

IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND CASE APPEAL NO. 3 OF 2018

(Originating from the Decision of the District Land and Housing Tribunal of Lindi
District at Lindi in Land Case No. 24 of 2017)

BAKARI SAID NAMKWACHA).....APPELLANT

**(Administrator of the estate of the late Mohamed Said
Namkwacha)**

VERSUS

SAID ABDALLAH LIKUKWA.....RESPONDENT

JUDGMENT

9 March & 9 April, 2021

DYANSOBERA, J.:

This appeal has been preferred by the appellant Bakari Said Namkwacha, administrator of the estate of the late Mohamed Said Namkwacha. He is faulting the decision of the District Land and Housing Tribunal for Mtwara at Mtwara which legalised the sale agreement made between the respondent one Said Abdallah

Likukwa. and the late Mohamed Said Namkwacha and declared the respondent the rightful owner of the suit premises.

Briefly, the respondent hereinabove filed Land Application No.8 of 2014 before the District Land and Housing Tribunal for Mtwara claiming, *inter alia*, a declaration that the sale agreement made between the applicant and the late Mohamedi Saidi Namkwacha, hereinafter referred to as the deceased, is legal. The same respondent claimed to be the rightful owner of the suit premises located at Plot No.95 Block "H" Chikongola area in Mtwara Municipality with the estimated value of Tshs.30,000,000/=. He asserted at the trial Tribunal that he purchased the suit land at Tshs.3, 500,000/= on 4th November, 2003 from the deceased and made the final payment on 1st March, 2004. He further asserted that the disposition of the suit property was made in writing. He argued that the deceased refused to hand over to him the letter of offer of the suit premises without assigning sufficient and good reasons. A resort to amicable means of settling the dispute proved futile. On 15th January, 2014 the Director of Mtwara Mikindani Municipality on behalf of the appellant, allegedly unlawfully announced the public through advertisement on the notice board that the letter of offer of the suit premise was lost.

The appellant, on his part, denied the existence of any valid sale of the suit premises between the deceased and the respondent , on the part of the appellant he disputed the applicant's claim by denying that there was no any valid sale agreement contracted

between the respondent and the late Mohamed Saidi Namkwacha on 4th November, 2003 or 1st November, 2004. The appellant further disputed the validity of the signature of the vendor in the disputed sale agreement different from the actual signature of the late Mohamedi Said Namkwacha on 4th November 2003 or 1st November, 2004.

The tribunal, after hearing the evidence of the respondent, the appellant and their witnesses including Justine Cleoplace Katumbuka (DW4), the Assistant Land officer at Mtwara Mikindani Municipal Council, found for the respondent. Dissatisfied, the appellant has preferred this appeal on the following grounds of appeal.

1. That the trial Tribunal Chairman erred both in law and fact for not considering the weight evidence given by the land officer of Mtwara Mikindani Municipality while he was genuine witness and expert in that land dispute
2. That the trial Chairman erred both in law and fact for failure to ignore that document sale agreement between the respondent and appellant's father was improperly and forged one since it was prepared with no land Plot Number different signature of the seller and no any witness of both part.

3. That the trial Tribunal Chairman erred both in law and fact for failure to consider that even now records of ownership of such land suit in related land office named the appellant's father as owner of then how comes the respondent declared legal owner based on the forged document of the sale agreement.
4. That the trial Tribunal Chairman erred both in law and fact for not considering that still nowadays the appellant pay land taxes of such suit plot
5. That the trial Tribunal Chairman erred both in law and fact for adjudicating this suit land without considering the importance of opinion of assessors, they were not involved in this suit proceedings.
6. That the trial Tribunal Chairman erred both in law and fact for not considering the suit land plot is parental inheritance which is mostly depended by the heirs.
7. That the trial Tribunal Chairman erred both in law and fact for hearing and determining this suit land unprocedurally since the High court of Tanzania at

Mtwara ordered this suit to be heard and determined again with proper procedure for the interest of justice.

This appeal was resisted by the respondents who filed a reply to the petition of appeal.

At the hearing of this appeal on 19th day of November, 2020, both parties appeared in person.

Supporting the appeal, the appellant argued that the judgment of the District Land and Housing Tribunal was unjust. He contended that he is paying all taxes for his piece of land, that the sale contract has neither plot number nor the owner of the land and that the land officer proved that the owner of the suit land was Mohamed Said Namkwacha. He maintained that the land was sold to none and the piece of land owned by the respondent bore different plot number. The appellant stressed that the seller died on 14.10.2006 while the respondent argued that he had bought the suit land in 2003.

The respondent, in rebuttal, told this court that after he bought the suit land, the appellant gave him the key and he inspected the

house and thereafter leased it to tenants. The respondent then took the matter to the Ward Tribunal but it lacked pecuniary jurisdiction and the respondent decided to go to the District Land and Housing Tribunal where he won the case. The appellant appealed to the District Court but the appeal was dismissed. It was then refiled in the District Land and Housing Tribunal where he also won. As regards the difference between HH and H, the respondent argued that HH was correct, H was just an error. The respondent contended that he paid taxes and was making a follow up until the appellant's father died.

In a short rejoinder, the appellant reiterated that he pays taxes and that the signature of the owner on the sale agreement is different.

I have considered the submissions of both sides and perused the impugned judgment, the trial tribunal proceedings and other materials available on the record.

The main issue calling for determination in this appeal is whether suit between the parties was properly conducted. Indeed, this is the gist of the appellant's complaint in paragraph 5 of the memorandum of appeal that:

5. That the trial Tribunal Chairman erred both in law and fact for adjudicating this suit land without considering the importance of opinion of assessors, they were not involved in this suit proceedings.

In other words, the appellant in the above ground of appeal is calling upon this court to make an assessment whether the learned trial Chairman adjudicated the matter by considering the opinions of the assessors and if at all, they were involved during trial. At the very outset of my discussion and analysis, I will first, I revisit the impugned judgment, at page 10 and 11 in particular, whereby the evaluation of the evidence of the parties was initiated by considering the opinion of the assessors whose opinions were unanimous. The learned Chairman copied and pasted what the assessors wrote in a piece of paper submitted to the trial Tribunal on 4/10/2019. It is on record that the joint opinions of the two assessors were jotted down in that piece of paper. In tackling this fifth ground of appeal, the court shall consider two aspects. One, whether the opinion of the assessors were taken in accordance with the dictates of the law and, two, whether the said assessors participated fully in the whole proceedings before the Tribunal.

The composition of the District Land and Housing Tribunal is found under section 23 (1) (2) of the Land Disputes Courts Act [Cap 216 R.E. 2019] which provides as hereunder:

"(1) The District Land and Housing Tribunal established under

Section 22 shall be composed of one Chairman and not less than two assessors.

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

According to the above legal provisions, the Act is clear on the composition of the assessors and their duties before the District Land and Housing Tribunal. With respect to the duty of the assessors, the law imposes a duty to the Chairman of the tribunal to require every assessor to give his/her opinion before he reaches his/her judgment. The above Section has to be read in conjunction with Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 made by G.N. No.174 of 2003 which provides the mechanisms of how the assessors of the tribunal shall give their opinions before the Chairman gives his judgment to the parties of the case. For clarity and ease of reference, Regulation 19(2) provides:

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

A correct interpretation of the above provision, in my view, mandatorily demands the Chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing before making a judgment. However, as the record of the lower Tribunal reveals, this procedure was not followed.

The record of the trial tribunal shows that the defence case was closed on 9.9.2019 and the matter was set to 4.10.2019 for assessor's opinions. The important excerpt shows as follows:-

"Tribunal: parties" evidence closed.

Orders:

1. Parties do not want to file submissions
2. Assessors' opinions to be filed on 4.10.2019
3. Judgment to be delivered on 11.10.2019 after reading assessors opinions.

SGD: H.I. LUKEHA
CHAIRMAN
11/10/2019"

Date: 11.10.2019

Coram:

.H.I. Lukeha-Chairman

Applicant:

For applicant: Salum Ahmad

Respondent: present

T/C: Muga

Tribunal:

This matter is for delivery of judgment

Orders:

1. Judgment pronounced today after reading assessors' opinions
2. Copies of judgment will be given to the parties on 25.10.2019

SGD: H.I. LUKEHA

CHAIRMAN
11/10/2019"

In the first place, it is not clear if the opinions of assessors were given, received or even filed in the Tribunal before the Chairman made the judgment. This is particularly so because the record is silent. Second, the law required every assessor present at the conclusion of hearing to give his opinion in writing and not to file their opinions leave alone filing them in the absence of the parties as was the case here. Besides, the learned Chairman is recorded to have stated that the matter was for reading assessors' opinion and for delivery of the judgment but nowhere where is it shown that the opinion was tabled by the assessors and read in the presence of the parties. The possibility that the judgment was delivered without hearing the opinions of the assessors was not ruled out. Bad enough, the Chairman received the joint opinions of his assessors on 4.10.2019, if at all he received them, in the absence of assessors. This means that the assessors did not actively and effectively participate in the proceedings of the trial Tribunal in order for their role to be meaningful as was directed by the Court of Appeal in the

cases of **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No.286 of 2017(unreported) and **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) where it observed:

"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed. Since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict. See also The **General Manager Kiwengwa Stand Hotel v. Abdallah Said Musa**, Civil Appeal No. 13 of 2012 (unreported)"]".

In the present case, I have no doubt that the Chairman flouted the law and committed an irregularity which was incurable hence vitiating the whole trial. As held by the Court of Appeal in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili**, Civil Appeal No. 154 of 2015, the consequences of unclear involvement of assessors in the trial renders such trial a nullity.

The omission was not curable under section 45 of the Land Disputes Courts Act because the omission went to the root of the matter occasioning failure of justice and leading to unfair trial in that the law was contravened and lack of recorded opinion of assessors vitiated the decision.

Invoking the revisional powers, I declare the whole lower Tribunal's proceedings, judgment and orders a nullity.

The respondent is still at liberty to file a fresh suit if he still thinks he has a good cause to establish a title to the suit premises.

Since this ground of appeal suffices to dispose the whole appeal, I find no any reason of discussing the rest grounds of appeal.

It is so ordered.

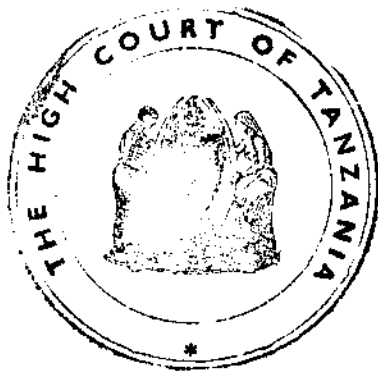


W.P. Dyansobera

Judge

9.4.2021

This judgment is delivered under my hand and the seal of this Court on this 9th day of April, 2021 in the presence of the appellant and respondent who have appeared in person and unrepresented.



W.P. Dyansobera

Judge