

TANZANIA / JUDGMENT

issa iddi kauzu vs ally abdalla mkoko another 2022 tzhc 11910 24 august 2022

COURT
TZHCDECIDED
24 August 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY)
AT MWANZA LAND APPEAL No. 08 OF 2022 (Arising from the Land Application No. 05 of 2022 of
the District Land and Housing Tribunal for Mwanza at Mwanza) ISSA IDDI
KAUZU..... APPELANT VERSUS ALLY ABDALLA
MKOKO----- 1st RESPONDENT AL-JUMAA
MOSQUE----- 2nd RESPONDENT

JUDGMENT

Last Order date: 20.07.2022 judgment Date: 24.08.2022 M. MNYUKWA. J. The Appellant Issa Iddi Kauzu is appealing against the Ruling of the District Land and Housing Tribunal (DLHT) of Mwanza at Mwanza in Application No. 05 of 2022 that was struck out. In the record, it goes that, the appellant lodged the Land Application No 05 of 2022 before the DLHT of Mwanza at Mwanza claiming that he has been a tenant at a business premises number 9 located at plot No 18 and 33 block T Lumumba, within Mwanza City since 2019. That, he renewed his tenancy by paying to the landlord who is the 2nd respondent, the Registered Trustee of Al-Jumaa mosque, Tshs 4,500,000 as a rent fee for the year 2022. That in diverse dates the appellant was denied from entering and occupying the said business premises as the 1st respondent claimed that he is the lawful occupier of the said premises having signed tenancy agreement on 25th December 2021 while the applicant was still under lawful occupation and his tenancy agreement has not expired. That the 2nd respondent did not issue a notice to terminate the tenancy agreement with the appellant and he received the rent fees from him that was deposited into his bank account. The appellant further alleged that, since he was denying from peaceful enjoying the occupation of the disputed premises, he had suffered loss which entitled him to be paid both specific and general damages. Among others, the appellant prayed before the DLHT to make a declaration that the 1st respondent is in unlawful possession of the disputed business premises and that the 2nd respondent breached the terms and conditions of the tenancy agreement. When filing his written statement of defence, the 1st respondent denied the claim put forward by the appellant and he raised the preliminary objection on point of law that the application is premature for want of certificate from the ward tribunal. After hearing the argument of both parties on the preliminary objection raised by the 1st respondent, the DLHT upheld the preliminary objection and struck

out the application as the appellant failed to attach the certificate of mediation in his application to show that they have failed to mediate the parties. Aggrieved, the appellant filed the present appeal with two grounds of appeal as they are reproduced hereunder;

1. That the trial chairman misdirected himself in law and in fact in upholding the 1st respondent's preliminary objection that Land Application No. 05 of 2022 has been filed premature hence incompetent for want of ward tribunal's certificate that I has failed to settle the matter amicably while failed to interpret the content of section 33 of Chapter 216 of the Laws of Tanzania, (Revised Edition 2019) and section 45(4) of the Written Laws (Miscellaneous Amendments) (No 3) Act 2021
2. That, the changes of the presiding Chairperson and Case file from previous presiding Chairperson to another was procedural illegal. At the hearing, Mr. Mwanalyela learned advocate appeared for the appellant and both respondents enjoyed the legal services of Paschal Joseph, learned advocate too. By the order of the court, the appeal was argued orally. The appellant learned counsel was the first to submit and he opted to abandon the 2nd ground of appeal and opted to argue on the 1st ground of appeal. In his submissions, he avers that the appeal centred on the preliminary objection raised by the 1st respondent on the issue of jurisdiction. It was ruled out that the DLHT was not clothed with the jurisdiction because there was no certificate of mediation from the ward tribunal as per the requirement of section 13 of the Land Disputes Courts Act, Cap 216 R.E 2019 as amended by Act No 3 of 2021. The DLHT upheld the preliminary objection and struck out the application. The learned counsel for appellant went on to submit that, the chairman of the DLHT misdirected himself on interpreting the above amended cited section due to the following reason; One, the amendment of the law brought by Act (No 3) Of 2021 did not affect the jurisdiction of the DLHT as it is provided for under section 33 of Cap 216 R.E 2019. Two, the Act (No 3) of 2021 does not affect the general jurisdiction of the ward tribunal as it is provided for under section 13(3) of Cap 216 R.E 2019. He added that, the duty of the ward tribunal is to resolve the dispute in regard to customary way of mediation, and therefore mediation can be conducted to the unregistered land in which customary principle of mediation is used. He remarked that since the dispute at hand is on registered land and its value is high there was no need to refer to the ward tibunal for mediation. He went on to state that, the law does not intend every dispute to start in the DLHT for mediation since customs do not apply in the registered land and that's why advocates do not appear before the DLHT. He went further by referring to section 45(3) of the Act (No 3) of 2021 which requires the Minister responsible for Legal affairs and Land to make Rules on the procedure to conduct mediation and up to this moment there was no Rules which has been made. He retires his submission in chief by praying the appeal to be allowed with costs. In rebuttal, the counsel for the respondents averred that, the amendments brought by Act No 3 of 2021, the DLHT cannot hear any dispute affecting the title or interest on land unless the said dispute is mediated by the ward tribunal and the tribunal issue a certificate that it has failed to mediate the parties. He added that, as the appellant filed his dispute when the above law is in use, he was supposed to refer the dispute to the ward tribunal before he had filed the same to the DLHT. On the issue of

the procedure 5 of mediation, he submitted that section 45(4) of the Act No. 3 of 2021 requires the parties to refer the matter to mediation in the ward tribunal for settlement. He formed the view that the issue of the responsible Minister to make Rules to guide mediation is optional and that cannot limit the law to be in use. He retires his submission by praying the appeal to be dismissed with costs. Re-joining, the counsel for the appellant briefly stated that the amendment removes the adjudication power of the ward tribunal and gives them powers to mediate on unregistered land. He insisted that the section provides that the Rules should be made and what is optional is to make consultation. He, therefore, insisted that the appeal to be allowed with costs. After the submissions by the counsel of both parties, I am now placed to determine this appeal whereby the main issue for consideration and determination is whether the appeal is meritorious. Before I proceed to determine the above ground of appeal, I find it wanting to briefly state that the ward tribunal has been established under the Ward Tribunal Act, Cap 206. Its function on land matters is now limited to mediation only which is all along was the primary function of the ward tribunal. The power of the ward tribunal to hear and determine land disputes as they used to do, was removed by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021. That is to say its power is now centred on mediation only. The purpose is to settle the land disputes amicably between the parties before the same is referred to the DLHT so as to bring peace and harmony to the litigants. Reverting to our appeal at hand, the appellant alleged that the chairperson misinterpreted the amendment brought by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021 because the tribunal has not been given power to mediate registered land because ever since its power is on unregistered land and that's why they are mandated with power to conduct the mediation. The above interpretation was strongly disputed by the counsel of the respondent who takes side with the tribunal chairperson who hold the view that it is the requirement of the law that the dispute has to be referred for the mediation to the ward tribunal before the same is instituted to the DLHT. To be in a safe side to decide the matter at hand, I find it wanting to reproduce section 45(4) of the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2021 which amends section 13 of the Land Disputes Courts Act, Cap 216 R.E 2016. The section provides that: " Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceeding affecting the title to or any interest in land unless the ward tribunal has certified that it has failed to settle the matter amicably.: Provided that, where the ward tribunal fails to settle a land dispute within thirty days from the date the matter was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the ward tribunal." (Emphasis is mine) To my understanding, the above cited provision of law makes it clear that, it is mandatory for any proceedings affecting the title to or any interest on land to be referred to the mediation before being instituted in the DLHT. The section is couched with mandatory terms when the words "shall" is used in any written law, as it confers the mandatory adherence. (See the case of Enerico Kukala v Mohamed Mussa (Administrator of Estate of the late Ahmed Zahoro Ahmed) Civil Application No 40 of 2011, CAT at Dar es Salaam. Without any disrespect to the learned counsel of the appellant, the law as it is, is very clear that before any dispute which affect the title to or any interest in land shall not be heard and

determined by the DLHT unless the same has been referred to the ward tribunal for mediation and 8 certified that it has failed to settle the matter amicably. In the above section, the law does not state if the ward tribunal will have the power to conduct mediation to unregistered land, the section categorically state that any proceedings affecting the title to or any interest in land. This means that the section covers both, registered and unregistered land. The above cited law in its proviso gives a leeway that in case the ward tribunal fails to mediate a land dispute after the expiration of thirty days from the date the dispute was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the ward tribunal. That is to say, what is important is for the matter to be referred to the ward tribunal so as to see the chances for the parties to be mediated. The counsel for the appellant tried to suggest that since the Rules on how to conduct mediation are not made up to now as it is provided for under section 45(5) it is mandatory for the parties to go in mediation. I think this issue should not detain me much, the provision is very clear that the Minister responsible for legal affairs may in consultation with the minister responsible for ward tribunal and minister responsible for land to makes rules prescribing the conduct and procedure for mediation of land disputes. For the time being when the rules are not made, it does not 9 mean that the mandatory requirement to refer the matter to mediation before the same is instituted to the DLHT is not there. In the final result, I agree with the chairman of the trial tribunal that the Land Application No 05 of 2022 was supposed to be first referred to the ward tribunal for mediation before the same being instituted in the DLHT. Consequently, the appeal is dismissed with no order as to costs. It is so ordered. Court: Judgment delivered in the presence of parties M.MN ILa JUDGE 24/08/2022 io

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