

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISCELLANEOUS LAND CASE APPEAL NO. 4 OF 2019

(From the Decision of District Land and Housing Tribunal of Tabora District at Tabora in Land Case Appeal No. 75 of 2018 and Original Ward Tribunal of Usimba Ward Kaliua District in Application No. 3 of 2018)

HASSAN SAID LAMBIKANO ----- APPELLANT

VERSUS

NDALAGAYE DAUD NZIMBOR ----- RESPONDENT

JUDGMENT

Date: 09/07/2021 & 03/09/2021

BAHATI, J.:

This is the second appeal whereby the appellant **Hassan Said Lambikano** challenges a decision of the District Land and Housing Tribunal for Tabora which dismissed his first appeal against the respondent **Jumanne Ndalagaye Daudi Nzimbor**.

The appellant managed to lodge his first appeal before the District Land and Housing tribunal couched with six grounds of appeal, after a full hearing of the appeal the District Land and Housing Tribunal finalized the appeal by upholding the decision of the trial Ward Tribunal which declared the respondent a lawful owner of the disputed land.

Still dissatisfied with the decisions of the two tribunals below the appellant appealed to this court couched with five grounds of appeal to wit: -

1. *That, the learned District Land and Housing Tribunal Chairman erred in law and fact in not determining the grounds of Appeal presented before it.*
2. *That, the learned District Land and Housing Tribunal Chairman erred in law and fact in not strictly determining the base of the dispute being forgery of the sale agreement and lack of spouse consent.*
3. *That, the learned District Land and Housing Tribunal Chairman erred in law and fact by confirming the Ward Tribunal's findings amid uncertain amount (sic) of land in dispute and even its measurement and boundaries.*
4. *That, the learned District Land and Housing Tribunal erred in law and fact in ignoring the fact of calling the parties and leaders who made boundary inspection on August 2008.*
5. *That, the learned District Land and Housing Tribunal erred in law and fact in deciding the dispute basing on sale agreement dated 19/10/2003 of which its authenticity is questionable for being forged document and the sale illegally being executed before "Balozi" instead of village or Ward government.*

When the appeal was called up for hearing Mr. Timothy Sichilima learned counsel appeared for the appellant who was also present whereas the respondent appeared in person.

In his submission, Mr. Sichilima stated that the respondent was leased the disputed land for cultivating tobacco by the appellant's deceased father one Said Lambikano who died on 16/10/2013. Mr. Sichilima added that the respondent continued to use the said land until when the appellant's father died in 2013 but on contrary, the respondent claimed that he bought the same from the deceased for TZS 70,000/=.

As to the second ground, Mr. Sichilima submitted that the sale agreement was not reliable because the deceased could neither read nor write. He insisted that the purported sale agreement was forged and it was not supposed to be tendered in court as an exhibit, moreover, the same was not signed by the village leader, the ten-cell leader who was involved was of a different village. Mr. Sichilima concluded by praying this court to allow the appeal.

In reply, the respondent submitted that the District Land and Housing Tribunal's Chairman was proper in deciding on the disputed matter. As to the issue of spouse consent, the respondent submitted that that could not be an issue because it had not been brought by either spouse.

After careful consideration of the submissions advanced by learned counsel and respondent, Also having read the records of the

two tribunals below I have detected two important legal issues that are worth consideration by this court.

1. *Whether the DLHT Chairman determined the grounds of appeal tabled before him*
2. *Whether the visit to locus in quo by DLHT Chairman was done in accordance with the law.*

On the first issue, I agree with the appellant that, the 1st appellate chairman did not determine the grounds of appeal presented before him, the judgment of the District Land and Housing Tribunal tells it all that the learned chairman never considered any of the six grounds of appeal tabled before him instead he disposed of an entire appeal in the following words, I quote: -

*"On my side, I will go straight to the point. Upon perusing the file and reading the submissions of the parties together with the visit to the locus in quo I proceed to upheld (sic) the decision of the trial Ward Tribunal as the land in dispute is the lawful property of the respondent as he bought the same on **19/10/2003** from the father of the Appellant one **Said Lambikano** who passed away on **16/10/2013**."*

The above-quoted paragraph holds an entire analysis of the appeal by the learned chairman; it needs no legal knowledge for one to notice that the grounds and evidence of the appellant were not considered by the chairman.

As to the second issue, I am mindful of the fact that no law mandatorily requires the court or tribunal to conduct a visit at the locus in quo as the same is done at the discretion of the court or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the tribunal decided to conduct such a visit, certain procedures should be observed.

In *Nizar M.H. vs Gulamali Fazal Janmohamed* [1980] TLR 29 the court stated that: -

"When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, the court should attend the parties and their advocates, if any, and with much each witness as may have to testify in that particular matter... when the court re-assembles in the courtroom, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes to understand or relate to the evidence in court given by witnesses."

In the case at hand, the proceedings are not clear as to who attended the said visit, whether witnesses were called to testify,

examined, and/or cross-examined, also the proceedings do not show whether the tribunal reconvened in the courtroom to read out the evidence collected in the visit. All that missing on record, it is my view that the visit was done contrary to the procedures laid by the Court of Appeal in **Nizar M. H (Supra)**

Moreover, it is my observation that in his judgment the learned Chairman before giving his findings considered the opinion of two lay Assessors namely Mzee Juma Hassan and Mama Rukia Mgumia. I revisited the entire proceedings of the tribunal nowhere it is shown that the opinion of lay assessors was ever recorded or read to the parties, in other words, there is no record that the assessor's opinion was read over before the parties. I don't know where the learned chairman received the opinion.

The Court of Appeal of Tanzania in numerous cases stated that the assessors' opinion must be expressly indicated in the record. In the case of **Hamisa S. Mohsin v Taningra Contractor Land Appeal No. 133 of 6 2009** where the Chairman did not indicate the opinion, the judgment was null and void and in the case of **Edina Adam Kibona v Absolom Swebe (Shell), Civil Appeal No. 286 of 2017** it was held that:-

"... the opinion of assessors must be given in writing and be reflected in the proceedings before a final verdict is issued".

Equally, the Court of Appeal of Tanzania in the case of **Ameir Mbarak and Azania Bank Corp Ltd v Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) held that:-

"Therefore in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In the circumstances, we are of a considered view that assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity."

Similarly, in the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported), the Court of Appeal of Tanzania stated that:-

"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings to make meaningfully 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 to enable them to know the nature of the opinion and whether Page 4 of 6 or not such opinion has been considered by the Chairman in the final verdict."

Therefore, I find this appeal with merit.

Following the above findings, I invoke the provision of section 43(1) (b) of the Land Dispute Courts Act, Cap. 216 to quash the judgment and decree and order the appeal be heard afresh by another Chairman with a new set of assessors. Since the parties are not to blame for the anomaly, each party shall bear its costs.

Order accordingly.



A.A. BAHATI

JUDGE

03/09/2021

Judgment delivered under my hand and seal of the court in Chamber, this 3rd day September, 2021 in the presence of both parties.



A. A. BAHATI

JUDGE

03/09/2021

Right of appeal fully explained.



A. A. BAHATI

JUDGE

03/09/2021

