

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

LAND APPEAL NO. 43 OF 2019

(C/F Arusha District Land and Housing Tribunal Application No. 163 of 2013)

BERNARD SISTI KIMARIO.....APPELLANT

Versus

MKUMBI MKALAMA.....1ST RESPONDENT

KING KISAI.....2ND RESPONDENT

PASAKA OJUANG.....3RD RESPONDENT

THOMAS YOHANA.....4TH RESPONDENT

JUDGMENT

17/03 & 07/05/2021

MZUNA, J.:

Mr. BERNARD SISTI KIMARIO has lodged this appeal challenging the judgment of Arusha District Land and Housing Tribunal which held that the disputed land measuring ½ an acre located at Mbuga ya Chumvi, Muriet Ward, within Arusha, is the property of **PASAKA OJUANG**, the 3rd respondent.

In this appeal, the appellant has lodged five grounds and is represented by Mr. Ombeni Kimaro, the learned counsel whereas, the respondents are represented by Mr. Asubuhi Yoyo, the learned counsel who opposed the appeal. Hearing proceeded by way of written submission.

The background story leading to this dispute is that both the appellant and the respondents purports to have bought the suit plot from different parties on different

dates. The sale agreement by the respondents purports that the plot is at Muriet while that of the appellant purports that it is at Terrat.

Two main issues emanates therefrom:-

First whether the raised preliminary objection has merit?

- (i) Was it proper to close the appellants case prematurely?*
- (ii) Did the suit proceed without joining the appointed administrator of the second respondent, if so, what is the effect?*

Second, who is the lawful owner of the disputed suit plot?

The first and second grounds of the petition of appeal are based on points of preliminary objections. In the first ground the appellant is challenging the procedure adopted by the Chairman to close his case prematurely after the advocate for the appellant failed to enter appearance at the time when three witnesses had testified. He says in so doing there was a violation of Regulation 13 (2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, G.N. No. 174 of 2003. He insists that there was no proof that indeed the advocate had defaulted for two consecutive dates or that the appellant could not lead his witnesses. The appellant says he was denied the right to call his witnesses. He therefore asked for the court to quash the proceedings and order for a retrial.

In the second point of preliminary objection, the appellant says the legal personal representative of the second respondent King Kisai (deceased) was not joined which is the violation of Order XXIV Rule 1, 2, 3 and 6 of the Civil Procedure Code Cap 33 RE 2002 and Item 16, Part III of the Schedule to the Law of Limitation Act, Cap 89 RE 2002. The

learned counsel brought to the attention of this court the case of **Godwin Charles Lemilia vs. Slim Ndikoko & Another**, Civil Appeal No. 28 of 2016 (unreported). The learned counsel urged the court to declare the proceedings conducted after the death of the second respondent be declared null and void. Both the judgment and decree be quashed and set aside, the administrator be joined instead.

On his part, the learned counsel for the respondents says closure of the appellant's case was after the last adjournment. That there was no excuse given for the absence of the advocate. That what the tribunal did has the blessing of the law citing Regulation 13 (2) and (3) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations) GN No. 174 of 2003. That the appellant was not prejudiced because the matter went to full trial.

Responding to the issue of failure to join the legal personal representative, the learned counsel for the respondents submitted that, that issue was brought to the attention of the court leading to the proceedings being halted for three months to pave way for the appointment of the administrator. The administrator was appointed. That the appointed administrator did testify on behalf of the second respondent. He insisted that the law allows flexibility in the proceedings where error does not affect merits of the case. He brought to the attention of this court provisions of section 45 of the Land Disputes Courts Act, cap 216 RE 2002. The logic according to the learned counsel is to safeguard the interest of the deceased which was done. He further said the court should refer to the provision of section 73 of the CPC, Cap 33 RE 2002 that misjoinder of a party cannot be

a ground to reverse a decree on appeal if it does not affect the merits of case or jurisdiction of the court.

After my close reading of the record, it is clear that the Tribunal closed the appellants case at the time when the appellant had not closed his case. He had informed the court that there were three witnesses remaining. There was also a document which was not received for the simple reason that it was not stamped. However, after complying with that requirement and after leave was granted to recall PW2 so as to tender it, the same was not received due to such closing of the case.

Now the question is, did the non attendance of the advocate deny the appellant his right to call his witness and lead them?

Article 13 (1) and (6) (a) of the Constitution of the United Republic of Tanzania clearly provides for equality before the law as well as the right to be heard fully, that:-

"13 (1) Watu wote ni sawa mbele ya sheria na wanayo haki, bila ya ubaguzi wowote, kulindwa na kupata haki sawa mbele ya sheria.

(6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba-

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa..."

The legal consequences of failure to afford a party a hearing before any decision affecting the rights of any person is given was well echoed in the case of **Tang Gas Distributors Ltd vs. Mohamed Salim Said & Two Others**, Civil Application for Revision No. 68 Of 2011, CAT (unreported) where the court cited with approval the case of **I.P. T.L. v. Standard Chartered Bank (Hong Kong) Ltd**, Civil Revision No.1 of 2009 (unreported) and observed that:-

*"no decision must be made by any court of justice/body or authority entrusted with the power to determine rights and duties **so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice**"*

[Emphasis original]

The above holding applies *mutatis mutandis* as in the case under consideration. The appellant was denied the right to full hearing and therefore is a violation of fundamental right of right to be heard, one of the cardinal principles of Natural justice. The allegation by the learned counsel for the respondent that the appellant was given last date of hearing did not mean that he could not summon his witnesses. Even the cited Regulation 13 sub rule 2 of the Land Dispute Courts (The District Land and Housing Tribunal Regulations GN No. 174/2003 clearly provides that in case the advocate default for two consecutive dates still "the tribunal may require the party to proceed himself..."

The proviso to that provision is that the Tribunal can make any other order after the party refuses to lead the evidence without good cause. That option was not given to the party instead the Chairman opted to close the appellant's case. That is improper and no

court can condone such act under the pretext of section 45 of the Land Disputes Courts Act, Cap 216 because "such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice." This is a serious irregularity. The appellant was prejudiced thereby, notwithstanding that the matter went to finality.

That said the appeal has merit. This ground alone is sufficient to dispose of this appeal. I direct that hearing should proceed from where three witnesses for the appellant testified with leave to recall PW2. The matter should proceed before another Chairperson assisted by a different set of Assessors. They may recall any witness for clarification if need be.

The appeal is allowed with no order for costs because the omission was not caused by the respondent.

