

TANZANIA / JUDGMENT

JUDGMENT SAMWEL MWINUKA
VS ISAYA MAHENGE final

COURT
TANZLII

DECIDED
19 March 2025

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA LAND APPEAL NO. 7150 OF 2024 CASE REFERENCE NO.
202404031000007150 (Originating from Application No. 44 of 2024 in the District Land and
Housing Tribunal for Rungwe at Tukuyu) SAMWEL MAJUTO
MWINUKA APPELLANT VERSUS ISAYA
MAHENGE 1ST RESPONDENT YUDA
MAHENGE2ND RESPONDENT ANYANDWILE PESAMBILI
MWANJOKA3RD RESPONDENT

JUDGMENT

6th February & 19th March, 2025 NONGWA, J. The appellant sued Isaya Mahenge and Yuda Mahenge for trespass over the piece of land situated at Mjimwema hamlet Danto village Ntokela ward within the district of Rungwe. He alleged to have purchased the same from Anyandwile Pesambili Mwanjoka, the third respondent who was joined to the suit through the tribunal order. Having been served with joint written statement of defence by the first and second respondents, the appellant sought order of the tribunal to amend the application by impleading the seller. He was granted and dully filed the amended application by adding the seller Anyandwile 1 Pesambili Mwanjoka. In their joint written statement of defence to the amended application, the first and second respondents raised a point of preliminary objection that the matter was pre-mature for failure to pass mediation process in the ward tribunal. Their argument was based on the ground that the third respondent was not party to mediation conducted in the ward tribunal. After hearing the parties, the tribunal concurred with the first and second respondents and the application was struck out. Un-amused, the appellant has filed this appeal on three grounds one, that the trial tribunal erred in law and in facts to struck out the land application with costs for joining necessary party merely because was not attended mediation. Two, the trial tribunal erred in law for refuting its own order. Three, the trial tribunal erred to agree that it was legal to seek withdrawal of a suit with a leave to refile before joining the necessary party. On the hearing date, the appellant was represented by Mr. Joseph Mwainyekule, the first and second respondent by Mr. Bosco Mdoe and the third respondent by Mr. James Kyando, all learned counsels. It was agreed the appeal be disposed by filing written submission. In his submission, Mr. Joseph

informed the court that ground one and three will be argued together and the second ground separately. 2 Arguing the first ground that it was not necessary to go for mediation after joining third respondent, Mr. Joseph faults the chairman for holding that it was necessary for the third respondent who was joined in the latter stages of the suit to have been involved in mediation in the ward tribunal. He contended, Order 1 rule 10(2) of the Civil Procedure Code, Cap 33 (the CPC) allows any party to be added to the case at any time, when that party is joined is not required to attend mediation. In support cited the case of Asha Omary and another vs Apolinary Nicodemu Manda (Suing as the Administratrix of the Estate of the late Nicodemus Tluway Manda), Land Revision No. 10 of 2022 [2023] TZHC 16186 (15 March 2023; TanzLII) in which the court stated there was no provision of law that bar the tribunal from joining a party at trial stage who was not a party to mediation proceedings before the Ward Tribunal. Counsel argued that the appellant was complying with the court order dated 27th November 2023 which ordered necessary party to be joined. On this he supported with the case of Fredrick Winston Kitwika & another vs Raphel Lefi David suing under power of attorney in favour of Isihaka Jongo Jabiri, Misc. Land Application No.458 of 2023 [2023] TZHCLandD 16988 (5 October 2023; TanzLII) on a decision that a court order must be obeyed unless set aside. 3 In the second ground that the court was precluded from refuting its earlier order, counsel for the appellant submitted that tribunal was functus officio to its order dated 27th November 2023 by referring to the case of Edgar Edward Kaijage vs Erick Edward Kaijage & 4 Others, Land Case No. 81 of 2023 [2023] TZHC Land D 16903 (18 September 2023; TanzLII) in which it was stated once a court makes decision on a particular issue its hands become tied up to redetermine it. Replying to the argument that it was not mandatory to go for mediation after joining the third respondent, Mr. Mdoe was in favour of the decision of the chairman. He submitted, requirement for all land disputes to be mediated before filing a suit is embodied under section 13(4) of the Land Disputes Courts Act as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 (the LDCA). He stated the third respondent who was joined following the prayer from the appellant did not participate in the mediation process in the ward tribunal. He referred to the case Mkome Mtwale Two Others vs Babilas Mwenge Mkome, Misc Land Case Appeal No. 21 of 2023

[2023] TZHC 20637 (25 August 2023; TanzLII) and Issa Iddi Kauzu vs Ally Abdalla Mkoko & Another, Land Appeal No. 8 of 2022 [2022] TZHC 11910 (24 August 2022; TanzLII) in both cases it was held 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. Counsel added that after the appellant noticing that third respondent was necessary to the suit ought to have withdrawn the matter with leave to refile so that the matter go to the ward tribunal for mediation as required by the law. He stated reliance on order 1 rule 10(2) of the CPC was not proper as there is section 13(4) of the LDCA which is the specific law governing mediation in land disputes. He referred to the case of Chama Cha Kutetea Haki Na Maslahi Ya Walimu Tanzania (chakamwata) vs Registrar of Organizations, Misc. Labour Application 3 of 2020 [2021] TZHC 3370 (12 May 2021; TanzLII). He submitted on the rule of interpretation of statutes by referring to the case of Republic vs Dodoli Kapufi & Another, Criminal Revision No.1 & C/F No.2 of 2008 [2008] TZCA 84 (14 July 2008;

TanzLII) On cases relied by the appellant, Counsel submitted that were all distinguished with the case at hand. In the second ground that the chairman was functus officio, Mr. Mdoe submitted generally that the court was not functus officio and the 5 appellant was supposed to go back to the tribunal after joining the third respondent. He prayed the appeal be dismissed. Mr. James on his part, submitted that although section 13(4) of LDCA requires before filing application to the DLHT to pass mediation it is silence if the procedure should be the same once the DLHT make any order that a party be joined to the application. To him the applicable law was order 1 rule 10(2) of the CPC. He implored the court to refer to the case of Asha Omary (supra) and Fredrick Kitwika (supra). In the second ground, it was submitted that addition of the third respondent and amendment of the application was by the order of the tribunal and therefore it was not proper to refute its order. Having considered rival submissions and record of appeal, I will dispose the grounds of appeal in the manner parties submitted. I opt to start with the second ground that the tribunal was functus officio. At what point the court becomes functus officio in Kamundi vs R [1973] EA 540 it was held that a court becomes functus officio when it disposes of a case by a verdict of guilty or passing a sentence or making some orders finally disposing of the case. In the present appeal before the tribunal, the chairman made an order that third respondent be joined to the application, it never 6 discussed the point of mediation in the ward tribunal before the first and second respondents raised the objection. On those circumstances, the issue of the tribunal being functus officio did not arise and all authorities cited by Mr. Joseph on the issue of functus officio would only be of considerable relevance and usefulness to me if the Chairman had discussed the issue of going for mediation when making the order to join the third respondent. That said, I find no merit in the second ground of appeal and hereby dismiss it. Coming to the first ground of going back for mediation when a party is added to the suit. Under discussion is section 13(4) of the LDCA, it provides; '(4) 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.' The above provision came on 11 October 2021 after the powers of the ward tribunal to adjudicate over land matter was stripped off. Its core function is now to mediate. To be noted the quoted provision has 7 put it mandatory that for the DLHT to have hear any proceeding affecting interest in the land, the matter must first pass before the ward tribunal which has to certify it has failed to mediate. In the present appeal, the following are matters not in dispute one, the matter was mediated by the ward tribunal as between the appellant and the first and second respondents. Two, that the appellant filed the application in the DLHT against the first and second respondents after the tribunal certified had failed to mediate. And three, the third respondent was joined by the order of the DLHT dated 27 th November 2023. The question that arose in arguments of the parties in the DLHT is whether after joining the third respondent, the appellant was supposed to go back to the ward tribunal for mediation.

The first and second respondents were in affirmative, the view also the chairman concurred. In reaching to the decision, the chairman relied on the case of Issa Iddi Kauzu (supra) and Mkome Mtwale (supra) cited by the respondents. Further that order 1 rule 10(2) of the CPC did not remove the requirement to go for mediation when a party is added to the suit. This argument has been repeated in this appeal except that counsel for the appellant has cited the case of Asha Omary and another (supra) 8 and Fredrick Winston Kitwika & another (supra) not cited his submission before the DLHT. The starting point is the rule of statutory interpretation of statute which was referred by Mr. Mdoe. It is elementary that the meaning of a statute must in the first instance, be sought in the language in which the Act is framed, and if it is plain, the sole function of the courts is to enforce it according to its terms. When the words of a statute are unambiguous, judicial inquiry is complete because courts must presume that the legislature says in a statute what it means and means what it says. See Jackson Sifael Mtares & Others vs The Director of Public Prosecutions, Criminal Appeal No. 180 of 2019 [2021] TZCA 612 (28 October 2021; TanzLII) and Republic vs Mwesige Godfrey & Another, Criminal Appeal No. 355 of 2015 [2015] TZCA 264 (19 February 2015; TanzLII). After reading the provision of section 13(4) the catch word is “land dispute”, the term is not defined by statutes but it may refer to a disagreement or conflict arising from competing claims or interests regarding the ownership, use, or boundaries of land. As hinted earlier, the land dispute was referred to the ward tribunal which certified that it failed to settle mainly after the first and 9 second respondent had refused to attend the mediation when they were summoned. Under section 13(4) of the LDCA, I read nothing requiring all parties to the case, even those joined in the later stages to be heard by the ward tribunal before the DLHT hear the case. In interpreting that provision, Mr. Mdoe and the chairman interpreted it in the way that each party to the case must appear for mediation before the ward tribunal. This is correct in my view only when a party is included in the suit from the beginning, that is when the application is filed. Interpreting the provision to cover even those party(ies) joined under order 1 rule 10(2) of the CPC is too wide interpretation and it may lead to absurdity. Had it been so, the legislature would have provided that all parties must appear for mediation in the ward tribunal before the matter is filed in the DLHT. In the case of Mkome Mtwale (supra) the land dispute was filed without completely being mediated by the ward tribunal whereas in Issa Iddi Kauzu (supra) the argument by the appellant was that section 13(4) of the LDCA did not cover registered land. On the other hand, in the case Asha Omary and another (supra), the issue was whether the second applicant could be joined in DLHT while the case was not mediated between her and the respondent which fall squares to the case at hand. 10 Going by the case relied by each side, those relied by Mr. Mdoe are distinguished with the present case. I have to emphasize that each case has to be determined according to its factual setting and circumstances. At hand, the matter went before the ward tribunal and in fact it certified that the first and second respondents did not attend. The fact that the third respondent was joined in the suit, in my view was not necessary to go back to the ward tribunal or to be involved in the mediation. Some akin situation happened in the case of Gabriel Mathias Michael & Another vs Halima

Feruzi & Others, Civil Appeal No. 28 of 2020

[2023] TZCA 17484 (10 August 2023; TanzLII) the court held that; ‘... we are of the view that, no injustice was occasioned when the mediation was conducted after the death of the second respondent and before her legal representative was made a party to the case. This is because the mediation did not succeed and thus no any rights of the parties were affected.’ At hand, the tribunal certified that the respondents refused to attend even when militiamen were deployed to procure their attendance. I subscribe to the reasoning in the case of Asha Omary & Another (supra) and add that the requirement under section 13(4) of the LDCA does not apply to the party who is added to the case in the course of trial. The first ground is allowed. 11 Having allowed the first ground, I hereby allow the appeal, the order to struck out the application is quashed and set aside. I remit the file to the DLHT and direct the application to continue from the stage it was, specifically from the order dated 27th December 2023. Parties being related I make no order as to costs. V.M. NONGWA JUDGE 19/3/2025 Dated and Delivered at Mbeya at this 19th March 2025 in presence of the Appellant in person, 1st and 2nd Respondents and Mr. Bosco Mdoe advocate for the 1st and 2nd Respondents and absence of 3rd Respondent. V.M. NONGWA JUDGE 12

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/337549/source_file/66735f1bdfce94e2/JUDGMENT_SAMWEL_MWINUKA_VS_ISAYA_MAHENGE_final.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/samwel-majuto-mwinuka-mediationrequirement-tanzlii-2025--6a3ea5243b1caa912981a58a

Prepared on 14 October 2026 · Esheria