

TANZANIA / JUDGMENT

PASILD MBOYA edited2

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
MANYARA AT BABATI LAND APPEAL NO. 16858 OF 2024 (arising from land Application No 22 of
2023 District Land and Housing Tribunal for Babati) PASILD MICHAEL
MBOYA.....1st APPELLANT THEOPHAN PANTALEY SEVERIN..... 2nd
APPELLANT VERSUS PHILOTEO DANIEL TANGO..... RESPONDENT 18th Nov &
6th Dec. 2024 MWIHAMBI J.:

JUDGMENT

In the District Land and Housing Tribunal of Babati (trial Tribunal) Philoteo Daniel Tango, the respondent, instituted a land dispute against Pasilidi Michael Mboya and Theophan Pantaley Severin, the appellants (Land Application No. 22 of 2023). The respondent sought and was granted a declaration that the 1st appellant has breached the lease contract entered with Daniel Tluway Tango (deceased and respondent's father) by subleasing to the 2nd appellant and for non-payment of rent. He also sought for an order for the 2nd appellant to handover the lease Page 1 of 33 house to the respondent and was also granted the order. The appellants were aggrieved with the decision and have filed this appeal presenting five grounds of appeal as follows:

1. That, the trial Tribunal erred in law and fact by deciding the matter before it without considering that, the appellants and the deceased agreed orally for the second appellant to conduct his business in the disputed house.
2. That, the trial Tribunal erred in law and fact by ordering the payment of rents by the first appellant without considering the amount which he was supposed to pay and the duration.
3. That the trial Tribunal erred in law and fact by not considering laws on procedures while handling trials before it.
4. That, the trial Tribunal erred in law and fact by ordered (sic) the removal of the second appellant's goods from the disputed house before the determination of the matter to the fullest without considering that they are perishable in nature; and
5. That, the trial Tribunal erred in law and fact by ordering the second appellant to vacate the suit house while he has already ordered him to vacate from the said house in the miscellaneous application for injunction. At the hearing on 7th November, 2024, the

appellants enjoyed the service of Mr. Joseph Mniko, learned Advocate while the respondent was represented by Mr. Sadiki Sadiki, learned Advocate. On the first ground of Appeal, Mr Joseph Mniko Learned Advocate for the Appellant argued that though the contract did not prevent the 1st appellant to sublease, the deceased gave an oral consent to the sublease, thus the sublease was proper under section 93 of the Land Page 2 of 33 Act [Cap. 113 R.E. 2019] (the Land Act). He further argued that there was an implied agreement between the deceased and the 2nd appellant because the 2nd appellant has been conducting business in the leased house for 7 years and the deceased was aware of it. Therefore, the fact that the deceased was aware of the 2nd appellant presence in the leased house and decided to keep quite means he had consented to the sublease. In conclusion the learned advocate prayed for this Court to be guided by the overriding objective principle under section 3A and 3B para of the Civil Procedure Code, [Cap 33 R.E 2019] (The CPC) considering that the 1st appellant had incurred construction expenses and his contract is still ongoing so not applying the overriding objective principle amounts to "kuikanyagia chini haki" Arguing against the first ground of appeal, Mr. Sadiki Sadiki Learned Advocate kickstarted by a reference to section 89 (1) (i) of the Land Act on implied for covenant on a lessee not to sublease the leased land or buildings or any part of it without previous written consent of the lessor. He argued that for appellants to benefit from their argument that they got consent of the lessor (the deceased) they were supposed to tender relevant document to that effect. Mr Sadiki opposed the argument that section 93 of the Land Act has been complied with Page 3 of 33 because the application under this section does not mean an automatic consent, rather the provision requires a written reply from the lessor. The learned advocate further argued that section 89 the Land Act on written consent makes an exception to short term contracts as defined under section 80 (1) the Land Act to include a contract of one year and less, and that a contract between the deceased and 1st appellant does not fall in that category hence it is bound by a written consent requirement. Mr Sadiki further argued that section 89 is clear and does not require any interpretation principles rather than reading the law as it is. On application of the overriding principle, the learned advocate argued that the Court of Appeal has held in various cases that the principle shall not be applied blindly, and that a court cannot apply the principle while there are mandatory requirements of law, and that in the matter at hand there are mandatory requirements under section 89 (1)

- (i) and 93 of the Land Act. Regarding the second ground of appeal, Mr Mniko submitted that the last rent was paid on 1st November, 2020 and had expired on 30th October, 2021 so by the time the dispute arose the outstanding rent was of three months, that is 1st November, 2021 to 1st February, 2022 Page 4 of 33 amounting to TZS. 300,000/-. In addition, the learned advocate argued that even the non-payment of rent was not appellants' fault because after the demise of the lessor, the 1st appellant attempted to pay rent to the widow but she declined on the respondent's instructions. Mr Mniko further argued that the respondent had no right to demand for TZS. 500,000/- as rent per month because it is contrary to the agreed rate. Responding to the second ground of appeal, Mr. Sadiki submitted that there is no proof of rent payment, that this is evident in contradictory statements given by the appellants.

That, in the trial Tribunal the 1st appellant said he paid rent from 2014 to 2020 and that the next rent was due to be paid on 1st November, 2021 while at the same saying he paid rent to the lessor while the lessor was hospitalised in Muhimbili National Hospital. In relation to the amount, the learned advocate argued that the respondent demanded TZS. 500,000/- per month as the market price and this was after appellants' apparent breach of the lease contract. On the argument that the non-payment of rent was not the appellants' fault, Mr Sadiki argued that the lessor's widow was right to decline the rent because by then administrator of deceased estate was already appointed and he was the one who was supposed to collect the Page 5 of 33 rent. The learned advocate further argued that had the widow accepted the rent then she would have been in breach of section 17 of the Probate and Administration of Estate Act, [Cap. 352 R.E 2019] which states: "Where a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any legatee or creditor of the deceased, to the extent of the assets which have come into his hands, after deducting payments made to the rightful executor or administrator, and payments made in due course of administration." The third ground of appeal seeks to challenge the trial Tribunal on procedural matters in handling trials before it, whereby the learned advocate raised four matters. One, that the 1st appellant was brought before the trial Tribunal as a witness and not a party, hence his right to be effectively heard was prejudiced. Two, that no mediation certificate was issued by the Ward Tribunal and the same operated like a court of law contrary to section 45 of the Written Laws (Miscellaneous Amendments) Act (No. 3) Act 2021 which has removed from tribunals powers to hear and determine land cases and instead they should just mediate and issue a certificate. Mr. Mniko relied on Issa Iddi Kauzu v Ally Abdallah Mkoko and Another, Land Appeal No. 08 of 2022 in the High Court of Tanzania at Mwanza (Unreported) which among other Page 6 of 33 things held that the tribunal should mediate and not adjudicate and must issue a certificate regardless of whether the mediation has succeeded or failed. Three, that all documents tendered by the respondent in the trial tribunal were copies and not original contrary to section 66 of the Evidence Act, [Cap. 6 R.E. 2019]. In addition, the documents submitted as secondary evidence were certified by an advocate who was part of the respondent's legal team and this amounts to conflict of interest against section 7 of the Notaries Public and Commissioners for Oaths Act, [Cap 12 R.E 2019]. The learned advocate argued that since these documents were tendered and admitted improperly, they should be expunged from court records and this Court to decide differently. Mr Mniko invited this Court to be guided by the judgment in Salum Nassor Mattar v. Bharat Bhagwanji Laxman and Another (Land case 15 of 2017) [2022] TZHC 13999 (13 May 2022) in which the court disqualified an advocate to represent a party on similar grounds. Four, that the trial Tribunal did not comply with legal procedures of dealing with preliminary objections, because issues of non-issuing of mediation certificate and non-involvement of the 1st appellant in mediation were raised as preliminary objections but the trial Tribunal issued no ruling on the same. That this is evident in the Page 7 of 33 trial Tribunal proceedings where it is just written "ruling is read" with no indication of content of the ruling. Responding to the third ground of appeal, Mr. Sadiki at the outset submitted that the rationale behind establishment of ward and district

tribunals and main principle in their operation is not to be bound by procedural technicalities. On the argument that the 1st appellant was brought before the trial Tribunal as a witness and not a party, the learned advocate referred the same case Issa Iddi Kauzu (supra) which among other things held that what is important is for the matter to be referred to the ward tribunal so as to see the chances for parties to be mediated. Thus, the fact that both appellants were before the tribunal for mediation means this matter was mediated regardless, they were called witnesses or otherwise. He further argued that, by then the tribunal's rules of procedure were not made therefore the 1st appellant presentation as a witness is not fatal and has not prejudiced anyone's justice. The learned advocate urged the Court, on this point, to be guided by the overriding principle. In relation to the argument that no mediation certificate was issued and the ward tribunal operating like a court against the law, the learned advocate submitted that what the Page 8 of 33 ward tribunal did was just to hear the parties, state its opinion and advised aggrieved party to refer the matter to the District Land and Housing Tribunal. He again referred the case of Issa Iddi Kauzu (supra) that the matter went for mediation and a certificate was issued regardless of wording of the certificate. Mr. Sadiki further submitted that aggrieved party should have used section 36 (1) and (2) of the Land Disputes Court Act [Cap. 216 R.E 2019] which empowers District Land and Housing Tribunals to rectify what happens in ward tribunals, but this did not happen. The learned advocate further urged this Court to be guided by the overriding principle and not be bound by wording of the Ward tribunal. In relation to the argument that all documents tendered in the trial Tribunal were copies and not originals, the learned advocate submitted that the documents were properly admitted under Section 67 of the Evidence Act [Cap.6 R.E. 2019] which provides that in circumstances where original document is lost the party that intends to use secondary evidence should give notice and serve the other party. He further argued that the relevant secondary evidence is not bound by certification thus even the issue of conflict of interest of the advocate is immaterial. In relation to the argument that the trial Tribunal did not Page 9 of 33 comply with the procedure of dealing with preliminary objections, the learned advocate urged the Court to counter check the handwritten proceedings. On the fourth ground which challenges the order of removal of goods from the dispute house before determination of the matter to the fullest and without considering that the goods are perishable in nature, Mr Mniko submitted that initially the trial Tribunal had ordered the dispute house to be closed waiting for final determination of the matter. However, it later issued an order to a court broker to remove goods from the said house. The learned advocate argued that this was an error as the trial Tribunal made an order for execution even before deciding the matter to its finality and at that time there was no such application that the trial Tribunal purported to be executing. Mr. Sadiki had not much to argue on this, he just submitted that the trial Tribunal acted on the application of the appellant that the goods are not part of the dispute and are perishable in nature. In the fifth and last ground of appeal, the appellants challenge the trial Tribunal for being functus officio, whereby Mr Mniko argued that in the miscellaneous application for injunction the trial Tribunal had already ordered the 2nd appellant to vacate and remove his goods from the Page 10 of 33 dispute house, but again the trial Tribunal orders the 2nd

appellant to vacate and handover the house to administrator of the estate of the deceased. The learned advocate further argued that this was ordered without regard that there was another person (the 1st appellant) who was involved with construction of the house and the one with initial contract with the deceased. In relation to the argument of *functus officio*, the learned advocate for the respondent submitted that the learned advocate has misdirected himself because orders given in miscellaneous applications are temporary pending determination of the main suit and that orders given in miscellaneous application cannot prevent the same tribunal to give final orders in the main matter. I have considered the submissions by the learned advocates and I commend them for assisting this Court in determining the appeal before us. Taking a leaf from *Salum Viale Kibwana v. Shaban Besa Philipina Mchomvu*, DC Civil Appeal No. 23 of 2022, High Court of Tanzania at Dodoma, I find it relevant at this stage to outline the principles which will guide me in determining the appeal grounds and the entire appeal. The first regards the role of this Court as the first appellate court. The Court of Appeal in *Makubi Dogani vs Ngodongo* Page 11 of 33 Maganga, (civil Appeal 78 of 2019) [2020] TZCA 1741(21 August 2020) held that; "f/te first appellate court is entitled to re-evaluate the entire evidence on record, by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision". The second principle concerns burden of proof. The law of evidence in section 110 (1) and (2) of the Evidence Act [Cap.6 R.E. 2019] places the burden of proof upon the person who alleges existence of a certain fact and wants the court to decide in his favour. Plenty authorities have illustrated this principle include *Paulina Samson Ndawavya vs Theresia Thomas Madaha*, Civil Appeal 45 of 2017 (unreported) where the Court of Appeal held: "It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved". The first appeal ground in principle argues that the lessor (deceased) did consent to the sublease between the 1st and the 2nd appellant and therefore the trial Tribunal was supposed to decide the matter in the Page 12 of 33 appellants' favour. Referring to the principles I laid down earlier, section 110 of the Evidence Act [Cap. 6 R.E. 2022] states that: "110. - (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof Ues on that person." Therefore, the 1st appellant had a duty to prove, on a balance of probabilities, that the lessor availed his consent to the sublease, failure to do so means the alleged consent does not exist or did not happen at all. How was the 1st appellant supposed to prove existence of deceased consent? The case of *National Housing Corporation and Another v. Turubali Gulamali Abdurasul (Executor of the Estate of Gulamali Abdurasul Satchu)*, Civil Appeal No. 64 of 1999 (unreported) elaborates that such allegations must be reinforced by documentary evidence. This is also envisaged in section 93 (2) (b) (i) and (ii) of the Land Act that: " Where an application is made by a lessee to a lessor for consent to enter

into a sublease, the lessor must, on receiving the application and within a reasonable time thereafter give that consent or withhold that Page 13 of 33 consent and, in either case, must inform the lessee in writing of his decision on the application, "(emphasis is mine.) I have supplied emphasis to underscore the point that, regardless of whether the application is done orally or in writing, the lessor must respond in writing. I hesitate to give a different meaning to this section by inserting the "oral element" in it because that would be going contrary to intention of the legislators. This is also due to the fact that subleasing varies terms of a contract, and it cannot be done easily as the appellants claim that they went to the deceased house to orally request for his consent to sublease and he orally accepted. I get strength from *Lugakingira, J* (as he then was) in *Edwin Simon Mamuya v. Adam Jonas Mbala* [1983] TLR 410 where he said: "it is common practice to vary the terms of the contract by a subsequent agreement. This may be done either orally or in writing save that where the contract is in writing or where the law requires it to be in writing, any variation thereto must similarly be in writing." (emphasis is mine.) I therefore join hands with Mr Sadiki that section 93 of the Land Act clearly indicates that an application for consent does not mean an automatic consent, rather the provision requires a written reply from the lessor. I have also revisited the trial Tribunal proceedings in page 36 and Babati Ward Tribunal in which the 1st appellant testified that he Page 14 of 33 subleased the 2nd appellant because the 2nd appellant assisted him in the construction of the leased house, and that they have an oral agreement for a duration of 3 years (from November, 2014) for a rent of TZS 100,000/- per month. He also testified that it was after the completion of the construction that he drafted the lease contract which was subsequently signed by both parties, to wit the deceased and 1st appellant. The question that may arise is why all terms were put in a written contract but the sublease one was left out? This is because according to the 1st appellant it was him who drafted the contract so he was in a position to incorporate another lessee so as to enable the lessor to also financially benefit from the arrangement. According to article (iv) of the contract, rent is deducted by half so as to reimburse the 1st appellant on the construction costs, at the same time the 1st appellant says he subleased the 2nd appellant because the 2nd appellant assisted in construction but the same 2nd appellant pays TZS 100,000/- as monthly rent to the 1st appellant! This leads to the conclusion that there was no lessor's consent or even knowledge of the sublease. Mr Mniko also claimed that the contract did not prevent the 1st appellant to sublease, however I have noted that the contract in article (x) says: Page 15 of 33 "Mpangaji anao uhuru wa kuitumia hiyo frem apendavyo bila kukiuka kanuni na taratibu za sheria ya Nchi." (emphasis is mine). That the lessee is at liberty to use the lease house the way he likes without contravening the law. Therefore, the liberty underscored in this article is not absolute, it has limits; the limits that are set out in various legislation. I believe that one of the laws that the contract envisaged and stressed its compliance is the Land Act in which section 89 (1) (i) prohibits sublease without consent of the lessor and section 93 explains how the consent is communicated. Mr. Mniko also argued that there was an implied agreement between the deceased and the 2nd appellant because the 2nd appellant has been conducting business in the leased house for 7 years, the deceased was aware of it but he kept quiet. Therefore, the fact that the deceased was aware of the 2nd

appellant presence in the leased house and decided to stay quite means he had consented to the sublease. This takes us to the concept of implied contracts which was lengthily discussed by this Court in a case of Mohamed Hassanali Kanji v. Ramadhan Hamisi Ntunzwe, Land Case No.5 of 2021 High Court of Tanzania Dar es Salaam (unreported) In this case, briefly, plaintiff and Page 16 of 33 defendant were family friends; their friendship gave rise to the idea of a joint venture. Plaintiff had a piece of land in Kariakoo and defendant had capital. They agreed to form a joint partnership and the defendant paid the plaintiff TZS 204,000,000/- as a share of their partnership. In 2011 defendant started to construct a "forty - shops business structure" on plaintiff's land. In 2012 after completion of the construction, the plaintiff wanted to sell the building to another person but the defendant declined to sell his share. Business at the building went on. In 2016 the matter was taken to Baraza la Serikali ya Mtaa wa Kariakoo Magharibi which advised status quo to be maintained until further legal actions. In 2021 the plaintiff instituted a case seeking various reliefs, including a declaration that the defendant is a trespasser. The Court stated that proving an implied contract is inherently a matter of factual inquiry, it then analyzed facts such as defendant paying plaintiff TZS. 204,000,000/- as his share in the partnership, defendant constructing " 40 shops" building from 2011 to 2012 and within such a period, plaintiff did not complain about the illegal construction, in the construction the plaintiff's vehicle "canter" was used to clear debris and that in 2016 when the matter was taken to Baraza la Serikali ya Mtaa wa Kariakoo Magharibi and the Baraza advising status quo to be maintained until further legal actions it took the plaintiff five years to institute a legal Page 17 of 33 action against the defendant. "The Court therefore ruled that the plaintiff was aware of the construction of shops which started in 2011 and completed in 2012, that being aware of such action and his inaction in the conduct of the defendant suggests an existence of oral agreement and that the defendant had lawful consent legitimizing his occupation of the plaintiffs land. That Court held that the plaintiff's silence meant nothing but consent, in Swahili "Kukaa kimya nako nijibu". Coming back to our case, the 1st appellant and deceased agreed that the 1st appellant will construct a business house and pay rent per annum, the defendant constructed the building, contract was signed and business started. The appellants have failed to prove, on a balance of probability, that the deceased was involved in the said construction and subsequent business other than receiving the rent per annum. What transpired between the plaintiff and the defendant in the case of Mohamed Hassanali Kanji (supra) differs completely with the matter before this Court now, therefore the concept of implied agreement does not apply. On application of the overriding principle, I join hands with the learned advocate for the respondent on cautions in relation to application of this principle. In the case of Njake Enterprises Limited v. Blue Rock Limited and Rock and Venture Company Limited, Civil Appeal No. 69 of 2017 the Court of Appeal held that the overriding objective Page 18 of 33 principle cannot be applied blindly on the mandatory provisions of the law. This can be gleaned from the objects and reasons of introducing the principle in the Act whereby the Written Laws (Miscellaneous Amendments) (No.3) Bill, 2018 stated that: "The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms..." In that respect I will not apply the overriding objective principle in a

situation which will jeopardize application of the mandatory terms under section 89 and 93 of the Land Act. From the foregoing, I am of the opinion that the first appeal ground lacks merit and I therefore dismiss it. On the second ground of appeal, according to parties' submissions and records of the trial Tribunal, both parties agree that there is an outstanding rent. They however differ on duration, amount, and reasons for non-payment. The Appellants' side argued that the duration is three months from 1.11.2021 to 1.2.2022 and the amount is TZS 300,000/- being TZS. 100,000/- per month, while the respondent argues that the duration is six months; from 1.8.2021 to 1.2.2022 and the amount is TZS. 3,000,000/- being TZS. 500,000/- per month. According to the trial Tribunal proceedings at page 39, the 1st appellant submitted that rent Page 19 of 33 was paid on cash basis with no written records. I find this very uncalled for on both parties. As for reasons for non-payment, the appellants threw the blame to the deceased's widow who refused to receive it from the 1st appellant, and the respondent threw the blame to the appellants and supports the widow's refusal for probate procedures. The trial Tribunal unanimously found that there is no proof that appellants have been paying rent for the whole duration of the contract. The trial Tribunal judgment at page 8 states: "Ninakubaiiana pia na waungwana wajumbe wa Baraza hili kwamba hakuna hata uthibitisho wowote kama wajibu maombi wamekuwa wakiiipa kodi ya pango katika kipindi chote cha upangaji kwa au marehemu Daniel Tluway Tango au kwa mjane Clementina Daniel Tango au na msimamizi wa mirathi ya marehemu ambaye ni mleta maombi haya." However, the trial Tribunal went on and ordered the payment of outstanding rent of TZS. 3,000,000/- and the accrued months to the full execution of the judgment. The question I'm asking myself is, if rent was not paid for all this time then why the ordered amount does not reflect it? And why no legal action was attempted for all these years? And why would the notice of rent default from the respondent to the appellants and respondent and widow's testimonies in the ward and trial Tribunal base on six months instead of the whole duration? In the Page 20 of 33 available records from the Ward to trial Tribunal the respondent's claim has been non-payment of rent from 1.8.2021 to 1.2.2022. This can be seen in page 1 of proceedings of the Ward Tribunal and page 29 of trial Tribunal proceedings. It was Mr Sadiki's argument that appellants provide contradictory statements in relation to payment of rent, but I think it is the other way around. I therefore agree with the appellants' submission that the outstanding rent runs from 1st November, 2021. In relation to the amount per month, the contract in article (iii) (iv) and

- (v) provides that: 7771 Kodi ya pango itakuwa TSHS 1,200,000 (miiioni moja na iaki mbili tu) kwa mwaka. iv. Kodi hii itaiipwa nusu kwa mwenye eneo na nusu makato ya gharama za ujenzi hadi zitakapokamiiika. (TSHS 600,000 kwa mwenye eneo na TSHS 600,000 makato ya gharama za ujenzi) kwa mwaka.
- v. Kodi ya pango haitabadiiika kwa muda wote wa mkataba (itabakia kuwa TSHS 1,200,000/-) kwa mwaka hadi mwisho wa mkataba kuingana na gharama za ujenzi." The respondent demands for TZS 500,000/- per month and not TZS. 100,000/- on the basis that 500,000/- is the current market price and that the TZS. 100,000/- does not apply anymore because the contract no longer exists due to the breach on part of the appellants. I have Page 21 of 33

earlier quoted Lugakingira, J (as he then was) in *Edwin Simon Mamuya v. Adam Jonas Mbala* (supra) that where the contract is in writing any variation thereto must similarly be in writing. In this case there is no proof that the contract was amended in article (iii). Thus, the respondent cannot decide arbitrarily and with no legal backup to demand a new rate of rent on the argument the lessee had breached the contract. The second ground of appeal is therefore meritorious and I allow it. The outstanding rent payable to the respondent be calculated from 1st November, 2021 at the rate of 1,200,000 per annum with a deduction of construction costs as agreed in the contract. The third ground of appeal faults the trial Tribunal that it erred by not considering laws on procedures while handling trials before it. The appellants' advocate divided it in four points and I will deal with them in the manner that both advocates did, that is, one after another. On the argument that the 1st appellant was brought before the trial Tribunal as a witness and not a party, records show that in the Ward tribunal parties were Philoteo Daniel Tango as complainant (respondent in this case) and Theophan Pantaiey Severin as respondent (2nd appellant in this case). In addition, Pasilidi Michael Mboya (1st appellant in this case) was Page 22 of 33 a witness. The ward tribunal focused on that part only and was of the opinion that: "... aliyestahili kulalamikiwa ni PasHidi Michael Mboya ambaye aiiingia Mkataba na Daniel Tango baba yake Phioteo Daniel Tango ambaye ni miaiamikiwa na siyo Theophan Pantaiey Severin..." That the matter was supposed to be instituted against the 1st appellant who had a contract with the deceased and not the 2nd appellant. Official records of the Ward Tribunal illustrate that the 1st appellant, in whatever capacity that he was, was very active and elaborative, and it was on the basis of his testimony that the Ward Tribunal concluded the matter as it did. On the other hand, Mr. Mniko failed to show how the 1st appellant was prejudiced by his participation and the procedure used by the Ward Tribunal during the hearing of the matter. The appellants also argued that no mediation certificate was issued by the ward tribunal and the same operated like a court of law contrary to section 45 of the Written Laws (Miscellaneous Amendments) Act (No. 3) Act 2021. Section 45 of the Written Laws (Miscellaneous Amendments) Act (No. 3) Act 2021 amended the Land Disputes Court Act [Cap. 216 R.E 2019] by inserting new subsections (4) and (5) to section 13 as follows: "(4). Notwithstanding subsection (1), the District Land and Housing Tribunal shall not hear any proceeding affecting the title to or any interest in land Page 23 of 33 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. (5). The Minister responsible for legal affairs may, in consultation with the Minister responsible for ward tribunals and Minister responsible for lands, make rules prescribing the conduct and procedure of mediation of land disputes." exv^X\3S\s is mine) I pause here to differentiate the matter at hand and the case of Issa Iddi Kauzu (supra). In that case the appellant had instituted the matter to the District Land and Housing Tribunal of Mwanza without referring the matter to a relevant ward tribunal. In this case available records show that the matter was instituted in the Baraza la Ardhi na Usuluhishi Kata ya Babati on 21st June, 2022, parties were heard on 23rd June,

2022, dispute area visited on 14th July, 2022 and the Ward Tribunal opinion was issued on 23rd January, 2023 which makes it 217 days from date the matter was instituted to the date the Ward Tribunal gave its opinion. According to section 13 (4) of the Land Disputes Court Act [Cap. 216 R.E 2019] the respondent had justification to institute the Page 24 of 33 matter to the trial Tribunal even without a certificate from the Ward Tribunal. On the argument that documents tendered were all copies the Evidence Act in section 66 provides that documents must be proved by primary evidence except as otherwise provided in the Act. It was the respondent's argument that section 67 provides for circumstances where secondary evidence may be admissible. According to records of the trial Tribunal, the respondent submitted a written notice on the intention to use secondary evidence in conformity with the above section. On the objection raised by appellants' advocate in relation to admissibility of copy of the Contract between the 1st appellant and the deceased, Chairman of the trial Tribunal ruled that: "Baraza: Naomba ipokeiwe kwa sababu mbi/i

1. Nakata wakiii Mniko atipewa
2. Nyaraka UHetwa kwa utaratibubaraza inapokeiwa..." I concur with the trial Tribunal on this ruling. In relation to the argument that the documents were certified by advocate who was part of the respondent's legal team thus conflict of interest, section 7 of the Notaries Public and Commissioners for Oaths Act. provides that: "No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested." Page 25 of 33 This provision has been applied and explained in a number of cases in different angles, one of the cases being the one cited by Mr. Mniko, that is Salum Nassor Mattar (supra). In this case the defendant's counsel had attested the affidavit and other pleadings in the same case and the Court held that the counsel is disqualified to represent the defendant for he acted as a commissioner for oaths for the first defendant and the said documents (counter affidavits) he attested are part of pleadings in the case and they are therefore evidence in the matter. This was also applied by this Court (Mirindo J,) in the case of Selina Gadiye v. Boay Lawala Hotay, (Land Appeal No. 26996 of 2023)[2024] TZHC 1385(12 April 2024), (unreported), The Court was of the opinion that "the Advocate was disqualified to represent respondent before Mbulu District Land and Housing Tribunal, that the proceedings before the Tribunal were prejudicial to the appellant and marred by unlawful legal representation to the respondent. The Court therefore quashed the proceedings before the Tribunal and set aside the judgment and decree emanating from them and ordered retrial a different chairperson!". In the present case, I do not see how advocate certifying secondary evidence could have prejudiced proceedings of the trial Tribunal against the appellants. The learned advocate for the appellants also argued that the trial Tribunal did not comply with legal procedures of dealing with Page 26 of 33 preliminary objections, because issues of non-issuing of mediation certificate and non-involvement of the 1st appellant in mediation were both raised as preliminary objections but the trial Tribunal issued no ruling on the same. This Court has gone through records of the trial Tribunal and found that there are two Rulings on preliminary objections raised by the appellants' advocate on different occasions. As Mr.

Mniko submitted, the first preliminary objection was that the matter is incompetent in law because the 1st appellant was not taken to the Ward Tribunal for mediation, it was heard on 18th August, 2023 and Ruling thereof was read on 21st August, 2023 and trial Tribunal records show that Mr. Mniko was present. For easy of reference the trial Tribunal ruled as follows: "... Hakuna ubishi kwa pande zote kwamba tarehe 1/8/2021 hadi tarehe 1/2/2022 wamekuwepo wakiftka Baraza la Kata kwa aji/i ya su/uhi. Kielelezo A4 kinaonyesha ukweii huo. Mjibu maombi wa kwanza alikuwa mmojawapo ya watu waiiofika Baraza la Kata ya Babati. Hakuna ubishi, katika suiuhu hiyo wadaawa waiishindwa kuelewana na ndipo mleta maombi akaleta shauri hili mbeie ya Baraza hili. Pingamizi hili haiina mashiko kwa sababu Hmekidhi matakwa ya kifungu cha 45 cha the Written Laws (Miscellaneous Amendments) Act No. 3/2021 ambacho kiiirekebisha kifungu cha 13 cha Page 27 of 33 the Land Disputes Courts Act 2/2021. Wadaawa waendeie na shauri kwa kuleta ushahidi ipasavyo. Gharama za kesi zitatazamwa mbeie ya safari." In translation, that the 1st appellant was among persons who appeared before the Ward Tribunal for mediation and the mediation failed that's why the matter was instituted in the trial Tribunal, and that the preliminary objection has no merit. The other preliminary objection, on jurisdiction of the trial Tribunal and that the matter was not filed in accordance with the law, was heard on 6th December, 2023 and the Ruling delivered on 16th January, 2024 and trial Tribunal records show that Mr. Mniko was present as well. For easy reference part of the Ruling read: "...nimewasikiliza mawakiii pande zote na yafuatayo ni sahihi; Mosi had ya madai ya mieta maombi inaeleza sababu za madai ya mteta maombi kwamba ni kushindwa kuiipa kodi, na mpangaji kupangisha nyumba kwa mtu mwingine ambaye hakuwa sehemu ya mkataba wa tarehe 27/8/2014 (subleasing/ tatu katika Mkataba wao hapakuwa na kipengele cha kumruhusu mpangaji apangishe kwa mgeni (Strange to the contract), nne mleta maombi anasema mjibu maombi wa kwanza sio nyumba yake mpaka kupata uhaii wa kupangisha kwa mtu mwingine... Na mwisho mleta maombi katoiea aya ya saba ya hati ya madai anasema Baraza iimuamuru mjibu maombi wa pi/i kutoiwa au kukabidhi nyumba, yenye mgogoro. Hivyo hakuwa na namna kwa kuwa mgogoro huu ni wa nyumba na upangaji ambapo Baraza hili Una uwezo wa kusikiiiza na kutoa uamuzi. Sio kweii ... kwamba mashauri ya ardhi ya nyumba yanahusu kodi ynapaswa kupeleka Mahakama ya Wiiaya. Page 28 of 33 Hakuna popote ambapo vifungu vya Sheria ya Ardhi Cap. 113 Hipotaja Mahakama ya Wiiaya kuhusika kudai kodi ya nyumba. Na hivyo basi Baraza la Ardhi na Nyumba kudai kodi za nyumba ni the Land Disputes Courts Act, Cap 216 na sio vinginevyo. Mapingamizi... yanakosa nguvu na yanakataiwa kwa gharama. Wadaawa waendeele na kusikiliza shauri lao kwa kuleta ushahidi ipasavyo." I am satisfied that procedure in dealing with preliminary objections were complied with. The above said and done, I find no merit in the third appeal ground and I dismiss it. The fourth appeal ground challenges the trial Tribunal's order in relation to removal of the 2nd appellant's goods from the dispute house. It is evident from records of the trial Tribunal that while main suit was in progress, (22 of 2023) Mr. Philoteo Daniel Tango (respondent) through Application No. 44 of 2023 applied for temporary injunction pending determination of the main suit on the basis that while main suit proceeds the 2nd appellant still occupies the dispute house without consent of owners, and continuing with

business without paying rent. The application was granted with an order that the respondents (appellants) should close the dispute house themselves or court broker to do it "wajibu maombi wafunge wenyewe au dalali wa baraza la ardhi anisaidie kupafunga." After a lot of dillydallying from the appellants' side, the trial Tribunal Chairman on 16 and 21st November, 2023 wrote Page 29 of 33 to a court broker to close the dispute house with clarification and specific instructions that: "... Kama kuna vitu ndani ya chumba chenye mgogoro watoe PasHidi Michael Mboya na Theophan Pantaley Severine na kuacha chumba cha mgogoro au la vitolewe na dalali na kuhifadhi kwenye Godawn iakd' The point of removing the goods or leaving them in the disputed house is immaterial. In the fifth and last ground the appellants challenge the trial Tribunal for being functus officio, that in the miscellaneous application for injunction the tribunal had already ordered the 2nd appellant to vacate and remove his goods from the disputed house, but again the trial tribunal orders the 2nd appellant to vacate and handover the house to administrator of the estate of the deceased. This matter should not restrain us long, in the Miscellaneous Application No 44 of 2023, the trial Tribunal ordered specifically that the dispute house should be temporarily closed pending the hearing and determination of the main suit, "ni kwa sababu hizo na kwa kuwa kuna kesi ya msingi itakayosikitizwa na kutoiewa uamuzi juu ya haki za wadaawa ninakubaiiana na maombi ya m/eta maombi kwamba eneo la biashara ambalo mjibu maombi wa pi/i anailfany!a kazi Hfungwe kwa muda..." Page 30 of 33 This Court in a case of Mery Mehi Masong vs National Microfinance Bank & 8 Others (Land Appeal 277 of 2021) [2022] TZHC Land D 404 (23 May 2022) said that according to Rule 3 of Order XXXVII the order of temporary injunction is a judicial notice meant to last only for 6 months and the court may extend such period upon application by the party. Rule 3 to Order XXXVII of the CPC provides: "in addition to such terms as the keeping of an account and giving security, the court may by order grant injunction under rule 1 or rule 2 and such order shall be in force for a period specified by the court, but not exceeding six months: Provided that, the court granting the injunction may, from time to time extend such period for a further period which in the aggregate shall not exceed one year, upon being satisfied, on the application of the holder of such court that the applicant has diligently been taking steps to sett/e the matter complained of and such extension sought is in the interest of justice, necessary or desirable". To make it more precise this court in another case of Jitesh Jayantilal Ladwa v. House and Homes Limited and Others, Miscellaneous Civil Application No. 97 of 2022, in the High Court of Tanzania at Dar es Salaam went far into elaborating that the object of an interim orders is to keep matters or things in status quo, in order that, if at the hearing of the substantive action the Applicant obtains a decision in his favor, the Page 31 of 33 Respondent, will have been prevented, in the meantime from dealing with the property or the subject matter in such a manner as to make that decision ineffectual. In granting the interim order sought the Court went on to hold that: "This interim order is interim and it will last for the period of the pendency of Miscellaneous Application No. ... and in the event the application is not determined within a period of 30 days, and for purpose of avoiding abuse of court orders, the interim orders herein shall elapse and the Applicant may apply to the Court for its renewal." In this case at hand, a question as to whether the applicant has

attempted to apply for the trial Tribunal to extend time for the order of temporary injunction issued in Mise. Land Application No.738 of 2019 has not been raised. Therefore, on the basis of Rule 3 to Order XXXVII of the CPC and the case of Mery Mehi Masong (supra) and Jitesh Jayantilal Ladwa (supra) the injunction order issued by the trial Tribunal in 7th June, 2023 in relation to the dispute house no longer exists. Page 32 of 33 In the final analysis, the appeal stands dismissed in ground 1,3, 4 and 5 and partly allowed in ground 2 to the extent explained. Each party shall bear its own costs. I order accordingly. Dated at Babati this 06th day of December, 2024. N.J. MWIHAMBI JUDGE Court: Judgment delivered in the presence of the first appellant and the respondent. Ms. Fatina RMA is present. Right of appeal is explained. N.J. MWIHAMBI JUDGE 06.12.204 Page 33 of 33

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