

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

MISCELLANEOUS LAND APPLICATION NO 112 OF 2020

ALPHAYO ODONGO AREGO APPLICANT

VERSUS

JACOB ARIRI RESPONDENT

*(Arising from Land Application No. 74/2016 District Land and Housing Tribunal of
Tarime original Ward Tribunal of Tai in Application No. 5 of 2020)*

JUDGMENT

23^d & 30th November, 2020

Kahyoza, J

Alphayo Odongo Arego sued **Jacob Ariri** before the Ward Tribunal for trespass. **Jacob Ariri** was the owner of land in disputed land. **Jacob Ariri's son** Emmanuel Jacob (DW2), borrowed money from **Tuboreshe Nyamagongo Group** (the group). Emmanuel Jacob failed to pay back the loan. Emmanuel Jacob discussed with father Jacob Ariri and decided to pledge the land in dispute.

In 2014, the group sought to sale the pledged land and began looking for a person interested in buying the land. **Alphayo Odongo Arego** decided to buy the land. He paid Tzs. 700,000/= to the group and the group handed the disputed land to him. The owner of the disputed land, Jacob Ariri signed the sale document to transfer land. The Chairman executive officer, the hamlet chairman as well as the chairman and the

Secretary of the group signed the document. Alphayo Odongo Arego, (the appellant) took possession of the land in dispute. The disputed land has a size of 45 x 24 paces.

The appellant licenced one Daudi Panyako to use the land he bought from the respondent. Daudi Panyako used the land in question from 2014 until on the 13/12/2018 without any dispute. On the 13/12/2018, Daudi went to the disputed land and found the respondent's wife cultivating the land and planting cassava. Daudi reported to the appellant. The appellant went to the disputed land and informed the Village Executive Officer. They summoned the respondent who went to the disputed land with a panga.

They could not discuss the dispute as the respondent was armed. The appellant sued the respondent and won the day before the Ward Tribunal.

Aggrieved, Jacob Ariri, the respondent, appealed to the District Land and Housing Tribunal (**the DLHT**). The **DLHT** overturned the decision of the Ward Tribunal. It decided in the respondent's favour. Dissatisfied, the appellant appealed to this court raising three grounds of appeal as follows-

1. That, the learned Chairman erred in law and fact and misdirected himself when he quashed the judgment and the proceeding of the ward tribunal and order the matter to start afresh at the ward tribunal without sufficient and credible reasons. However, erred in law to direct to join TUBORESHE group as a party to this case, while TUBORESHE group was a witness of the Appellant at the ward

tribunal and testif[ied] that the suit in dispute is the appellant property.

2. That, the trial Chairman erred in law and fact, and failed totally completely to handle the matter, although the two assessors' opinion declare the Appellant (respondent) as the lawful owner of the land in dispute but the Chairman differ[ed] with the assessors without mention any concrete reason to differ with assessors and judgment of T[rial] ward tribunal.
3. That, the trial Chairman erred in law and fact, failed totally to consider that, (the Appellant bout the suit land legally from TUBORESHE group) since then the Appellant used the suit land peacefully until 2018 when the respondent raise a dispute.

The appeal was heard orally. I now answer the issued raised by the three grounds of appeal.

Was the DLHT justified to quash the judgment and proceedings of the Ward Tribunal?

The appellant contended that appellate tribunal erred to quash the proceeding and judgment of the Ward Tribunal and order trial *de novo* by joining the group as a party.

The respondent supported the decision of the first appellate tribunal that the chairman was right to order the matter to start afresh as TUBORESHE GROUP was a necessary party.

This is a second appeal. It is a rule of practice that a second appellate has no duty to review the evidence. It is unfortunate that the first

appellate court did not play its role of reviewing the evidence. I had to examine the evidence on record. The evidence on record shows that the respondent's son Dw2 Emmanuel Jacob borrowed money from the group which he was a member. He failed service the loan. Dw2 Emmanuel deposed that he discussed the matter with his father, the respondent. They the respondent and Dw2 Emmanunel decided to pledge the respondent's land so as to get money and pay the loan. Dw2 Emmanuel and the appellant decided notify the group that they wanted to pledge the disputed land to pay the loan. The group leaders decided to take the disputed land as a security for the loan. Dw2 Emmanuel deposed that they (the respondent and Dw2 Emmanuel, the borrower) pledged the disputed land to the group for five years. Dw2 Emmanuel evidence reads -

"Na ardhi hiyo mimi shahidi ndiye iliyeenda katika kikundi cha Tuboreshe Nyamagongo na kukopa pesa kiasi cha Tshs 200,000/= nilikuwa na mgojwa mke wangu alikukwa anumwa nillimleka hosipitali baadaye nilishindwa kupata pesa hizo kusudi niwarudishie halafu tulikaa na baba yangu kusudi tumtafue mtu kutudhamini au kumwekea ardhi rehani kusudi tulipe pesa zile halafu mimi niliwapelekea wanakikundi taarifa hiyo alafu wao wanakikundi waliambia badala ya kutafuta mtu ni bora tuwape wao kwani kikundi chao ni endelevu kusudi wafanyepo mradi wao wakulima kwa ajili kutunisha mfuko wa hisa baadaye walikuja na Mtendaji nikawapeleka katika eneo iliyokuwa sentani lakini hapo hawakuridhika nayo halafu baba aliwapeleka katika eneo lingine la shamba hapo waliridhika nayo mpaka tukaandikiana na kuweka

*ihii zetu. Kwa dhamana (rehani) miaka mitano (5) tulikuwa na
wa tu familia wengine hawakuja kwa kuwa mapatano ya
wakikudni."*

Her defence witness (the respondent's witness) was Dw3 Diana Jacob, this witness informed that Ward Tribunal that the respondent pledged that land in question. The actual used was "kukodisha" (leased) the disputed land for five years to the group.

It is clear from the respondent's evidence that the respondent took part in the exercise of giving land to group. It was also clear that the respondent pledged land to secure the loan his son Dw2 Emmanuel borrowed from the group. I found it proved that the group members wanted cash in order to distribute to the members. The group found a person who was ready to buy the disputed land. The appellant bought the land. The Pawnee, that is the the group, and the pawnor, the respondent signed the document to pass the disputed land to the appellant. This time the pawnor was a guarantee and not the borrower. The borrower Dw3 Emmanuel failed to pay the loan the group had a right turn to the guarantor's property.

Section 128(1) of the law of contract stipulates that where a pawnor defaults to pay loan, the pawnee may sell the pawnor's property after giving the latter adequate notice. It states-

"128(1) Where the pawnor makes default in payment of the debt or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit

against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale."

I see nothing wrong in the arrangement. The respondent guaranteed loan by pledging his the land. The land was in the lender's hand but the land could not have sold it without involving the guarantor. The lender and guarantor disposed the pledged land to repay the loan. That arrangement was legal and enforceable. S. 128 cited above supports the arrangement. I, therefore do not share the same views with the chairman of the land tribunal. Thus, it was not justified for him to reserve the decision of Ward Tribunal. I answer the first issue affirmatively.

Did the chairman give reasons for dissenting with the assessors?

The appellant complained that the chairman differed with the assessors with stating the reasons for doing so.

The respondent replied that the chairman was not bound by the opinion of the assessors.

In deed the chairman of the DLHT is not bound with the opinion of the assessor. The law requires the chairman to give reason for differing with the opinion of assessors. S. 24 of the **Land Disputes Court's Act** [Cap 216 R. E. 2019] States:-

"24. In reaching decisions, the chairman shall take into account the opinion of the assessors but shall not be bound by its, except that

the chairman shall in the judgment give reasons for differing with such opinion."

I went through the DLHT's judgment and found that the chairman differed with the opinion of the two assessors without assigning reasons. Both assessors opined that the appellant who was the respondent before the DLHT had right to the disputed land.

The chairman found in favour of the respondent who was the appellant without assigning reasons for differing with the opinion of the assessors. The judgment of the DLHT speaks loudly. It reads-

"After hearing the submission from both sides I have noted that the respondent purchased the land in dispute from one group by the name of TUBORESHE. It further alleged that the appellant son took loan from that group after failure to repay the loans by his son is when the appellant gave the land in dispute to TUBORESHE group who later on sold it to the respondent.

From the above observation, I will differ with assessors opinion who opine to declare the respondent as the lawful owner of the land in dispute but rather I hereby quash the judgment and proceeding of ward tribunal and further I direct the matter to start fresh at ward tribunal and TUBORESHE group to be joined as party to this case to determine whether the appellant gave them the land in dispute hence to have the right to sell it to the respondent.

It is so ordered"

I uphold the second ground of appeal that the chairman had no reason to differ with the opinion of the assessors. The chairman's findings cannot be allowed to stand.

Did the chairman consider the evidence on record?

The last ground of appeal was that the first appellant tribunal did not considered the fact that the appellant bought the land in dispute on the 1/7/2014 and occupied it until 2018.

The respondent replied that it was not established how the group got the disputed land it passed to the appellant.

I totally agree with the appellant, that the first appellate tribunal did not properly consider the evidence on record. It failed to analyze the evidence on record. It is true that the appellant bought the disputed land and occupied it from 2014 to 2018. The appellant licenced one Daudi Panyako (PW3) to use the land. Daudi Pw3 deposed that the respondent and his son accepted that the pledged land be sold to repay the loan.

The respondent's son, Emmanuel Jacob (DW2), deposed as quoted above that they discussed the issue with his father and resolved to pledge the land to get money to pay the loan. He added that it was the respondent who led the group leaders to the disputed land. The respondent was party to the agreement to pledge land and to dispose it to the appellant. The respondent is estoppel to deny the truth of the two agreements.

It is on record that the hamlet chairman and the village executive officer witnessed the sale or transfer agreement between appellant on side and the group and the respondent, on the other. I have no reason to hold that the respondent was not party to the sale agreement. The appellant

tribunal did not assign reasons for discrediting the sale agreement or transfer agreement.

Had the chairman considered, re-evaluate the evidence on record, he could not have differed with the opinion of the assessors.

In end result, I find the judgment of the DLHT not supported by evidence on record. I quash the judgment and set aside the orders. I uphold the Ward Tribunal's findings, that the disputed land belongs to the appellant. The respondent transferred the disputed land to the appellant. The appeal is allowed with costs.

It is so ordered.

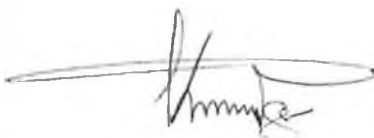


J. R. Kahyoza

JUDGE

30/11/2020

Court: Judgment delivered in the presence of the parties. B/C Prisca Juma present.



J. R. Kahyoza

JUDGE

30/11/2020

