IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
Misc. LAND APPEAL NO. 03 OF 2020

(Arising from the District Land and Housing Tribunal for Mwanza in Land Appeal No. 74 of 2018 Originated from the Ward Tribunal for Magengein Land Case No. ... of 2018)

JOSEPH NGEZA .... APPELLANT

VERSUS

1. PATILICIA BUNDALA
2. ELIZABETH MULISHI } **......... RESPONDENTS**

JUDGMENT

Last order: 23.04.2020

Judgment Date: 30.04.2020

A.Z.MGEYEKWA, J

The appellant appealed to this court following her dissatisfaction with the decision of the District Land and Housing Tribunal for Geita in Land Appeal No. 74 of 2018 which decided in favour of the respondents.

A brief background of the case relevant to this appeal is that the appellant filed an appeal before the District and Housing Tribunal for Geita claiming that the trial Tribunal determined the case while it was time-barred, the respondent had no locus stand and lacks jurisdiction. Before the determination of the appeal, the respondents raised an objection that the appeal was bad in law, and here was a misjoinder of party. The appellate tribunal sustained the preliminary objection and dismissed the appeal.

Dissatisfied the appellant knocked the gates of this court with five grounds of appeal. The grounds of appeal can be crystallized as follows:-

1. *That, the appellate tribunal erred in law and in fact for not taking into account the submission by the appellant that the judgment of the ward tribunal was contradicting in the names of the parties to the case.*

2. *That, the appellate tribunal erred in law and in fact for dismissing the appeal instead allowing the appellant to amend the parties and determine the matter on merits.*

3. *That the appellate tribunal erred in law and in fact for denying right to the heard for the appellant.*

4. *That, the appellate tribunal erred in law and in fact for dismissing the appeal basing on untrue submission by the respondents.*

5. *That, the ruling of the chairperson of the District Land and Housing Tribunal is itself a contradicting in reasoning.*

The hearing proceeded through audio conferencing, the appellant e njoyed the service of Mr. Renatus Malecha, learned counsel whereas, the respondent enjoyed the service of Mr. Pauline Rwechengula, learned counsel.

The learned counsel for the appellant opted to abandon the 1st, 4th, and 5th grounds of appeal and proceeded to argue the 2nd and 3rd grounds.

Arguing for the 2nd ground of appeal, Mr. Renatus argued that the District Land and Housing Tribunal misdirected itself by not allowing the appellant to amend the parties and proceed with a determination of matter on merit. He argued that it was not proper for the appellate tribunal to dismiss the appeal based on misjoinder of parties while misjoinder can be cured by amending parties and not dismiss the suit. Mr. Renatus fortified his submission by referring this court to the case of **Mango Yahaya and 18 others v Jessie Mnguto (Liquidator Tanzania Sisal Authority) and 3 others** Civil Appeal No.24 of 2007. He insisted that the Court of Appeal of

Tanzania observed that no suit shall be defeated because of misjoinder of parties. Mr. Renatus argued further that the appellate tribunal refuted the appellant's right to be heard on merit.

Concerning the 3rd ground of appeal, Mr. Renatus argued that the appellate tribunal deprived the appellant's fundamental right to be heard. To support his submission he referred this court to the case of **DPP Shabani Donasia and others** Criminal Appeal No. 196 of 2017. He went on to submit that the appellate tribunal failed to determine the substantial justice of the appeal. He also referred this court to Written Laws (Miscellaneous Amendments) No.8 of 2018 that courts are required to get rid with the overriding objective. Mr. Renatus valiantly argued that the appellate tribunal decision was wrong because the preliminary objection did not go to the root of the case therefore he was in a position to determine the case on merit.

In conclusion, Mr. Renatus prays this court to allow the appeal with costs and quash the decision of the District Land and Housing Tribunal of Geita.

In his reply, Mr. Pauline arguing for the 2nd ground of appeal stated that the appellate tribunal was right in dismissing the appeal since it could not order amendment of parties while there was a preliminary objection. He went on insisting that when an objection is raised then the objection was supposed to be determined. Mr. Pauline argued that the Chairman's reasoning was correct because he could not entertain an appeal that was not emanated from the trial tribunal.

It was his further submission that the appellant created a case that had no legs to stand on because the 1st respondent one Patilicia Bundala never appeared before the Ward Tribunal. Mr. Pauline referred this court to the trial proceedings which shows that Elizabeth Mishi, Method Patrick, Baraka Patrick, Majuto Patrick, Furaeh Patrick, and Dickson Patrick instituted the case at the trial tribunal. He added that they are the ones who were proper parties to the suit because they are the ones who filed the case. He continued to submit that Pauline was a female name while the respondent's father was known as Patrick, therefore, the name Patilicia is not known therefore the error was huge that is

why the appellate tribunal dismissed the appeal. Mr. Pauline argued that the cited case of Mango Yahaya (supra) is distinguishable from the instant appeal since the said case was a suit while the present case is an appeal.

With regard to the 3rd ground of appeal, Mr. Pauline forcefully argued that parties were heard on merit because both parties were represented by their advocates. He went on stating that the preliminary objection was argued by way of a written submission and the preliminary objection was determined on merit. He distinguished the cited case of Shabani Donasia (supra) and argued that the overriding objectives are not intended to rectify the mistakes of this nature he added that the mistake goes to the root of the case.

In conclusion, the learned counsel for the respondent urged this court to dismiss the case.

After a careful perusal of the record of the case, the testimonies adduced by the parties and the final submissions submitted by parties. I should state at the outset that, in the course of determining this case I will be guided by the canon of the civil

principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 which require that "*the person whose evidence is heavier than that of the other is the one who must win*".

In the course of perusing the records of the present appeal, I realized that the central issue for consideration is ***whether the appellant has sufficiently argued on the grounds of appeal to warrant this court allow the appeal.***

To start with the first ground of appeal, that the District Land and Housing Tribunal misdirected itself by not allowing the appellant to amend the parties and proceed with a determination of matter on merit.

In the trial, tribunal records parties to the dispute were Elizabeth Mulishi and others (the plaintiff) versus Joseph Ngeza (the defendant) and before the District Land and Housing Tribunal parties were Joseph Ngeza (the appellant) versus Paticilicia Bundala (1st respondent) and Elizabeth Mulishi (2nd respondent).

There is no dispute that the appellant after being dissatisfied filed an appeal that means the case was in existence since the appellant appealed against the decision of the Ward Tribunal, but he included a party who was not a party at the trial tribunal.

In my view, the DLHT has misdirected itself since the case which involves a misjoinder or nonjoinder is not subjected to be defeated as stated under Order 1 Rule 9 of the Civil Procedure Code Act, Cap. 33 provides thus:-

> " ...*No suit shall be defeated by reason of the misjoinder or no-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it*".

Based on the above provision of law, it is not fatal for misjoinder of parties in a suit. The appellate tribunal ought not to order dismissal of the appeal for a mere fact of misjoinder. The open recourse to the appellate tribunal was to afford the appellant with an opportunity to amend the petition of appeal by deleting the party who was not part of the case, struck out, or expunge the name of the 1st respondent. Taking to account that the 2nd respondent, one Elizabeth Mulishi was a proper party. In

the case of **Nuru Hussein v Abdul Ghani Ismail Hussein** [2000] TLR 2L7, the court observed as follows:-

> *" Where there is non-joinder in a suit, the court ought to proceed in terms of Order 1" R 10 by asking the parties to amend the pleadings and all interested parties."*

Based on the above provision of law I am in accord with the learned counsel for the appellant submitted that the appellate tribunal misdirected itself for dismissing the appeal on the ground that it was a misjoinder of parties for the reasons stated above. Therefore this ground is answered in affirmative.

As to the 3rd ground of appeal that the appellate tribunal erred in law and in fact for denying the appellant right to be heard. In my view, as I have stated earlier, the remedy for misjoinder was to order the amendment of the petition of appeal to allow the appellant to amend the name of the party or to strike out the appeal whereas, the appellant could file a proper appeal against a proper party (ies) and challenge the decision of the trial tribunal. Failure to order the appellant to exercise his right to appeal, the appellant was condemned unheard. It is trite law that

a party must be afforded with a right to be heard failure to afford a hearing before any decision affecting the rights of any person. Fortunately, it is common ground as stated 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.*"

Similarly, in the case of **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 the Court of Appeal of Tanzania held that:-

> " *It is settled law that no person shall be condemned without being heard is now legendary. Moreover, it is trite law that any decision affecting the rights or interest of any person arrived at without hearing the affected party is a nullity even if the same decision would have arrived at had the affected party been heard.*"

Guided by the above authorities, the appellate tribunal was required to accord the parties a right to be heard instead of dismissing the appeal.

For the aforesaid reasons, I find that the appellate tribunal entered into error for failure to order the appellant to amend the petition of appeal or struck out the order and for failure to afford the appellant's right to be heard on merit.

In the upshot, I quash the decision and order of the District Land and Housing Tribunal for Mwanza in Land Appeal No.74 of 2018 and proceed to allow the appeal without costs. I order the appellant to amend the Petition of Appeal and the appeal be determined by another competent Chairman.

Order accordingly.

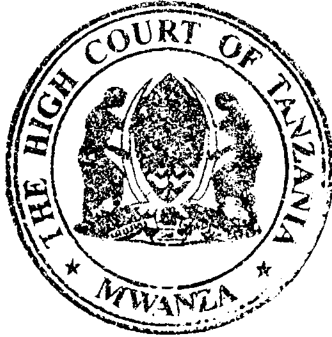
DATED at Mwanza this 30th day of April, 2020.

A.Z.MGEYEKWA

JUDGE

30.04.2020

Judgment delivered on 30th day of April, 2020 via audio conference, and both parties were remotely present.



A.Z.MGEYEKWA

JUDGE

30.04.2020

Right of Appeal is fully explained.