

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISCELLANEOUS LAND CASE APPEAL No. 7 OF 2018

MUSSA BOSCO.....APPELLANT

VERSUS

TWALIB SEIF.....RESPONDENT
(Appeal from the Decision of the District Land and Housing Tribunal of
Rukwa in Land Appeal No. 87 of 2016)

JUDGMENT

14th November, 2018 – 23rd January, 2019

MRANGO, J:

This is a second appeal. The matter originated from Muze Ward tribunal (hereinafter referred to as “the trial tribunal”) whereby the appellant herein on behalf of his family sued the respondent herein for the claim of piece of land (hereinafter referred to as the disputed land) measured 20 paces length and 14 paces width. He partly won and partly lost the case. The trial tribunal arrived at its conclusion by ordering that the respondent be given of his purchase price to the tune of Tanzanian shillings three hundred thousand (Tzs. 300,000/=) and costs for development he made on the disputed land to the tune of Tanzania shillings three hundred thousand.

Aggrieved by the trial tribunal decision, the respondent successfully appealed to the District Land and Housing Tribunal of Rukwa (henceforth "the appellate tribunal") after complained amongst that the trial tribunal gave a contradictory decision to the effect that it ordered that the disputed land be returned to the appellant's family upon refund of the purchase price while at the same time it had already decided that the respondent lawful bought the disputed land.

Before the appellate tribunal the appellant (the then respondent) had the legal services of Mr. Mathias Budodi, the learned advocate while the respondent (the then appellant) appeared in person, unrepresented. Upon hearing the appeal, the appellate tribunal found the same meritorious on the grounds that the seller as necessary party was not joined as defendant, the proof that the appellant (the then respondent) was the administratrix of the estate of his late father is wanting and that the trial tribunal judgment is contradictory it gives right on one hand and takes it by the other hand and thus it proceeded to allow the appeal and set aside the trial tribunal judgment.

Dissatisfied with the said decision, the appellant herein through the legal services of Mr. Mathias Budodi, the learned advocate from Budodi Advocate Zonal Law Chambers lodged a six grounds petition of appeal as hereunder quoted;

1. That, the appellate Tribunal erroneously allowed an appellant to re-file an Appeal No. 87 of 2016 having struck out Appeal No. 135 of 2014 for reasons of incompetence;

2. That, the judgment of the appellate tribunal is bad in law as it did not include and/or consider the opinion of wise assessors of the tribunal;

3. That, the judgment of the appellate tribunal is bad in law as it determined the grounds which were impliedly abandoned by the Respondent hence the

judgment failed to show which rounds of appeal were allowed and which ones were not allowed;

4. That, the judgment of the appellate tribunal is bad in law is it left out contested material issues unresolved especial legality of the sale of the land in dispute which was the cornerstone issue in this dispute;

5. That, the appellate tribunal erred in law and fact for raising and determining, *suo motto* the issue of non joinder of seller and the issue of locus stand without giving the parties a right to be heard by affording them chance to address on such a legal issues; and,

6. That, the appellate tribunal erred in law and fact for its failure to analyze properly the evidence tendered before it hence its findings are not supported by the evidence in record.

Like when the matter was before the appellate tribunal before this court again the appellant had the legal services of Mr. Budodi, during the hearing of this appeal; while, the respondent appeared in person. The hearing proceed orally.

Arguing for the first ground of appeal Mr. Budodi, submitted that the respondent filed an Appeal No. 87 of 2016 at the appellate tribunal and the appeal was incompetent. He said the appellant rose a preliminary objection and he appellate tribunal did struck out the appeal, however, the appellate tribunal did grant the leave to re-file the same appeal which is wrong because the issue to r-institute the appeal is not the decision of the court. To buttress his argument, he referred this court to the decision of the Court of Appeal in the case of **Mustafa Fidahussein Esmail versus Dr. Posanyi Jumah Madati**, Civil Appeal No. 43 of 2003 (Unreported).

On the second ground, he submitted that the decision of the appellate tribunal did not consider the assessors' opinions. He said, the appellate tribunal judgment ought to have considered the opinion of the assessors and if the Chairperson departs from opinion of assessors has to give reasons as provided for under **Section 36 of the Land Dispute Court Act, CAP. 216** (henceforth CAP. 216). The judgment of the appellate tribunal is therefore nullity for non compliance of that section. He prayed this court to declare so.

As regards to the third ground, he submitted that the appellate tribunal erred to consider the grounds which were abandoned. He said the appellate tribunal judgment does not show which grounds were allowed and which were not.

Mr. Budodi, went on asserting that the re-filed appeal had three grounds of appeal, however, the appellant did not show whether he adopted the grounds of appeal or not. His argument did not address which ground he was arguing. The submissions were different from the grounds lodged. Therefore it implies that he had abandoned the grounds of appeal lodged, he submitted. Mr. Budodi had the case of **Christina Alphonse Tomas versus Saamoja Masingija,**

Miscellaneous Civil Application No. 13 of 2013 HC - Sumbawanga (Unreported) to cement his argument.

In respect of the fourth ground of appeal he submitted that the judgment of the appellate tribunal is bad in law. It left behind the contested material. The cornerstone issue was a sale of the disputed land. That controversial issue was not resolved.

He went on asserting that the disputed land was sold by one of the child who was not the administrator of the deceased estate. He said the appellate tribunal failed to consider the decision in the case of **Dafroza George Mlyato versus Peter Msalila**, (PC) Probate and Administration appeal No. 3 of 2015 H/C – Sumbawanga (Unreported) where this court held that a transaction which is not done by an administrator of the estate of the deceased duly appointed by the court is an onerous transaction unless sanctioned by the heirs.

On the fifth ground of appeal, Mr. Budodi, submitted that the appellate tribunal erred in law where it raised suo motu of the issue of locus standi without giving the parties right to be heard. The parties were not invited to address the issue as provided for by the Court of Appeal in the case of **Roza Somji versus Amina Salum**

[1993] TLR 208 page 212. With that view, he said the appellate tribunal erred to raise the issue suo motu while its the remedy was to call the parties to address the issue otherwise invalid and set it aside.

On the sixth ground they had the view that the trial tribunal was quite proper, there was no contradiction whatsoever. It addressed properly the issue of sale and ordered the bona fide purchaser to be returned his money. That according to Mr. Budodi was just and fair decision to both parties.

With all those, Mr. Budodi prayed this court to allow the appeal and restore the decision of the trial tribunal with costs.

In reply, the respondent submitted that he lodged the three grounds petition of appeal before the appellate tribunal and argued them in his submission. He said he purchased the disputed land legally. Thus there was no justification to handover back the disputed land.

He went on asserting that the appellant didn't produce any document to establish that he was legally appointed as administrator of the deceased's estate.

In rejoinder, Mr. Budodi, reiterated that the respondent had to sue a seller to recover the sale proceeds. The ward tribunal considers recovering of the purchase price. He added that there was no permission to sale the disputed land from the appellant. With that view he insisted that the appeal be allowed with costs.

I have perused the records of this appeal and have thoroughly gone through the files of the two tribunals below. But without much wasting my time, I find no reason to embark on the determination of this appeal on merit. Because I am attracted by the irregularity as clearly transpired on the records of this appeal. The irregularity I noted is as regards to the quorum or attendance of the members of the trial tribunal who sat during the determination of matter before it. As regards to the composition of ward tribunal the law is clear as provided for under the provision of **Section 11 of CAP. 216**. The section reads thus and I quote that:

"Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as

**provided for under Section 4 of the Ward
Tribunals Act, 1985”**

The above quoted **Section 11 of CAP. 216** should be read together with **Section 4 (3) of CAP. 206** which reads:

**“The quorum at a sitting of a Tribunal
shall be one half of the total number of
members”**

Thus the trial tribunal for that matter ought to be constituted of by at least four members and not less than that throughout the hearing of the case. The records should be self explanatory as regards to the member who sat in that session to hear evidence and determine the dispute. Unfortunately, in the instant matter in some of trial tribunal session the records do not show if there were members who sat to hear the case.

It is apparent from the trial tribunal record that on unknown date the hearing of the case at the trial tribunal commenced. On that unknown date the complainant, Mussa Bosco gave his evidence. He was asked questions by the defendant, Twalib Seif and by the tribunals’ members. Later on, the case was adjourned to come for

continuation of hearing on 6.11.2014. Unknowingly, the case come for hearing on 13.11.2014 whereby Clede Sabuni, the complainant's witness gave his testimony. He was asked question by the defendant and tribunal members. And thereafter, the defendant gave his defence story. He was also questioned by the complainant, Mussa Bosco and the tribunal members. The case was adjourned to come for continuation of hearing on 18.11.2014. Unfortunately, the hearing took off on 25.11.2014 whereby Joshua Prosper and Nyansio Joseph defendants' witnesses. They were asked questions by the complainant and tribunal members. In the two trial tribunal sessions that of unknown date and of 13.11.2014 the names of tribunal members who sat in those sessions were listed at the end of each session. Thus the trial tribunal was properly constituted as required by the law.

But the records are silent if there was any tribunal member who sat on 25.11.2014 when defendant's witnesses (Joshua Prosper and Nyansio Joseph) were giving their evidence and if in fact the trial tribunal was properly constituted as required by the law. Failure to

show/list their names in the quoram or attendance contravened

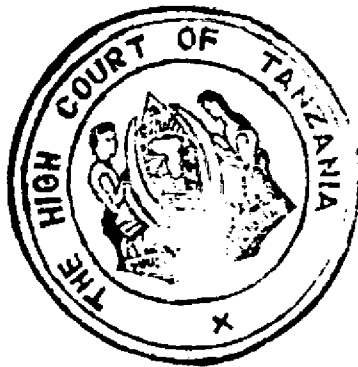
Section 11 of CAP. 216.

It is trite law that hearing and determination of cases by the ward tribunal without involving tribunal members or without showing an attendance of the tribunal members during its session is fatal and renders the whole proceedings and the decision thereof null and void. With that in mind, I find that the trial tribunal was not properly constituted and therefore the decision reached by it is totally unlawful and void *ab initio*.

With that view in my mind, I find the irregularity pointed out and determined herein above is fatal and makes the proceedings and judgement thereof of the trial tribunal a nullity. The judgment and or order in appeal in the appellate tribunal of Rukwa were based on such nullity proceedings and judgement of the trial tribunal. In the premises, I do invoke the revisionary powers enshrined under the provision of **Section 43 (1) (b) of CAP. 216** and proceed to quash the proceedings and decision of the lower tribunals. The orders made consequent to such nullity proceedings and decisions in both lower tribunals are also set aside. In the circumstances of the case as a

whole, I find the order of a retrial is not preferable. Instead, I direct and order that any party is at liberty to institute a case afresh; and, in the meantime, the *status quo* before filing of "**Madai Na. 6/2014**" before Muze Ward tribunal be maintained. In view of the fact that the irregularity was raised by this Court *suo motu*, I make no order as to costs.

It is accordingly ordered.





D. E. MRANGO
JUDGE
23.01.2019

Date - 23.01.2019
Coram - Hon. R.M. Mbuya – DR.
Appellant } - Absent
For Appellant }
Respondent - Present
B/C - J.J. Kabata

COURT: Judgment hereby delivered this 23rd day of January, 2019
in the present of the Respondent and Ms. J.J. Kabata the
Court Clerk and in the absent of the Appellant to his
advocate Mr. Budodi.

Rights of appeal explained.




R.M. MBUYA
DEPUTY REGISTRAR
23.01.2019