

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 38 OF 2020**

(C/F the District Land and Housing Tribunal of Karatu, Land Case No. 2 of 2011)

**PASKALINA MAGE GITONGE..... APPELLANT**

**VERSUS**

**ELIASA ZAKARIA MTEMI.....RESPONDENT**

**JUDGMENT**

24/8/2021 & 12/11/2021

**ROBERT, J:-**

This appeal arises from the judgement and decree of the District Land and Housing Tribunal (DLHT) of Karatu in Application No. 2 of 2011. The respondent sued the appellant successfully claiming lawful ownership of a suit land measuring 5½ acres located at sabato area, Tloma village within the district of Karatu and a permanent injunction against the appellant, her agents, servants or workmen from trespassing into the suit land.

Briefly stated, the respondent filed a case at the DLHT of Karatu claiming to be the owner of a parcel of land measuring 5½ acres given to

him by his father, Zakaria Mtemi, in 1984. In 2001, the appellant asked to reside temporarily in the house within the said 5½ acres which was vacant at that time while looking for her permanent place. In 2007 the appellant allegedly cultivated the remaining part of the suit land without the permission of the respondent herein. The respondent reported the matter to the Village executive officer and the respondent was told to stop the invasion. In 2010, the respondent invaded the same area again claiming she was the wife of the respondent's father who died in 2002.

On her part, the appellant alleged that, the suit land belonged to her late husband, Zakaria Mtemi, to whom they were married in 1980 under customary rites. She further stated that, during the lifetime of her late husband they were residing on the suit land which is now claimed by the respondent. She maintained that, the appellant's mother was not the wife of the late Zakaria Mtemi and she is now married to another man.

After the hearing, the trial tribunal made a finding that the respondent had proved his case beyond reasonable doubt by establishing how he came into possession of the suit land whereas the appellant failed to prove that she was the wife of the late Zakaria Mtemi who was the owner of the suit land. Thus, the DLHT decided in the favour of the Respondent. Aggrieved with that decision, the appellant filed this appeal

challenging the decision of the DLHT on seven grounds which for easy of reference I have taken the liberty to reproduce as follows:

- 1. That, the decision of the trial District land and Housing Tribunal was a nullity as the said tribunal was not properly constituted.*
- 2. That, the trial Tribunal erred in Law and in fact in declaring the respondent herein the lawful owner of the suit land while he had no locus standi to institute the dispute of land against the Appellant.*
- 3. That, the trial Tribunal erred in law and in fact when it held that the appellant is not and had never been the wife of the late Zakaria Mtemi while there was overwhelming evidence to prove that fact.*
- 4. That, the record of the trial tribunal right from the grass root having violated the mandatory provisions of section 32 of the Land Dispute Court (Cap 216 R.E 2019) the judgment of the District Land and Housing Tribunal is bad in law.*
- 5. That, the judgment of the trial tribunal is bad in law for failure to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such determination.*
- 6. That, the proceedings, judgment and decree of the trial tribunal are a nullity in that the changes of the different chairman of the tribunal who had presided over the matter without giving reasons for doing so.*
- 7. That, in the alternative and without prejudice to the above grounds the trial tribunal erred in law and in fact in holding that the Respondent is the lawful owner of the suit land in the absence of the evidence from the Respondent's family members as to whether the suit land came into the hands of the Respondent by virtue of inheritance.*

At the hearing of this appeal, both parties appeared in person without representation. At the request of parties, hearing proceeded by filing written submissions.

Submitting on the first and sixth grounds together, the appellant argued that, the application at the trial tribunal commenced before Hon. R.S.S Mandari who recorded the entire evidence, however, the judgment was written by K.C Ngonyani and it was delivered by Vincent A. Ling'wet. She alleged further that, the judgment was not certified by the judicial officer as true copy of the original which make the entire proceedings a nullity.

In reply to the first and sixth grounds, the respondent submitted that, the trial tribunal was properly constituted by a chairman and two assessors as required under section 23 (1) (2) of Cap. 216 (R.E 2002) contrary to what was submitted by the appellant herein.

On the second and third grounds, the appellant argued that, the respondent lacked *locus standi* to institute the proceedings against the appellant at the DLHT. She maintained that, the late Zakaria Mtemi, was a polygamous person and his estate has to be administered by the legal representative not otherwise. She argued that, the respondent's mother was never married to the owner of the suit land, the late Zakaria Mtemi

that's why the respondent's mother did not attend the meeting of the wives of the deceased. She submitted that she was married to the late Zakaria Mtemi in 1980 after the payment of dowry.

In response to the second and third grounds, the respondent submitted that, the said suit land was given to him in 1993 prior to the death of his father and that was supported by the testimony of PW4 and PW5 at the trial tribunal. He submitted further that, since he was given the suit land before the death of his father then the property belongs to him. He referred this court to the case of **Mary Tuyate vs Grace Mwambenja and Another**, Land Appeal No. 42 of 2019 (unreported), to support his argument.

Further to that, he maintained that, as the appellant failed to prove that she was one of the wives of the deceased, the trial tribunal was correct in deciding that the respondent was the lawful owner of the suit land.

On the fourth ground, the appellant submitted that the trial tribunal mixed the language, English and Kiswahili while section 32 of the Land Dispute Courts [Cap 216 R.E 2019] which explained the language of the court to be either Kiswahili or English.

Responding to this ground, the respondent contended that, the appellant did not show where the chairman mixed Kiswahili and English, therefore, this ground is unfounded and it lacks merit.

Regarding the 5<sup>th</sup> ground, the appellant did not submit on this ground, consequently, the Respondent maintained that, as the appellant didn't prosecute it, it should be dismissed for want of prosecution.

On the last ground, the appellant alleged that the respondent failed to prove his case at the trial tribunal by his failure to call witnesses other than her step mother to prove his allegation. No family members were called to testify if it was true that he was given the suit land by his late father. The said evidence is full of contradiction regarding the ownership of the suit land. In the end, she prayed for the appeal to be allowed with costs.

Responding to this ground, the respondent argued that, he successfully proved that he was the owner of the suit land at the trial tribunal as this was supported by the testimony of PW2, PW4 and PW5. He therefore maintained that these allegations are unfounded.

In the end, he prayed for the appeal to be dismissed with costs and the decision of the DLHT of Karatu be upheld.

In rejoinder submissions, the appellant reiterated what she submitted in her written submissions in chief. She denied that the respondent was given the suit land by his late father and maintained that, the said land disposition was never blessed by the Village council. She referred the Court to the cases of **Bakari Mhando Swanga**, Civil Appeal No. 389 of 2019, CAT (unreported) and **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo & 136 Others**, Civil Appeal No. 193 of 2016, CAT (unreported) in support of her argument.

Having carefully considered the rival arguments advanced by the parties and examined the records of this matter, the main issue to be considered is whether, in the light of the grounds argued by the appellant, there is merit to this appeal.

I wish to begin with the first and sixth grounds as I consider them capable of disposing of this appeal. In this ground, the appellant is challenging the changes of chairmen who presided over this matter in the course of hearing and deliverance of the impugned judgment without recording reasons for the said changes.

On the issue of change of chairmen, Order XVII Rule 10 of the **Civil Procedure Code**, Cap 33 (R.E. 2002) provides that:-

*"Where a judge or a magistrate is prevented by death, transfer or other cause from conducting a trial suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage which his predecessor left it."*

Looking at the quoted rule, it seems as if it does not specifically require recording of reasons once there is a change of judicial officer in the course of the proceedings. However, its wider interpretation has been well uttered in the decision of the Court of Appeal in the case of **M/S Georges Centre Limited vs. The Honourable Attorney General and M/S Tanzania National Road Agency**, Civil Appeal No. 29 of 2016 (unreported) to the effect that:

*"... once the trial of a case has begun before one judicial officer, that judicial officer has to bring it to completion unless there are some reasons that he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so... the one who sees and hears the witness is in the best position to assess the witness credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."*



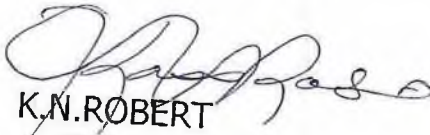
the records of this matter, it is clear that, when the dispute was filed at the trial tribunal it was assigned before Hon. R.S.S Mandari, who presided over the case up to the first defence witness (RW1), then Hon. Prosper Makwandi took over without giving reasons to that effect, thereafter Hon. D.W Mungure also took over without assigning any reasons and after a few adjournments, Hon. K.C. Ngonyani took over without assigning reasons and delivered a ruling in respect of the respondent's failure to bring her witnesses and decided to close the respondent's case and prepared judgment which was delivered by Hon. Ling'wet.

In the circumstances, I find the proceedings of the trial tribunal to be marred with irregularities occasioned by changes of presiding chairmen without assigning reasons for the said changes. Thus, I invoke the revisional powers vested in this Court under section 43 of the Land Disputes Courts Act, Cap. 216, [R.E. 2019] and nullify the proceedings of the trial tribunal. As a consequence, I quash and set aside the judgement and decree of the trial tribunal. I further order the case to be remitted to the trial tribunal for re- trial before another Chairman.

I give no orders for costs since the noted irregularities were not occasioned by the parties.

It is ordered accordingly.



  
K.N. ROBERT  
JUDGE  
12/11/2021