

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 06 OF 2019

*(Originated from the District Land and Housing Tribunal of
Mbeya in Land Application No. 90 of 2018)*

JOSEPH MWAMBONEKE.....1ST APPELLANT

SAULI MWAMBONEKE.....2ND APPELLANT

VERSUS

MAGRETH MWAKINGILI.....RESPONDENT

JUDGMENT

Date of last order: 20/02/2020

Date of Judgment: 03/03/2020

NDUNGURU, J.

In this appeal, the appellants, Joseph Mwamboneke and Sauli Mwamboneke are challenging the decision of the District Land and Housing Tribunal of Mbeya (herein referred as the trial tribunal) in the Land Application No. 90 of 2018. In that trial tribunal, the respondent,

Magreth Mwakingili sued the appellants for trespass over a suit land located at Itanji area within Igawilo Village in Mbeya City.

In the defence, the first appellant told the trial tribunal that, he had never sold the suit land to the respondent. He also testified that he is not the owner of the suit land. Further the first appellant told the trial tribunal that, the suit land belongs to Saul Mwamboneke. On other hand the second appellant contended that, he is a lawful owner of the suit land.

Having heard the evidence tendered by the both parties together with their witnesses, the trial tribunal found that, the respondent's evidence was heavier than the evidence adduced by the appellants. Therefore, the trial tribunal declared the respondent to be the lawful owner of the suit land.

The appellants being aggrieved and dissatisfied with the decision of the District Land and Housing Tribunal of Mbeya hence, lodge the present appeal before this Court. In the memorandum of appeal the appellants raised five grounds of appeal to wit:

1. That, the District Land and Housing Tribunal erred in law and facts by making decision in favour of the respondent despite the fact that the

respondent not failed to produce document as proof of sale of the suit land.

2. That, the District Land and Housing Tribunal erred in law and facts by deciding in favour of the respondent despite the facts that there is sufficient evidence which proves otherwise.
3. That, the District Land and Housing Tribunal erred in law and facts by basing the decision in favour of the respondent which to a large extent her evidence was full of fabrication.
4. That, the District Land and Housing Tribunal erred in law and facts by failing to analyze the case at hand hence, reached at an unjustifiable and wrong decision.
5. That, the District Land and Housing Tribunal erred in law and facts by entertaining the suit of which its premise was pending retrial at Ward Tribunal , the order which emanated from the land Appeal No. 120 of 2017, which was entertained and ordered by the same District Land and Housing Tribunal.

When the appeal was called on for hearing, Mr. Sambwee Shitambala learned advocate appeared for the respondent whereas the appellants appeared in person, unrepresented. The matter was argued

by the way of the written submission following the order of this Court and both parties have adhered to the scheduled order.

In supporting the first, second and third grounds of appeal, the appellants submitted that, in the whole trial, the respondent never produced any document as proof of the sale of the suit land as she purported it. They added that the whole of the evidence adduced by the respondent does not have tangible proof/exhibits. They went on to submit that the people in the same clan or even family, may own land independently.

They continued to submit that, the respondent bought a suit land from the person who was not a real owner of the suit land. They went on to submit that there was no any evidence which shows that such small portion was also given to the respondent by her mother.

On the fourth ground of appeal, the appellants alleged that, the trial tribunal failed to analyze the case and reached at an unjustifiable and wrong decision. They added that, the second appellant had given part of the suit land to his sister, Shari Mwamboneke who is the mother of the respondent. Therefore the trial tribunal was wrong to hold that, the respondent has been there for 12 years.

On the fifth ground of appeal, the appellants submitted that, trial tribunal in Land Appeal No. 120 of 2017 found that the proceedings of the ward tribunal were not taken at locus in quo, did not show names, signature and gender of the ward tribunal members and also there was no cross examination by either party. They went on to submit that the trial tribunal was wrong to entertain Land case No. 90 of 2018 while there was pending trial denovo of the same matter at the Ward Tribunal. In the conclusion, they pray the Court to find out that there was no sale of the suit land at all and also declare the appellants lawful owner of the suit land.

Responding to the first, second and third of appeal, Mr. Shitambala learned counsel for the respondent contended that, an agreement can either written or not. He went on to submit that, a mere fact that there was no written document does not invalidate an agreement. He added that the respondent had proved her case on balance of probability and therefore the trial chairman had correctly entered a judgment in favour of the respondent.

Turning to the last ground of appeal, Mr. Shitambala reply that, this is new issue to the case as it was not raised by the appellants either in way of reply in Written Statement of Defence nor as an

objection. He added that Land Appeal No. 120 of 2017 involved Saul Mwamboneke and Magreth Mwakingili as parties while this case is between Magreth Mwakingili versus Joseph Mwamboneke and Sauli Mwamboneke. He went on to submit that, the appellants were wrong to raise the issue of the locus standi on appeal stage.

In rejoinder, the appellants reiterated their submission in chief. Finally, they reiterated their prayer that this Court to nullify the proceedings of the trial tribunal.

After having gone through the records of the trial tribunal, grounds of appeal and written submissions made by both parties to this appeal and before starting discussing the grounds of appeal raised and the submissions by the parties, this Court has found some procedural irregularities committed by the chairman of the trial tribunal.

The first anomaly occasioned by the trial chairman is that, the assessors were not full involved in the whole proceedings, they were not accorded with opportunity to pose question for clarification because the record is silent see page 5 up to 22 of the proceedings of the trial tribunal.

Also the records are silent as to whether the chairman invited the assessors to give their opinion as required by the law. What is in the

record is their written opinion. It is doubtful as to how and when they found the way in the Court record they are to be taken circumspectly.

Section 23 (2) of the Land Disputes Court Act (Cap 216 R.E. 2019) provides as follows:

*"(2) The District Land and Housing Tribunal **shall duly be constituted when held by a chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.**"*

Therefore, it is the law which gives the assessors mandate to give opinion on the verdict before the chairman composes the decision. In other words it is mandatory for the chairman of the tribunal to consult the assessors before he reaches the judgment.

Further the Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003 provides that:

"Notwithstanding sub- regulation (1) the chairman shall, before making judgment, require every assessors present at the conclusion of the hearing to give his opinion in writing and the assessors may give his opinion in Kiswahili."

However, the record of the trial tribunal at page 21 of the typed proceedings provides that:

ORDER

Judgment on 22/11/2018

Sgd.
T.Munzerere
Chairman
10/10/2018

Further, the record revealed that:

ORDER

- 1. No opinion by assessors*
- 2. Judgment on 12/12/2018 parties to appear.*

Sgd.
T.Munzerere
Chairman
22/11/2018

Therefore, the record does not reveal if the assessors were given opportunity to give their opinion as required by the law. The record of the proceedings show that the parties were ordered to appear on the date of the judgment and that there was no opinion of assessors but it is silent as to whether the chairman invited the assessors to give their opinion as required by the law.

In my understanding, the same being filed in the absence of the parties therefore it is not easy for the parties to know the nature of the opinion given by the assessors and whether such opinion has been considered by the chairman in his judgment. The same position is well

articulated by the Court of Appeal of Tanzania in the case of **Edina Adam Kibona vs. Absolom Swebe (Shell)**, Civil Appeal No. 286 of 2017 (Unreported) and the case of **Tubone Mwambete vs. Mbeya City Council**, Civil Appeal No. 287 of 2017.

Another anomaly occasioned by the trial chairman is that, the record shows that, the respondents adduced their evidence as locus in quos witness instead of the defence witness, in my opinion this is not right in civil practice. Therefore, the trial chairman was wrong to conduct the proceedings in that way.

In that event, I will not labor on the grounds of appeal as the above discussed irregularities suffice to dispose the appeal. It is further ordered that the case must be remitted back to the trial tribunal for trial denovo; the matter should be heard by another chairman with a new set of assessors. I make no order as to the costs on account that the irregularity is done by the tribunal chairman the parties have no hand to that effect.

It is so ordered.




D. B. NDUNGURU
JUDGE

03/03/2020

Date: 03/03/2020

Coram: D. B. Ndunguru, J

1st Appellant: Absent

2nd Appellant: Absent

Respondent: Present

For the Respondent: Ms. Tunu Mahundi holding brief of Mr. Shitambala - Advocate


B/C: M. Mihayo

Ms. Tunu Mahundi – Advocate:

I hold brief of Mr. Shitambala advocate for the respondent. The case is for judgment.

Court: Judgment delivered in the presence of Ms. Tunu Mahundi holding brief of Mr. Shitambala Advocate for the Respondent and in the absence of the Appellant.




D. B. NDUNGURU
JUDGE
03/03/2020

Right of Appeal explained.