

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA

LAND APPEAL NO. 19 OF 2019

*(From the decision of District Land and Housing Tribunal for
Mbeya in Application No. 107 of 2016)*

BERNARD MBUJI.....APPELLANT

VERSUS

JOSEPH CHEREHANI.....RESPONDENT

JUDGMENT

Date of last order: *05/11/2019*

Date of Judgment: *17/02/2020*

NDUNGURU, J.

The appellant, Bernard Mbuji unsuccessfully sued the respondent at District Land and Housing Tribunal for Mbeya at Mbeya (herein referred as trial tribunal) over a piece of land located at Mabadaga Village in Mbarali District in Application No. 107 of 2016. The respondent was subsequently declared a lawful owner of the disputed land.

Being aggrieved by judgment and decree of the trial tribunal, the appellant has lodged this appeal. In his memorandum of appeal, the appellant has raised four grounds of appeal:

1. That, the District Land and Housing Tribunal erred in law and in fact after entertain the matter while there is non-joinder of necessary party.
2. That, the District Land and Housing Tribunal erred in law for enter judgment without providing reasons why differ with the opinion of assessors.
3. That, the District Land and Housing Tribunal erred in law and in fact for failure to value the credibility of appellant' evidence.
4. That, the District Land and Housing Tribunal erred in law and fact to enter judgment in favour of respondent without considering contradictory evidence by the respondent.

Before going any further, I think, it is useful to give a brief historical background of the matter which led to this appeal. At the trial tribunal, the appellant testified that he is the administrator of the late John Antony Tyaso who was the original owner of the disputed land. He added that the suit land was allocated to John Antony Tyaso in 2002 by village government and on 2004 he passed away. Further the appellant contended that, the respondent invaded the suit land in 2015.

In his defence, the respondent vehemently disputed the claim. He alleged that the suit land belong to him. Also the respondent claimed that the suit land is part of 10 acres of the land that he purchased from the late Ndila Ngegeshi. Further the respondent tendered a sell agreement to prove the same. After full trial, the trial tribunal declared the respondent the lawful owner of the disputed land.

At the hearing of this appeal, Ms. Caroline Mseja learned advocate appeared for the appellant while Ms. Joyce Kasebwa learned advocate

appeared for the respondent. The matter was argued by way of written submission following the order of this Court and both parties adhered to the scheduled order.

In supporting the first ground of appeal, Ms. Mseja for the appellant submitted that, the Mabadaga Village Council was not join as a party to the case while the said village council allocated the disputed land to the late John Antony Tyaso. She went on to submit that the respondent claimed to be the owner of the suit land having being purchased it from one Ndila Ngegeshi who was the 2nd respondent unfortunately removed in the case while is the important person to declared the said contractual agreement between him and the respondent, even if he is dead then his administrator could step in as a party to this case. To support her position, she referred this Court to the case of **Juma Kadala Vs. Laurent Mnkande (1983) TLR 103**.

Arguing the second ground of appeal, Ms. Mseja submitted that, the trial tribunal erred in law and fact to enter judgment without providing reasons why he differed from the opinion of assessors. She cited the case of **Mbarak and another Vs. Kahwil**, Civil Appeal No. 154 of 2015, Court of Appeal of Tanzania (Unreported).

In regard to the third and fourth grounds of appeal, Ms. Mseja contended that, the trial tribunal based his decision on contradictory evidence of the respondent without considering the credibility of appellant's evidence. She added that the trial tribunal erred by relying into contradictory evidence which was supported by the sale agreement dated on 16th day of June 2018 while the respondent claimed to occupy the disputed land since 2004. Finally, she prays the Court to nullify the

proceedings, quash the judgment and set aside the orders of the trial tribunal.

Responding to the first ground of appeal, Ms. Kasabwe submitted that, it is not true that the trial tribunal erred in law and fact to entertain the matter while there is non-joinder of necessary party. She cited Order I Rule 9, 4 and 13 of the Civil Procedure Code (Cap 33 R.E. 2002) to support her contention.

Also she referred this Court to the case of **Massawe and Company Vs. Jashbai P. Patel and 18 others (1998) TLR 451, Ami Mpungwe Vs. Abas Sykes**, Civil Appeal No. 67 of 2000 Court of Appeal of Tanzania (unreported), **Gapco (u) Ltd. Vs. AS Transporters Ltd. (2009) 1 EA 145 (scu)** and the case of **Ramadhani Kisuda & Mdiluu Jamaa Village Vs. Adamu Nyalandu, Rajabu Ngholo, Saidi Ng'ui & Shaban Said (1998) T.L.R 68** to support her submission.

Replying the second ground of appeal, Ms. Kasebwa submitted that, the trial tribunal provided reasons why differed with the opinion of assessors as reflected at page 2 of the judgment. She went on to submit that the assessors are full involved in trial as essential part of the processes and the trial tribunal done as it is required by the law. She cited the case of **Abdallah Bazamiye & others Vs. Republic (1990) T.L.R 42, Tubone Mwambeta Vs. Mbeya City Council**, Civil Appeal No. 287 of 2017, Court of Appeal of Tanzania (unreported) and Section 24 of the Land Disputed Courts Act (Cap 216 R.E. 2002) and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 to cement her argument.

In response to the third ground of appeal, Ms. Kasebwa argued that, the trial tribunal analysed and evaluated the evidence of both parties. She added that the person whose evidence is heavier than the other must win. She invited this Court to read the case of **Hemed Said Vs. Mohamed Mbilu (1984)**.

The counsel continued to submit that, the appellant in his evidence did not bring any evidence to suggest that village council allocated him the suit land. To cement her argument she cited the case of **Abdallah Rajab Vs. Saada Abdallah Rajab (1994) TLR 132** and the case of **Augustino Kaganya, Athanas Nyamoga & William Mwanjenje Vs. Republic (1994) TLR 16**.

Turning to the fourth ground of appeal, Ms. Kasebwa reply that, the evidence adduced by the respondent was not contradictory evidence. She referred this Court to the case of **Mohamed Said Matula Vs. Republic (1995)** to support her submission. In conclusion, she urged the Court to dismiss the appeal for being meritless.

In rejoinder, Ms. Msaje reiterated her submission in chief that the appeal be allowed. Finally, she reiterated her prayer that this Court to nullify, quashes, reversed or set aside the proceedings and judgment of the trial tribunal with costs.

I have considered the records of the trial tribunal, the grounds of appeal and written submissions made by both parties.

On the issue of mis-joinder of necessary party, my position is that, first the appellant was one who had a duty to join all necessary party in his case. Thus, over the years, Courts have made a distinction between

necessary and non-necessary party. For instance, in the case of **Departed Asians Property Custodian Board Versus Jaffer Brothers Ltd (1999) EA 55**, the Supreme Court of Uganda held that that there was a clear distinction between the joinder of a party who ought to have been joined as a defendant and the joinder of the one whose presence before the Court was necessary for it to effectively and completely adjudicate upon the question involved in the suit. That position was restated by the Court of Appeal of Tanzania in the case of **Abdullatif Mohamed Hamis Vs. Mehboob Yusuf Osman & another**, Civil Revision No. 6 of 2017 (unreported).

Also in the Indian case of **Benares Bank Ltd Vs. Bhagwandas, A.I.R. (1947) All 18** the full bench of the High Court of Allahabad laid down two tests for determining the question whether a particular party is necessary party to the proceedings; **First**, there has to be a right of relief against such a party in respect of the matter involved in the suit and; **Second**, the Court must not be in a position to pass an effective decree in the absence of such a party.

From the authorities cited above, it is my opinion that there was no need to join the administrator of estate of the late Ndila Ngegeshi and Mbadaga Village Council in the suit because there are no rights of relief against them in respect of the matter involved in the suit. Also the absence of those parties cannot hinder the Court to pass an effective decree. This position is well elaborated under Order I Rule 9 of the Civil Procedure Code (Cap 33 R.E. 2002). The Rule provides:

"No suit shall be defeated by reason of the mis joinder or non-joinder of parties, and the Court may in every

suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."

Therefore the first ground of appeal lacks merit.

Coming to the third and fourth grounds of appeal, this Court observed that, it is not true that the trial tribunal relied on the contradictory evidence its to form decision. It is clear from the record that, a sale agreement dated 16th day of June, 2014 and not dated on 16th day of June 2018 as contended by the learned counsel for the appellant in her submission. Therefore third and fourth grounds of appeal have no basis to stand hence lack merits.

Regarding to the issue of assessors, subsection (2) of the Section 23 of the Land Disputes Courts Act (Cap 216 R.E. 2002) provides that:

*"(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 41 of the typed proceedings provides that:

ORDER

- 1. Judgment not ready*
- 2. There was no opinion*
- 3. Judgment on 07.2.2019*

Sgd

T. Munzerere

Chairman

17.12.2018

The record does not reveal if the assessors were given opportunity to give their opinion as required by the law. It is silent as to whether the chairman invited the assessors to give their opinion as required by the law. What is in the record is the written opinion of the one assessor. It is doubtful as to how and when they found the way in the court record they are to be taken circumspectly.

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 Mwambeta Vs. Mbeya City Council**, Civil Appeal No. 287 of 2017. But it is clear on record that

the trial tribunal well assigned the reason why he differed with the opinion of assessors as reflected at page 2 of the typed judgment.

Since the proceedings of the trial tribunal do not show that if the assessors full participated at the trial that is an irregularity which is fatal and cannot be cured at this stage. It is therefore not safe to rule out that, justice was done. Under the circumstance, the proceedings and judgment of the trial tribunal are nullified.

In that event, I find this appeal has merit. It is further ordered that the case must be remitted back to the trial tribunal for retrial; 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
17/02/2020

Date: 17/02/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Appellant:

Respondent:

For the Respondent: Mr. Luko Deda – Advocate

B/C: M. Mihayo

Mr. Luko Deda – Advocate:

The case is for judgment, we are ready.

Appellant:

I am ready.

Court: Judgment delivered in the presence of Ms. Luko Deda
Advocate for the respondent and the appellant who has
appeared in person.




D. B. NDUNGURU
JUDGE
17/02/2020

Right of Appeal explained.