

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LAND APPEAL NO.14 OF 2020

(Arising from Land Application No. 16 of 2019 in The District Land and Housing Tribunal for Mtwara at Mtwara)

ZUBERI JUMA SHANTE APPELLANT

VERSUS

CATHERINE RAMADHANI MWAIHESYA..... RESPONDENT

Date of last order: 01/10/2021

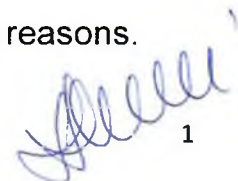
Date of Judgment: 28/10/2021

JUDGMENT

MURUKE, J.

The appellant Zuberi Juma Shante being aggrieved by the decision of Mtwara District Land and Housing Tribunal in Land Application No. 16 of 2019 preferred present appeal raising four grounds, namely:

1. That the trial tribunal erred in law and fact by not joining the Mtwara Mikindani Municipal Director as the necessary party to the proceeding.
2. That the trial tribunal failure to properly analyses and evaluate evidence as required by the law.
3. That the trial tribunal erred in law by improperly admit document as exhibit P2 and form the basis of the tribunal decision.
4. That the trial chairman grossly erred in law by departing from the opinion of the assessors without any good or sufficient reasons.



On the date set for hearing, both parties were unrepresented. By consent, they agreed to dispose this appeal by way of written submission. In his written submission the appellant first prayed to consolidate ground 2 and 3 as they fall on one point, and submitted that, the entire proceeding and judgment of the trial tribunal should be declared nullity for not- joining Mtwara Mikindani Municipal Director. The latter is the one who allocated respondent with the plot No. 202 Block "B" Mitengo in Mtwara Municipality, plot which was occupied by the appellant since 2007 and at the time of survey appellant together with other relatives were offered by the commission for land and Municipal Director that, to maintain their occupation and possessing of their respective plot.

Respondent was allocated plot in dispute by Mtwara Mikindani Municipal Council a person who is not party to the suit. There was a need to join Mtwara Mikindani Municipal Council as the necessary party. Dispute of ownership which emanate from re allocation of land it cannot be solved without joining the responsible authority who allocate the said plot as the necessary party in the suit.

It was appellant further submission that, necessary party is a person who has to be joined in the suit but whose presence before the court is necessary for it to effectively and completely adjudicate upon the questions involved in the suit. Referring this court to the case of **Christina Jaliso Mwamlima and Another Vs. Henry Jaliso Mwamlima and 6 others, Land case No. 19 of 2017** and the case of **Deputy Comr, Hardoi Vs. Rama Krishna, AIR. 1953 S.C. 521**, Non-joinder of necessary party, the position of law is such that the judgment and proceeding become null and void as stated in the case of **Godfrey**



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Kuzugula Vs. Abdulrahim peter Shangashi Misc. Land Appeal No. 120 of 2019 (unreported).

In ground 2 and 3 he submitted that, the entire judgment from page 1 up to 12 the trial chairman summarized the evidence and assessors' opinion, is departing from assessors' opinion, there is no clear point of determination as the chairman stressed his mind on the evidence of the PW 1 and PW 2 to conclude the entire evidence. At the trial tribunal there is no in any place applicant tendered exhibit P2. Looking at the trial proceeding record at page 10, only exhibit P1 and P3 the certificate of occupancy admitted but not read as required by the law, citeng the case of **National Microfinance bank Vs. Chama cha kutetea haki na maslahi ya walimu Tanzania(chakamwata), Civil Appeal No. 17 of 2019** and the case of **Hussein Idd and another Vs. Republic [1986] TLR 166.**

In ground 4 appellant submitted that, under section 23(2) of the land Disputes Court Act Cap. 216 R.E 2019 as read together with regulation 19(2) of the lad disputes courts (the district land and housing tribunal G.N. No.174/2003, requires the chairman to sit with two assessors who are required to give their opinion before the judgment, but in the proceedings, there is no record of the assessor's opinion, hence render the whole proceedings to be nullity. The law require the chairman departing from the opinion of the assessors to give reasonable reasons.

In reply, respondent submitted that she was allocated with land indispute by Mtwara Mikindani Municipal Council thus proved her ownership of suit land by tendering ownership documents, to wit, letter for application to be allocated with the suit land, certificate of occupancy and receipts



for payment of land rent. At the trial tribunal the appellant never raised any cause of action against Mtwara Mikindani Municipal Council to warrant his argument of being necessary party to the suit.

There is nowhere the appellant claims to have been allocated with the same plot and there is no piece of evidence to suggest that the appellant was also allocated with the same plot by Mtwara Mikindani Municipal Council, instead the evidence on records shows that the appellant was allocated plot No. 283 Block "B" Mitengo area and not the disputed plot. Owing to the fact that there is no element of double allocation of the suit land and there is no claims from either party against Mtwara Mikindani Municipal Council the later was not a necessary party to the suit since there is no cause of action against the same.

In second and third grounds, respondent he submitted that, they lack legal merits since the appellant has not properly substantiated the defects on the judgment of the tribunal with regard to the analysis and evaluation of evidence. In the issue of failure of the trial tribunal to consider the evidences adduced, the appellant ought to have critically analyzed the strength of evidences adduced on his side against the weaknesses of the evidence of the opposite side vis a viz the decision made thereon. The appellant has completely failed to point out or analyses the defects in the evidence of both sides so as to clearly establish the alleged mischief in analyzing the evidence.

Further that, the disputed plot is a surveyed plot, of which the only proof of ownership for a surveyed plot is documents of ownership issued by the responsible authority. At the trial tribunal respondent produced documents which justify her owner ship of the suit land unlike the appellant who merely stated to have been allocated with the suit land



without any proof of documents. Respondent brought land officer from Mtwara Mikindani Municipal Council one Patric Mpangala who testified as PW2 stated that the authority allocated the suit land to the respondent and the appellant was allocated with plot No. 283 Block "B" Mitengo which is not the same to the suit land and it is not in dispute.

The allegations that exhibit P2 was not tendered and admitted as exhibit are utter unfounded according to the records in the proceedings of the trial tribunal and the cases cited by the appellant in respect of this issue have no relevance to the matter at hand.

In the last ground, he submitted that, the chairman is not bound by the opinion of the wise assessors as provided under section 24 of the Land Disputes Court Act, Cap 216 R.E 2019.

In rejoinder, the appellant reiterated what he had submitted in his submission in chief, but he submitted further that, proceedings shows that the authorized authority is Mtwara Municipal and respondent is in occupation from the disputed plot since 2007, Director of Mtwara Municipal is necessary party to the proceedings because there is claim against him.

Upon reading the written submission from both parties, together with the evidence on record. There are two main issues to be determine;

1. Whether allocation of land to respondent was proper.
2. Whether the suit can stand without joining Mtwara Mikindani Municipal Director.

It is principle that a first appellate court/tribunal vested with powers to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and alive at its own decision. In our jurisdiction this principle was

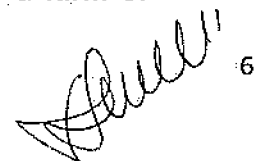
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established in various decisions, including in the case of **The Registered Trustees of Joy in the Harvest Vs. Hamza K. Sungura, Civil Appeal No. 149 of 2017 CAT** (unreported) at Tabora, where it held that;

“The law is well settled that on first appeal, the court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand. the obligation imposed on the first appellate court in handling appeal is not a light duty, it is painstaking exercise involving rigorously testing of the reliability of the findings of the court below.”

To answer the first issue, we have to re- evaluate the whole evidences testified at the trial tribunal to see if the allocation of suit land to respondent was proper. It was on the record that respondent allocated suit plot by Mtwara Mikindani Municipal Council, although there is no specific date mentioned by any witness as to when he was allocated but according to the certificate of occupancy he was allocated on 28th October 2018, however the processes for his allocation stated the dates back before he issued with certificate of occupancy. At this point we have to consider the following questions; **first**, who was the original owner/owners of the suit plot before allocated to respondent, **second**, how did the suit land come into respondent ownership, **lastly**, did the procedure of surveying the suit land properly conducted by Mtwara Mikindani Municipal Council. The above three questions will guide this court in disposing the first issue. According to the testimony of PW2 (Patric Mpangala), the suit plot was surrendered to the government by Mr Sajani who was Indian, then they surveyed the area and advertised for application to be allocated to the suit plot. For clarity part of his evidence is quoted;

“The plots of Land at Mitengo had many problems, because formally the suit plot and other plots at Mitengo was a farm of

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Mr. Sajan he surrenders the ownership to the government, we surveyed advertised to people to purchase the plots. Catherine and others applied and were allocated plots at Mtwara”

In cross examination he responded that;

“Sajan surrendered his certificate of occupancy thus his ownership was cancelled that is why, the Municipal Council was able to allocate plots from the farm at Mitengo to other people.”

It is a settled principle of law that, every witness entitled to credence and his testimony have to be believed as stated in the case of **Goodluck Kyando Vs. Republic [2006] TLR 363**, that;

“It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.”

I had no doubt that the, respondent allocated suit plot by Mtwara Mikindani Municipal Council. But PW 2 as a key witness in this case had a duty to prove clearly every fact in dispute so that trial tribunal could satisfy that the procedure followed to allocate suit plot to respondent was correct.

PW 2 never explained clearly when he said Mr Sajan surrendered the suit land to the government, also he never tendered any document to support his evidence or called any other witness to support his evidence that the original owner of suit plot was Mr. Sajan, as opposed to appellant and therefore the procedure to allocate suit plot to respondent was proper.

I am very aware that, no particular number of witnesses can prove case, even a single witness can be enough to prove a case as established under section 143 of the Evidence Act. However, depending on the,

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nature of the case I have expected PW2 to give more clarification to make clearer on how Mr. Sajan surrendered the suit plot to government as the process of allocating the land is depends on the nature of land.

PW2 testified further that, appellant(respondent) and other people invaded the suit plot; for easy of reference his peace of testimony is quoted;

“There were some residents at Mitengo who had invaded the farm when surveyed. One of the invaders was the respondent Zuberi Juma Shante.’

At the same time, he added that, *because Shamte invaded the suit plot, our office found him and others new plots. Shante was allocated plot No. 283 “B” Mitengo and we issued him with a letter,* PW2 tendered exhibit P3.

In normal situation I don't think if it is possible for a person who invaded another person land illegally, be allocated to a new land. This facts is an procedure taken by Mtwara Mikindani Municipal Council to allocate suit plot to respondent was not proper.

Respondent complained that, he was given the suit plot by his grandmother one Bibi Najuma in 2007. At first, he built a hut which was roofed with coconut dry leaves, thereafter he demolished the said hut built another house of mud roofed by iron sheets. After some years Land Officer one Maiba convened a meeting with Mitengo residents with a view of the Government to formalize their plots of land. He tendered four letters from Mkurugenzi wa Manispaa Mtwara Mikindani marked exhibit D1, D2, D3 and D4. In cross examination he responded that, he was not compensated by the relevant authority, before survey of the suit plot, he was told that same piece of land would be surveyed and handed over to

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him. That is why he is still occupying the suit plot No. 202 Block "B" Mitengo because it is the same piece of land his property before it was surveyed." Later on, he realized that plot No. 283 Block "B" Mitengo is located to different from his previous piece of land. The piece of land where plot No. 202 Block "B" Mitengo is located.

When cross examined by tribunal assessors, he explained that, Mtwara Mikindani Municipal Council was supposed to allocate him plot No. 202 Block "B" Mitengo because it is located on his previous piece of land where he was living. There is no any record which proves that Mitengo's residents together with him were paid compensation.

PW2 never explained how the suit plot was surrendered to government, they also never compensated the appellant before they allocated them to a new plot No. 283 Block "B" which is different to plot No. 202 Block "B" Mitengo.

DW 1's evidence corroborated by the testimony of DW2 (Basha Hamis Ismail), who testified that, in 2007 his grandmother one Some Juma, gave appellant suit plot for either cultivation or building. After sometimes he was informed by respondent(appellant) that he has been sued by applicant(respondent). DW3(Sharifa Mohamed Luheche) told trial tribunal that in 2006 or 2007 appellant migrated to live in the suit plot before it was surveyed, in 2012 the suit plot was surveyed. After surveying exercise, they were given numbers of surveyed plots at Mjimwema, they complained to Mtwara Mikindani Municipal's Director who directed the land office to allocate them the plots from their original pieces of land. He said, when they had collected numbers from the land office, after their photos were taken, they came to learn that, they were allocated the plots in different area from their original pieces of land. On

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cross examination, she said, I was told that my piece of land (plot No. 183 Block "B" Mitengo) was allocated to another person one Frank who is not living at Mitengo or in Mtwara.

DW4 (Maulid Aubi Luambano), said that, from 2007 he used to store his building materials at respondent(appellant) house on the suit plot.

Coming to the second issue, whether the suit can stand without joining Mtwara Mikindani Municipal Director. The law recognizes two kinds of parties among those who can be joined in one suit. These are necessary parties on one hand, and non- necessary parties on the other. These two kinds of parties were more explained by Court of Appeal in the case of **Abdullatif Mohamed Hamisi Vs. Mehboob Yusuph Othman and Another, Civil Revision No. 6 of 2017 CAT** (unreported) at Dar es salaam. Where court stated that;

"That said, we should prelude our consideration and determination of the contentious issue with the subject as to who may be joined as parties to a suit. In this regard, Order 1 of the CPC makes elaborate provision as well as laying down the procedure to be followed in cases of the non- joinder of the parties. Generally speaking, if a suit is instituted by or against a particular identifiable group, all the members of such a group have to be impleaded whether in personal or in representative capacity. The presence of opposing parties is, undoubtedly, one of the essential requirements of any civil suit. Not all parties are necessary for the suit to be adjudicated upon."

Court stated further that;

"The question of joinder of parties may arise either with respect to plaintiffs or the defendants. Speaking of a necessary party to a suit, whether as plaintiff or as defendant, who, as a matter of necessity, ought to have been joined."

The term necessary party was also defined in various cases including in the case of **Food and Packing Ltd Vs. Tanzania Sugar Producers**



Association and another, Civil Appeal No. 91 of 2003 CAT
(unreported) at Tanga, where court stated that;

"A necessary party is one whose presence is prescribed by law and, in whose absence, no effective decision can be given, without such a party, the action appeal or proceedings is not properly constituted....."

Having that principle in mind, I can now be in a position to dispose this issue. It was on the record that respondent allocated the suit plot, plot No. 202 Block "B" Mitengo in Mtwara Municipality by Mtwara Municipal Council who surveyed the suit plot and allocated to respondent. The evidence of the respondent was as follows;

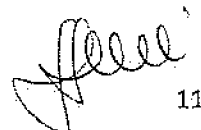
"The suit plot No. 202 Block B Mitengo in Mtwara Municipality. I got it from the government. First, I sent a letter to Mtwara Mikindani Municipal Council. They responded to accept my letter then I paid Tshs. 10,000/= for surveying costs. After paying for that plot, I was given a letter of offer then, after a year, I was issued with certificate of occupancy."

Her evidence was corroborated by the testimony of Patrick Mpagala, land officer from Mtwara Municipal Council. His testimony was as follows;

"The dispute is on plot No. 202 Block B Mitengo, Mtwara Municipal. After surveying this plot was allocated to Catherine Ramadhan Mwaihesya (respondent). She paid all payments for ownership of the suit plot. Thereafter, the municipal prepared certificate of occupancy of ownership of 99 years. Was signed by the assistant commissioner of Land of Southern Zone and then was given to Catherine Mwaihesya."

This was also proved by the testimony of DW1. On cross examination he said:-

"Mtwara Mikindani Municipal Council was supposed to allocate to me plot No. 202 Block "B" Mitengo because it was previous piece of land where I used to live"



In terms of evidence explained above, It is clear that dispute cannot be resolved without joining Mtwara Mikindani Municipal Council. There are two unresolved issues: one who surrendered the area in dispute, Two If not surrendered was the appellant compensated before survey and allocation of land to respondent? The two issues cannot be answered without joining Mtwara Mikindani Municipal Council. Thus, proceedings, judgment and decree in Land application No. 16 of 2019 of the District Land and Housing Tribunal for Mtwara is quashed and set aside. Appellant to file fresh dispute at District Land and housing Tribunal of Mtwara at Mtwara within 90 day from 1st November 2021.



Z.G. Muruke

Judge

28/10/2021

Judgment delivered in the presence of appellant in person and in presence of Richard Ebrahim Lema respondent's husband.



Z.G. Muruke

Judge

28/10/2021