

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 24 OF 2018

ERASTO YAKOBO SANGA.....APPELLANT

VERSUS

MAULID MUSSA.....FIRST RESPONDENT

MASONGO HUSSEIN JUMA.....SECOND RESPONDENT

JUDGMENT

Date of Last Order: 11/09/2020

Date of Delivery: 27/11/2020

AMOUR S. KHAMIS, J

Erasto Yakobo Sanga was the applicant in the District Land and Housing Tribunal for Tabora in which he sought an order for declaration that was a lawful owner of a disputed property on Plot No. 2, Block "RR", Chemchem area, Tabora region.

According to the pleadings, he bought the disputed house from one Kondo Rashid in the year 2015 at a price of Tshs. 30,000,000/=.

He also sought an order of eviction against the respondents, Maulid Mussa and Masongo Hussein Juma.

Maulid Mussa and Masongo Hussein Juma filed a Joint Written Statement of Defence in which they disputed Erasto Sanga's claim on ownership of the property.

The suit proceeded to trial out of which the trial tribunal found that the appellant Erasto Sanga had no legal foundation to claim ownership and declared that the property belonged to the late Shebe Ramadhani Mwinyipembe with exclusion from any other person including Kondo Rashid Mtaki who allegedly sold it to the appellant.

The trial tribunal further nullified a sale of the disputed property between Kondo Rashid Mtaki and the appellant on the ground that the seller had no title to sale it off.

Aggrieved, Erasto Yakobo Sanga, lodged this appeal raising five grounds to challenge the trial tribunal's findings, to wit:

1. That the trial chairman grossly erred in law in giving judgment without taking into account of assessor's opinion.
2. That the trial Chairman grossly erred in law and fact for failure to evaluate and consider evidence adduced by appellant's witnesses.
3. That the trial chairman erred in law and fact in holding that the landed property is located at Madaraka Street while it is at Utusini Street.
4. That the trial chairman erred in law by refusing to call land officer from Tabora Municipal Council.

5. That the trial chairman grossly erred in law and fact to proceed with the matter and give judgment while there is a procedural irregularity.

When the matter was set before me for hearing, Mr. Kanani Chombala, learned advocate, appeared for the appellant while Mr. Hassan Kilingo, learned advocate, acted for the respondents.

The appeal was canvassed by way of written submissions and a schedule set by the Court was complied with by the appellant. For no apparent reason(s), the respondent did not file any submissions.

It is trite law a party's failure to file written submissions is tantamount to failure to appear on a date set for hearing (See. **NATIONAL INSURANCE CORPORATION OF (T) LTD & ANOTHER V SHENGENA LIMITED, CIVIL APPLICATION NO. 20 OF 2007** and **PATSON MATONY V THE REGISTRAR INDUSTRIAL COURT OF TANZANIA & ANOTHER, CIVIL APPLICATION NO. 90 OF 2011**(unreported)).

For this reason the Court will proceed to consider the one sided submissions filed by the appellant's counsel.

Mr. Chombala prayed to consolidate the second and third grounds of appeal and separately amalgamated the fourth and fifth grounds.

On the 1st grounds of appeal, he submitted that the trial chairman grossly erred in law in giving judgment without taking into account opinion of the assessors.

On the second and third grounds of appeal, the learned counsel faulted the trial chairman for failure to evaluate and consider the evidence adduced by the appellant's witnesses.

On the fourth and fifth grounds of appeal, the appellant's advocate faulted the trial chairman for failure to summon a land officer from Tabora Municipal Council with a view to shed light on ownership of the disputed parcel of land.

I will start with the first ground of appeal that touches on failure to consider the assessors' opinion.

The question is whether the trial chairman failed to consider opinion by assessors.

Section 24 of **THE LAND DISPUTES COURTS ACT NO. 2 OF 2002, R.E 2019** provides that

"In reaching decision the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the Judgment give reasons for differing with such opinion".

At page 3 of the impugned Judgment, the trial Chairman referred to an opinion of a lay assessor, Mama Mgumia who opined that the matter be struck out for lack of locus on part of the respondents.

Immediately thereafter, the chairman differed with her opinion and gave five itemized reasons and or decision points.

Prior to the above, the chairman observed that another assessor Mama Aneth Nsimba was sick and thus unable to opine.

In my view, the trial Chairman dutifully complied with the stated legal provisions.

On the third and fourth grounds of appeal, the appellant's counsel contended that the trial chairman did not take on board evidence adduced by the appellant's witnesses.

Proceedings show that the appellant had paraded three witnesses: PW 1 Erasto Yakobo Sanga, PW 2 Kondo Rashidi Mtaki and PW 3 Mussa Karuta.

PW 1 was the appellant himself. His testimony was extremely brief. He stated that:

"The case against the respondents is that the respondents have trespassed to the land of me. So I pray the tribunal to decide the case so as the justice be done. I have the evidence or documents I pray to tender the same so as to prove my case."

Thereafter, the tribunal admitted the documents as Exhibit P 1. On cross examination, PW 1 stated that neighbours were not involved in the sale of the house.

On cross examination by the second respondent, he admitted that no beacons were shown to him at a time of sale and that was ignorant of the size of the disputed plot.

On further cross examination by the second respondent, PW 1 said that:

"When I bought the land I have seen the customary boundary such as palm trees. When I bought the plot the Mtaa

Leaders were not there. There are no neighbours who had involved into the transaction.”

PW 2 was the seller of the disputed property while PW 3 gave a very short testimony stating that the appellant had bought the disputed house from PW 2.

On cross examination by the second respondent, PW 3 stated that he was a relative of the appellant.

On cross examination by the first respondent, he stated that during sale of the house, neither neighbors nor street council leaders were involved in the transaction.

On further cross examination, PW 3 stated that:

“....There were only the seller and the buyer together with the State attorney. We have seen the coconut tree and palm tree to the area which are the properties of Mzee Kondo.”

In pages 2 – 3 of the typed Judgment, the trial Chairman analyzed the evidence on record, thus:

“Upon hearing of the parties and their witnesses and also upon visiting to the locus in quo on 21/07/2018, there is no dispute that the applicant has trespassed to the disputed plot as the seller of the suit plot one Kondo Rashid Mtaki (PW 2) admitted that when the sale was done the neighbours to the area were not involved also he was yet to get title deed to the disputed plot. In short it is difficult to have one plot which exceeded from one street to another.

The PW 2 again admitted that he sold the plots to the applicant but he gave one title deed and the other one was not given since there is problem....”

Having weighed the substance of evidence given by PW 1, PW 2 and PW 3, it is clear that there was nothing substantial that could be said of PW 1 and PW 3.

In the circumstances, the trial Chairman rightly analyzed the substance of evidence given by PW 2 and I find nothing wrong to fault him.

On the fourth and fifth grounds of appeal, the appellant’s counsel asserted that it was prudent to summon the land officer to testify on demarcations of the plot (s) in dispute on the ground that witnesses gave different plot numbers.

From the outset, I did not see merits in this contention.

It is trite law that every party to the case is entitled to call witnesses as he deems fit. The Court has no duty to call witnesses to fill in the gaps in a litigant’s case.

Order XVI Rule 1 of **THE CIVIL PROCEDURE CODE, CAP 33 R.E 2019** provides that at any time after the suit is instituted and on application to the Court, the parties may obtain summonses to whose attendance is required either to give personal evidence or produce documents.

I have thoroughly examined the trial tribunal’s proceedings but did not come across any application by the appellant or a refusal by the tribunal to have a land officer summoned as a witness.

There was also a contention that the trial chairman confused location of the plot in dispute.

This assertion is equally misplaced^{as} the tribunal's records indicates that the trial chairman was well aware of the two different streets referred to by the parties and took them into account.

This is reflected in page 3 of the typed Judgment, thus:

"...In short the seller (PW 2) his plot is situated at Utusi Street, Chemchem area whereas the plot of the respondent's family is situated at Madaraka Street. So it is not just for the seller (PW 2) to sale his plot in Utusi Street Chemchem area and the plot of his neighbor at Madaraka Street."

I have also considered the substance of evidence given by the respondents through DW 1 MAULID MUSSA, DW 2 MASONGO HUSSEIN and DW 3 CHARLES MANYAMA.

DW 3 is a neighbor to the disputed plot and narrated its ownership history.

According to him, the respondents herein are grandchildren of the late Mzee Shebe, the renowned owner of the land in dispute.

On examination in chief, he stated that:

"I know very well the plot of Mzee Kondo and the plot of Mzee Shebe. What I know is that Mzee kondo's area is at Utusi Street and Mzee Shebe's plot is at Madaraka. I came to the area in 1984. I found the late Mzee Shebe into the suit plot up to this moment when his grandchildren uses the area."

Testimonies of DW 1 and DW 2 corroborated the evidence of DW 3 on the late Mzee Shebe's ownership of the disputed plot.

In the circumstances, I find no merits in this appeal which is accordingly dismissed with costs. It is so ordered.



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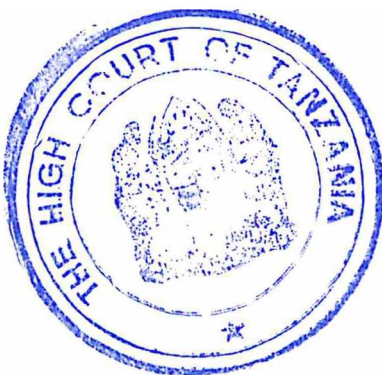
AMOUR S. KHAMIS

JUDGE

27/11/2020

Court:

Judgment delivered in the presence of Mr. Amos Gahise Advocate holding brief for Mr. Kanani Chombala, Advocate for the Appellant and Mr. Kilango Hassan, Advocate for the Respondent. Right of appeal explained fully that is within 45 day to the Court of Appeal.



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B.R. NYAKI

DEPUTY REGISTRAR

27/11/2020