

TANZANIA / JUDGMENT

LAND APPEAL CASE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL CASE NO. 28509 OF 2023 (An appeal from the Judgment and Decree of Land Application No. 6/2023 in the District Land and Housing Tribunal of Kigamboni, dated If1 November, 2023) MARIAM HAJI ALI.....APPELLANT
VERSUS ALLY MOHAMED URIO 1st RESPONDENT KURUSUMU HAJI..... 2nd RESPONDENT

JUDGMENT

30/5/2024 & 20/6/2024 GWAE, J This is appeal from the judgment of the District Land and Housing Tribunal of Kigamboni ("the DLHT") in Land Application No. 6 of 2023, delivered on 14th November 2023 in favour of the 1st respondent. The appellant being aggrieved by the decision of the DLHT, she has filed this appeal. The brief background of this case as derived from the facts which led to the institution of Land Application No. 6 of 2023 by the 1st respondent is not complicated. It is as follows; that, on 9th June, 2020, the 1st respondent, entered into a sale agreement and purchased the house on Plot No. 129 Block "5", located at Magengeni Juu area, i Kigamboni ward within Kigamboni District in Dar es salaam Region from the 2nd respondent branding herself as the rightful owner of the suit property. After the 1st respondent had effected the payment of Tshs. 25, 000, 000/= to the 2nd respondent and when the 1st respondent wanted to enter the suit house and do some renovation, he found resistance from the appellant dwelling therein alleging that, the suit land belongs to her and other family members. The 1st respondent decided to file a suit against the appellant and the 2nd respondent before the DLHT. The 2nd respondent admitted all the claims by the 1st respondent, but the appellant vehemently dispute the same by asserting that, the suit property belongs to the late Haji Ally and that she is the administrator of his estates. The DLHT found the evidence adduced by the 1st respondent was sufficient. Thus, it entered the judgment in his favour. Aggrieved by the decision of the trial Tribunal, the appellant is now before the Court challenging the judgment and its decree on the following grounds:-

1. That, the Honourable trial Tribunal had no jurisdiction to entertain the matter for failure to comply with the requirement of the laws as the appellant has never been involved at the stage of Mediation at the Ward Tribunal 2 henceforth violating the requirements of the law and good practice.

2. The trial Tribunal erred in law by proceeding with the suit in the absence of the admitted certificate certifying on a failed mediation at the Ward Tribunal hence rendering to an apparent errors on the proceedings, judgment and decree.
3. The trial Tribunal erred in law and fact by entertaining the suit against the Appellant on her person capacity instead of her position as an administratrix of estate of the late Haji Ally Haji pursuant to exhibit DI as tendered through the proceedings hence rendering to an impugned proceedings judgment and decree.
4. That, the trial Tribunal erred in law and facts by including the 2nd respondent in her personal capacity contrary to the requirements of the law.
5. That, the trial Tribunal erred in law and facts for failure to analyse the evidence on record henceforth leading to rendering a judgment with errors." Hearing proceeded by way of written submission. Mr. Mlyambelele Abedinego, learned advocate, represented the appellant whereas the 1st respondent was represented by Mr. M. Majaliwa, learned advocate. The 2nd respondent did not appear despite of being duly served. Therefore, the matter proceeded ex-parte against her. 3 Regarding the 1st ground of appeal, the counsel for the appellant submitted that, the suit was instituted in the trial Tribunal without complying with the requirement of the law notably; Section 13 of the Land Disputes Courts Act, Cap 216 as amended by the Written Laws (Miscellaneous Amendment) (No. 3) Act No. 5 of 2021. He further stated that, the appellant was never party and parcel of the mediation process because she was never summoned for mediation process. He was therefore of the view that, it was an error to plead the appellant as a party to the impugned proceedings. On the 2nd ground of appeal, Mr. Mlyambelele submitted that, the trial Tribunal heeded to determine the dispute without having admitted an exhibit certifying that, really dispute passed through the mediation process at the ward tribunal. He referred the case of Patrick William Magubo vs. Lilian Teter Kitali, Civil Appeal No. 41 of 2019 and urged this court to quash the record of the trial Tribunal since there is no evidence in record recognising that, the dispute at hand passed through the mandatory mediation procedure rendering the entire proceedings nothing but a nullity. Mr. Mlyambelele combined the 3rd and 4th ground. In support of those ground, he argued that, the appellant and the 2nd respondent 4 were sued on their personal capacity contrary to the dictates of the law despite the fact that at the Tribunal she tendered her instrument as an administratrix of the estate of the late Ally Haji. He thus added that, the Trial Tribunal ought to have ordered for a joinder of the appellant as administratrix of the estate of the deceased in order to comply with the requirements of the laws. Fortifying his line of argument, he cited the case of Marietta Gabo vs. Adam Mtengu, (civil Appeal No 485 of 2022) [2023] TZCA 17318 (8 June 2023). Regarding the 5th and 6th ground of appeal the counsel for the appellant submitted that, there was no any evaluation of evidence adduced before the trial tribunal and on record before entering the judgment. He added that, the trial Tribunal proceeded to declare the 1st respondent as the rightful owner of the suit property on the basis that he, purchased the same from the 2nd respondent. According to him, the

DLHT'S Chairperson was supposed to consider as to whether the proper procedures on purchasing the said property were followed such as to whether all the heirs consented to the process of sale of the said landed property. Responding to the 1st ground of appeal, Mr. Majaliwa submitted that, the issue on, whether the parties have attended the mediation 5 process in the Ward Tribunal had never been issue between parties. He thus argued that, it was not necessary to tender evidence to support such undisputed fact. He further argued that, the appellant has never been recorded to complain or raise any concern about the certificate of the Ward Tribunal to prove failure of mediation. Regarding the 2nd ground of appeal. The learned counsel for the 1st respondent reiterated his submissions opposing ground one and stated that, the case between Patrick William Magubo (Supra) cited by the counsel for the appellant is distinguishable to this case since it originated from Matrimonial proceedings whose legal domain is different from the case at hand. On 3rd and 4th ground it was the submission by the 1st respondent that, the 1st respondent was claiming for vacant possession against the appellant and the 2nd respondent pertaining the suit property registered in the name of the 2nd respondent as the sole lawful owner of the suit property. He stated that, exhibit P1, P2, P3 and P4 in the proceedings proves that fact and as per the law, there is no need to identify their position and capacity in the proceeding. In brief rejoinder submissions, the appellant's counsel reiterated his submissions in chief. He nevertheless, he added to the 1st ground 6 that, the cited case of Patrie William Magubo (Supra) though originates from a matrimonial dispute but it provides a general guidance of the law that for a document to be believed and relied by the court of law, the same must be tendered and admitted as an exhibit. Regarding the 3rd and 4th ground of appeal, Mr. Majaliwa re-joined by that, since it is not disputed that the appellant was a successor as an administratrix of the late Haji Ally Haji after the revocation of the former administratrix one Kurusumu Haji as evidenced by DEI. He thus stated that, the trial Tribunal was supposed to direct the parties to join the appellant as to her capacity. He cited the case of Sabina Daba (The Administratrix of the Estate of the Late Holo Lumija who was the Administratrix of the Late) Bala Daba vs. Masubi Selemani @ Luhumbika (The Administratrix of the Estate of the Late Kuhela Daba Ngo'hole) and another, Land Appeal No. 35 of 2023 at page 4 to support his argument. Having gone through the rival submissions by the counsel for both parties, the issue for determination is whether this appeal is meritorious or not. In determining this appeal, I will combine the 1st and 2nd ground of appeal, then, 3rd and 4th grounds of appeal. Thereafter, I shall determine the 5th ground separately. 7 On the first and second grounds of appeal, it is the compulsory legal requirement that, all matters deserving to be instituted at the DLHT are to be referred to mediation process at the Ward Tribunal. This is the dictate of Written Laws (Miscellaneous Amendment) (No. 3) Act No. 5 of 2021 amending section 13 of the Land Disputes Courts Act, Cap 216, provides that:- "Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceedings 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 ward tribunal." From the context of the above provision of the law, the DLHT is required at the institution of the suit to satisfy itself that, disputants have passed through mediation process at the Ward Tribunal as plainly required by the law. This is the vital requirement before an institution of a land dispute before DLHT, which the parties are required to comply with. To prove that, the applicant/plaintiff is required to submit at the 8 Tribunal the certificate from the Ward Tribunal certifying that it has failed to mediate the parties. However, the proviso provides for an exception to the general rule that, if 30 days' period lapses from the institution of the dispute before the ward tribunal, any aggrieved party may institute the dispute before DLHT without the certificate from the ward tribunal. In the matter at hand, it is plainly clear that, the 1st respondent attached to his application, the certificate from the Ward Tribunal dated 15/12/2022, certifying that, the Ward Tribunal had failed to resolve the parties' dispute. The attachment of the certificate, in my firm view, was enough to prove that, the parties passed through the mediation process at the Ward Tribunal. Further, as rightly submitted by the counsel for the 1st respondent, since the issue on, whether the parties attended the mediation process in the Ward Tribunal was not the contentious matter between the parties before the DLHT, it was therefore not necessary for the 1st respondent to tender evidence to support such undisputed fact during hearing. For the purpose of admission or institution of a land dispute before DLHT, in my considered opinion, a mere attachment of the copy of mediation certificate is sufficient proof that, the parties have gone through the mandatory mediation process unless an adverse party 9 raises such concern before DLHT and not before the 1st appellate Court as herein. On the 3rd and 4th ground, the parties' pleadings indicates clearly that there is contentious issue on whether the 1st applicant now 2nd respondent had locus stand or consent from the family members of the late Haji Ally to sale the suit house. It is also an observation of the Court through the DLHT's pleadings that, the suit house with Certificate of Title NO. 188678 (PEI) was issued on the 13th December 2019 in the name of the 2nd respondent. Similarly, it is evident that, the respondent signed deed of transfer (PE3) on 30th November 2020 in favour of the 1st respondent. Apparently, not clear if the 2nd respondent was an administratrix of the estate of her late father who passed away on the 11th February 1977 except through the letter from the Kigamboni Council addressed to Kigamboni Primary Court. However, the 2nd respondent's appointment was revoked through the ruling of Kigamboni Primary Court (DEI) dated 27th January 2023. The fact that, the appellant is an administratrix of the estate of the late Haji Ali was made known to the tribunal as well as other parties to the suit upon service of her written statement of defence duly filed with the trial tribunal on 1st March 2023. io That, being the court's observation, I am therefore persuaded by the learned counsel for the appellant that, the trial tribunal or the 1st respondent would have caused an amendment of the parties' pleadings. I am holding for an obvious reason that, the appellant expressly wished to stand before the DLHT as an administratrix of the estate of her late father. Equally, even during hearing of the matter, the fact that the appellant stood and stands as an administratrix of the deceased's estate was amply established and that the fact that, the suit house is alleged to be an estate of the late Haji Ali. For sake of clarity,

parts of evidence recorded by DLHT is herein reproduced;- XX Mdaiwa Na.2 (1st respondent) "Sijaridhika kupokeiwa hii had. Nyumba ni ya Baba yangu ya Urithi.... nyumba ni ya urithi tunayokaa ni famiHa." SU2 Ali Haji "He nyumba anayoidai mnunuzi ni ya Haji All. Haihusiani na Kuluthumu kwenye ile hati, Kuluthumu Haji alibadilisha jina toka Haji Ally kwenda Jina la Kuluthumu wakati huyu Kuluthumu ni mwanafamilia, tena ni mdogo wangu....ile nyumba ile sisi hatujakubaliana nae..... " As correctly argued by the appellant, in order to prevent hurdles in the execution in the event the appellant wins the case, the proper order it could have been, for joining her as an administrator rather than in her personal capacity. Any declaration in the appellant's favour may possibly lead to deprivation of the interests of the deceased's heirs, if proved, as alleged by the appellant. That, omission to sue a proper person is likely to cause vitiation of proceedings like in the present case. I am of that view for the reason that, the appellant expressly pleaded that she is duly appointed as an administratrix of the estate of her late father one Haji Ali. Similarly, during her cross-examination to the 1st respondent as well as her witnesses (SU2-SU4). How could the appellant vest ownership of the suit property to the 1st respondent, which she does not have while the ownership is claimed to be of the deceased. Hence, a need for the 1st respondent to ascertain who is the proper person to be sued. I would like to subscribe the decision of Court of Appeal pertaining consequences of joining a wrong party in a judicial proceeding in Marietha Gabo vs. Adam Mtengu (supra), in which it was stated; "In the light of the stated principle governing the construction of a provision of a statute when the language used is plain, it is glaring that section 45 plainly sets out the curable irregularities on improper admission or rejection of any evidence, which do not have the effect of occasioning a failure of justice. The legislature did not intend any stretch to cover omissions or irregularities vitiating the trial proceedings such as, instituting a claim against a wrong party like it is the case at hand. We are fortified in that regard because suing a wrong party has serious consequences, which include rendering the trial vitiated or subjecting execution to untold hurdles. Indeed, it is a matter, which must be determined at the earliest. In the premises, since the learned High Court Judge was satisfied that, the claim initiated against the appellant had the effect of vitiating the trial proceedings, he ought to have acted promptly and the matter would not have reached this far." (Emphasis supplied) See also the case of Chama cha Wafanyakazi Mahoteli na Mikahawa Zanzibar (HORAU) vs. Kaimu Mrajis wa Vyama vya Wafanyakazi na Waajiri Zanzibar, Civil Appeal 300 of 2019) [2020] TZCA 1923 (18 December 2020) Basing in the above judicial decisions and nature of the dispute between the parties, it goes without saying that, the appellant could not have been sued in her personal capacity. She was thus wrongly joined despite the disclosure of her status. The applicant now 1st respondent or the trial Tribunal or both could have prevented the mischief and its unwarranted impacts including possible vitiation of proceedings. These 13 grounds of appeal are consequently found to have merit, I allow them accordingly. Having demonstrated as herein, I am therefore not required to be curtailed by the remaining ground, 5th ground of appeal since by doing so, it could not only be an academic exercise but also an act, which may preempt the future determination of the dispute by the District Land and Housing Tribunal. In the

premises, I find this appeal to have not lacked merit on the 3rd and 4th ground, I thus proceed quashing the proceedings of the District Land and Housing tribunal of Kigamboni from 7th August 2023 and the impugned judgment and direct an amendment of the parties' pleadings relating to the parties' status. The case file is remitted for trial denovo before a different chairperson of the Tribunal. Given the nature of the matter, I shall not make orders for costs. It is so ordered. DATED and DELIVERED at DAR ES SALAAM this 20th June 2024 14

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