

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

LAND APPEAL NO. 18 OF 2018

(Arising from Judgment and Decree of the District Land and Housing Tribunal for Tabora in Appeal No. 49 of 2017 (M.H Waziri - Chairman) dated 13th March 2018 and the original Decision of Ugunga Ward Tribunal – Kaliua District in Land Dispute No. 3 of 2017)

SAMWEL MARWA.....APPELLANT

VERSUS

MOSHI MOHAMED.....RESPONDENT

JUDGMENT

Date of Last Order: 23/03/2021

Date of Judgment: 25/03/2021

AMOUR S. KHAMIS, J:

This is a second appeal by Samwel Marwa who challenges the Judgment and Decree of the District Land and Housing Tribunal for Tabora which upheld the decision of Ugunga Ward Tribunal in declaring Moshi Mohamed as a lawful owner of the disputed parcel of land.

The proceedings in the ward tribunal were initiated by Moshi Mohamed who claimed that Samwel Marwa invaded his shamba measuring 24 meters by 19 meters located at Masonso Relini Hamlet, Tuombe Mungu Village, Kaliua District, Tabora Region.

The trial ward tribunal received evidence from the complainant, Juma Mohamed, the respondent and one Nguvumali Balanyikwa, purported to have sold the disputed land to Samwel Marwa and also visited the locus in quo.

At the conclusion of trial, the ward tribunal found that Samwel Marwa trespassed onto the land owned by Moshi Mohamed and declared the latter as a lawful owner thereof.

On appeal to the District Land and Housing Tribunal for Tabora, the trial tribunal's decision was cemented hence the present appeal by Samwel Marwa premised on eight grounds of appeal, namely:

1. That the Honourable Chairman erred in law and fact by upholding the decision of the ward tribunal that the respondent is the lawful owner of the disputed property without considering the evidence adduced by the appellant and the sale agreement itself.

2. That the appellate tribunal erred in law and fact by deciding in favour of the respondent without considering that trial tribunal cut off the hearing of evidence from the appellant's witnesses without any reasons.

3. That the appellate tribunal erred in law and in fact by upholding the decision of the ward tribunal that the appellant trespassed the disputed property while is his property.

4. That the Honourable Chairman erred in law and fact by deciding that the respondent had locus stand to prosecute

the suit basing on a letter of administration from Kaliua Primary Court which on face of it has problem which tends to mislead and lying to the Court.

5. That the Honourable Chairman erred in law and fact to consider the letter of administration from the respondent while the said letter was never tendered as an exhibit at the ward tribunal but was tendered at the appellate tribunal that is after the event.

6. That the Honourable Chairman erred in law and fact by holding that the respondent is the lawful owner of the disputed property while it is clear from the sale agreement that the one who owned and sold the disputed property to the appellant was Nguvumali Baranyikwa and not Moshi Mohamed from the family of Kijigo.

7. That the Honorable Chairman erred in law and fact by admitting and considered the Minutes of Mariatabu Kijigo and Nguvumali Baranyikwa family dated on 8/3/2017 because it has evil motives against the appellant.

8. That the Honorable Chairman erred in law and facts by upholding an explanation from Nguvumali Baranyikwa dated 25/4/2017 and 2/5/2017 concerning the measurement of the disputed land which contradict the measurements provided on the sale agreement. 103 times 158 while on the said dates provided measurement of 40, 17 and 20 which is below the measurement of the disputed property.

During hearing of the appeal both parties were unrepresented. Whereas Samwel Marwa adopted the grounds of appeal, Moshi Mohamed embraced contents of the Reply to the Petition of Appeal which he had earlier on filed.

In his Reply to the Petition of Appeal, Moshi Mohamed responded on each grounds of appeal.

As regards to the first ground of appeal, he disputed it on the ground that the appellate chairman correctly decided the matter based on the evidence on record.

He added that his evidence proved that a demarcation in the sale agreement did not include the respondent's land as argued by the appellant.

On the second ground of appeal, the respondent contended that the evidence given was against the appellant.

On the third ground of appeal, the respondent contended that the appellate tribunal was quite right to enter judgment in his favour allegedly because its decision was based on thorough evaluation and consideration of the evidence on record.

On the fourth ground of appeal, the respondent maintained that the appellant's contention was misleading because the respondent submitted (tendered) in the trial tribunal a letter of administration of the estate of the late Mohamed Kijigo as appointed by Kaliua Primary Court and was not objected.

Addressing the sixth ground of appeal, Moshi Mohamed argued that the evidence adduced during trial was not objected to and that the said ground of appeal was not raised in the District Land and Housing Tribunal.

The respondent generally disputed the fifth, seventh and eighth grounds of appeal and subjected the appellant to strictest proof thereof. He stressed that the appellate chairman was right in his decision as the appellant failed to prove the case on a balance of probabilities.

Before I venture into the merits or otherwise of this appeal, I find it prudent to point out the duty of this Court in the second appeal like this.

The law on this point was restated in a chain of decisions by the Court of Appeal including **DAMSON NDAWEKA V ALLY SAID MTERA, CIVIL APPEAL NO. 5 OF 1999** (unreported), wherein it was held that:

"The High Court as the first appellate Court was bound to analyse the evidence of both sides with a view to satisfy itself that the finding of the trial Court was justified on the evidence"

In **RAJABU MABEYU V HASSAN KITANDO, LAND APPEAL NO. 9 OF 2015, HIGH COURT OF TANZANIA AT TANGA** (unreported), this Court held that when the first appellate Court fails to discharge its duty of analyzing the evidence on record, the second appellate

Court is entitled to do what was otherwise to be done by the first appellate Court.

On reading the appellate Chairman's Judgment and on comparison to the trial tribunal's record, I found a partial analysis of the evidence on record at pages 3 and 4 of the typed Judgment.

This takes me to a principle stated in **ZANZIBAR SILK STORES V A.H JARIWALLA T/A ZANZIBAR HOTEL (1980) TLR 31** wherein it was held that:

".....an appellate Court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law or procedure."

Since the first appellate tribunal was expected to do a thorough analysis of the evidence on record which duty was not satisfactorily discharged, I will do the needful for the ends of justice.

Records show that Moshi Mohamed and one Juma Mohamed testified on the complainant's side. Moshi Mohamed stated that on unnamed day, he found workmen of Samwel Marwa cultivating his farm and on questioning, they said that Samwel Marwa had instructed them to do so.

The incident was reported to the village council whereupon a summons was issued to Samwel Marwa.

On cross examination by Samwel Marwa, the respondent briefly stated that:

“..Hoja kuwa mdai hakuweza kumshirikisha mjomba hoja kuwa mdaiwa hakumkuta alithibitisha hivyo mjenga hoja kwa mdaiwa yeye hakuweza kumhusisha. Mwisho wa hoja.”

Juma Mohamed addressed the issue of locus standi and informed the tribunal that:

“....Anafhamu ugomvi wa eneo la bwawa baada ya kukaa kifamilia hivyo walifanya maamuzi ya kumteua Bwana Moshi Mohamed kufungua kesi au musimamiaji...”

Neither the appellant nor members of the ward tribunal questioned Juma Mohamed on his testimony.

On the other side, the appellant’s testimony (Samwel Marwa) was as follows:

“Eneo hilo ni lake alilipata kutoka kwa Mzee Nguvumali Balanyigwa kwa kulinunua kwa thamani ya shilingi laki sita 600,000/=. Baada ya kununua eneo hilo lina ukubwa wa heka mbili na thelathini. Ilikuwa na visima pamoja na visuguu vitano (5). Baada ya zoezi hilo kufanyika watu wanaopakana nao 1) Sikujua Hamisi 2) Abdallah Nkingo kwa upande wa Mashariki. Upande wa kaskazini anapakana na sikujua Hamisi. Upande wa Magharibi na Kusini ni Nguvumali..”

The respondent did not have any question to cross examine the appellant. On examination by the tribunal's member, the appellant's testimony was recorded as follows:

"...Wakati wa kufanya biashara hawakuwepo ila wakati wa kuonyeshana mipaka walikuwepo."

On further examination by members of the tribunal, Samwel Marwa stated that:

"....alikuwa yeye na muuzaji na familia yake yeye ndiye atakuwa mkweli.....Aliamini vielelezo. Haelewi kama ni familia yake."

Nguvumali Balanyikwa was the second witness for the appellant. For the avoidance of doubt, I will reproduce his evidence as recorded by the tribunal, thus:

"Yeye amesema kwamba kuna eneo ambalo alilonunua kwa Mzee Kigigo Luhaya alinunua shamba. Baada ya hapo ndipo aliamua kumuuzia Mzee Samweli Marwa eneo la shamba la juu pamoja na mbuga pesa ambayo ndiyo aliyouza kwa kumuuzia Samweli Marwa Shilingi Laki 700,000/=. Eneo hilo lina kubwa wa heka 2 na nusu. Hayo ndiyo maelezo ya shahidi Mzee Nguvumali Balanyikwa."

On examination by the appellant, Nguvumali Balanyikwa stated that:

“Kuna visuguu viwili 2 vikubwa. Hana karatasi ya kumbukumbu. Visima vipo.”

On cross examination by the respondent, Nguvumali Balanyikwa stated that:

“Ndiyo eneo lote pamoja na mipaka ninaitambua. Anafahamu mipaka iliyokuwepo siku hiyo.”

In its Decision dated 9/05/2017, the trial tribunal concluded that:

“Kwa kuwa ushahidi wa mdai Moshi Mohamed ambao alielekeza siku ya 2/05/2017 na kuonyesha eneo lake ni wazi kabisa kwamba eneo hilo lilikuwa limechukuliwa kwa kujiongezea na mdaiwa Samweli Marwa hivyo sasa kwa maelekezo ya muuzaji Mzee Nguvumali Balanyikwa mipaka hiyo izingatiwe na iheshimiwe kila mtu alinde mipaka yake ya eneo....”

Prior to that conclusion, the trial tribunal stated in its decision that it visited a locus in quo on 2/05/2017 during which visit members saw demarcation marks set by the village council and took measurements of the disputed land as guided by Mzee Nguvumali Balanyikwa.

The trial tribunal further gave account of the proceedings at the locus in quo, thus:

“...Wajumbe wa Baraza walipima hatua za eneo ambalo muuzaji Mzee Balanyikwa alizoelekeza kutoka kwenye Mchikichi hatua 40 kutoka Mashariki na palipolimwa urefu hatua 20 na upana hatua 17. Kwa kuwa muuzaji Mzee Nguvumali Balanyikwa anakiri kumuuzia ndugu Samwel Marwa eneo ambalo aliloonyesha mbele ya wajumbe wa Baraza basi hatua hiyo Baraza halina hoja wala pingamizi kwa muuzaji huyo.”

Despite of these conclusions based on the evidence adduced at the locus in quo, proceedings in respect of the said locus in quo are missing.

In the case of **NIZAR M. H. V GULAMALI FAZAL JANMOHAMED (1980) TLR 29** the purpose of visiting locus in quo was restated that:

“...Where it is necessary or appropriate to visit locus in quo the Court should attend with parties and their advocates, if any, and with such witnesses who may testify in that particular matter.”

I have no doubt that a visit to the locus in quo is part and parcel of the trial proceedings and thus attracts a full and proper recording.

In the present case, names of members of the tribunal, parties present, testimonies given, questions asked and or documents tendered at the locus in quo, if any, were not disclosed.

Going by the records as it is, one cannot know what actually transpired at the locus in quo. This in my view, is a deficiency that goes to the root of justice in the case.

Another irregularity pointed out by the appellant was the appellate tribunal's failure to examine a letter of administration in respect of the estate of the late Mohamed Kijigo allegedly not tendered in the trial tribunal.

Addressing that issue, the appellate Chairman at page 4 of the typed Judgment, commented that:

“Over the issue of the respondent to be appointed as the administrator of the estate of the late Mohamed Kijigo this is hollow as the respondent was dully appointed by Kaliua Primary Court as an administrator on 25/05/2013.”

Records of the trial tribunal contain a document, copy of the letters of administration in respect of the estate of the late Mohamed Kijigo issued by Kaliua Primary Court in a probate matter whose number was not readily disclosed.

The purported letters of administration was issued on 25/05/2013 to Moshi Mohamed Kijigo in respect of the deceased who died on 20/03/2013.

From the testimony of Moshi Mohamed and Juma Mohamed, it is clear that the respondent derived his ownership over the disputed shamba from his late father, Mohamed Kijigo.

In the case of **LUJUNA S. BALONZI V REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI (1996) TLR 203** the Court of Appeal held that an applicant must show not only that the Court has power to determine the issue but also that he is entitled to bring the matter before the Court.

The same reasoning was applied in **NURU SALUM V PILI SALUM, PC CIVIL CASE NO. 145 OF 1994** (unreported) wherein this Court sitting in Dar es Salaam held that:

“In order to be recognized by the courts as the lawful heir of the late father’s estate or that she administers it (the estate), the respondent had to adduce evidence that she had inherited the estate or she could represent it in courts. The usual evidence is of course, letters of administration or probate of a will. She produced no such evidence. She did not, in other words, establish her locus standi in the case.”

In the present matter, proceedings are silent as to when and by whom the letters of administration were tendered and or admitted in the trial tribunal. In such circumstances, it was not proper for the appellate chairman to assume its/their validity in the proceedings.


Consequently, proceedings of the trial ward tribunal were vitiated for the reasons stated above. In the same vein, the first appeal in the District Land and Housing Tribunal and the present appeal were void ab initio and thus, cannot stand.

In the circumstances, I invoke the revisional powers of this Court in terms of Section 43(1) (b) and (2) of **THE LAND DISPUTES COURTS ACT, CAP 216 R.E 2019** and nullify the Proceedings and quash the Decision and Orders of the Ugunga Ward Tribunal in Land Dispute No. 3 of 2017.

Furthermore, I hereby nullify the Proceedings and quash the Judgment and Decree of the District Land and Housing Tribunal for Tabora in Land Appeal No. 49 of 2017.

Whoever is interested to further pursue the dispute, is at liberty to institute fresh proceedings in a competent forum and subject to the law of limitation.


It is so ordered.


AMOUR S. KHAMIS
JUDGE
25/03/2021

Judgment delivered this 25th day of March, 2021 in the presence of both parties in person.

B.R. NYAKI
DEPUTY REGISTRAR
25/3/2021

I certify that this is a true and correct copy of Original Judgment/Order/Order



Deputy Registrar

Date 1st Apr 2021 at Tabora

Right of appeal explained fully.

B.R. NYAKI
DEPUTY REGISTRAR
25/3/2021