late Theodora Masheyo v Simon Paulo**, Misc. Land Application No. 708 of 2019 HC Land Division (unreported). Mr. Rimoy submitted in length on the issue of the right to be heard. He lamented that the nullification of a judgment because of the violation of justice in the case at hand is baseless since the appellant's right to be heard at the tribunal was not infringed.

Submitting on the second ground, the respondent's counsel argued that the appellate tribunal exercised its appellate power and the records show that the witnesses proved that the appellant blocked the pathway and recognized the respondent as the lawful owner of the suit land. The counsel for the respondent went on to submit that it is not known why the tribunal did not determine the issue in dispute and went on to decide the matter and allowed the respondent to develop the suit land. To bolster his submission he referred this Court to page 3 of the typed trial tribunal's Judgment. He insisted that the trial tribunal decision was credible, and he did see any good reasons for the appellate tribunal to vary the trial tribunal decision.

The learned counsel for the respondent continued to submit that the appellate tribunal misdirected itself to rule out that the appellant was not the owner of the suit land while the trial tribunal analysed the evidence on record and the witnesses testified to effect that the suit land is a pathway.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs.

In his rejoinder, the appellant's Advocate reiterated his submission in chief. Stressing on the point of the right to be heard. The learned counsel for the appellant stated that the right to be heard is a legal right. He stated that the appellant was required to be summoned to appear in court on the day of judgment. Ending, the learned counsel for the respondent urged this Court to allow the appeal and quash the appellate tribunal decision.

Having heard the submission of both learned counsels for and against the appeal. I should state at the outset that the main issue for determination is *whether the appeal is meritorious.*

Starting with the first ground, the records show that the appellant was summoned to appear in court, and on 20th May, 2021 the appellant appeared in person and the respondent had the legal service of a learned counsel, the appellant prayed for an adjournment to enable her to engage an advocate. The appellate tribunal adjourned the hearing until 28th

September, 2021, however, the appellant did not show an appearance hence the appellate tribunal ordered the appeal will be determined *exparte* against the appellant. The appellate tribunal delivered its judgment in her absence. The appellant after being amused by the decision of the appellate tribunal had an opportunity to set aside the *exparte* judgment and raise his claims before the appellate tribunal instead of filing an appeal against the *exparte* judgment before this court. Therefore, in my considered view, this ground is prematurely filed before this Court, hence the same cannot be determined.

On the second ground, the appellant's counsel is claiming that the appellate tribunal erred in law and facts for concluding that the appellant is not the owner of the disputed land. I had to go through the records of the trial tribunal to find out what transpired and noted that the respondent is the one who lodged the case at the trial tribunal against the appellant and he claimed that he is the lawful owner of the suit land and the appellant has trespassed into his land and demolished the water well pillar and blocked the pathway. The appellant also claimed that she is the lawful owner of the suit land and sold part of the suit land to the respondent also informed the respondent that there was a water well pillar that she will demolish it. The record shows clearly that the issue of ownership of the piece of land was undisputed because the appellant testified to the effect

that she sold a piece of land to the respondent and part of the land included the water well. However, the land which was in dispute involved the pathway and as rightly stated by the appellate tribunal Chairman, the issue of the pathway was not determined by the trial tribunal. I expected during the visit *locus in quo* the trial tribunal could find out if there was a pathway but the same was not stated by the trial tribunal in its judgment.

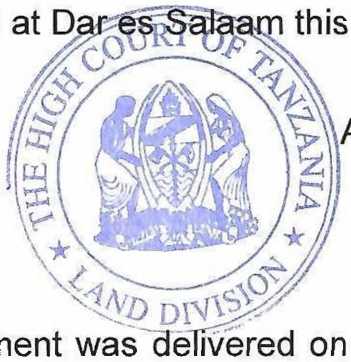
In addition, I partly differ with the order of the appellate tribunal of ordering the appellant to demolish her fence or anything which blocked the pathway. I say so because the trial tribunal did not prove whether the appellant blocked the pathway. Reading the evidence on record, it is not certain if there was a pathway. Seif Hussein and Jocea Miaga Njagi testified to the effect that there is a pathway and Mikidadi Ahmad Saburi testified to the effect that there were two pathways; official pathway and Sophia has her own private pathway. However, Aidan Michael did not inform the tribunal if there is a pathway or not. Therefore, in order to clear doubts, I find it appropriate to order the trial tribunal to visit *locus in quo* and find out whether the respondent has blocked the pathway or not. The visit to the *locus in quo* will assist the tribunal to clarify the contradictions and in reach a fair decision.

Following the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional

powers to this court, I quash the judgment and orders of both tribunals and order the District Land and Housing Tribunal to visit *locus in quo* to determine whether there is a public pathway or otherwise. Appeal is partly allowed to the extent explained above without costs.

Order accordingly.

Dated at Dar es Salaam this date 23rd February, 2023.




A.Z.MGEYEKWA

**JUDGE**

23.02.2023

Judgment was delivered on 23rd February, 2023 in the presence of Mr. Alex Balomi, counsel holding brief for Mr. Nickson Ludovick, counsel for the appellant and Mr. Frank, counsel for the respondent.


A.Z.MGEYEKWA

**JUDGE**

23.02.2023