

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 41 OF 2021

(C/F Land Application No.15/2020 of the District Land and Housing Tribunal for
Moshi at Moshi)

KIMASIO RURAL CO-OPERATIVE SOCIETY LIMITED1ST APPELLANT

KIRIMA BORO RURAL CO-OPERATIVE SOCIETY LTD.....2ND APPELLANT

Versus

THE REGIDTERED TRUSTEES OF CATHOLIC DIOCECE

OF MOSHI (t/a SANGITI SECONDARY SCHOOL)RESPONDENT

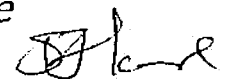
JUDGMENT

20/4/2022 & 13/6/2022

SIMFUKWE, J.

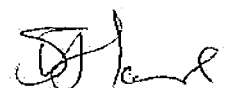
This appeal was preferred by the Appellants herein to challenge the entire judgment and decree of Land Application No. 15 of 2020 of Moshi District Land and Housing Tribunal (trial tribunal). The Appellants advanced nine grounds of appeal as reproduced hereunder:

- 1. That, the learned trial chairperson erred in law and fact by proceeding to entertain the matter and entering judgment despite change of assessors occasioning failure of justice.*
- 2. That, the learned trial chairperson erred in law by hearing the matter and entering judgment with assessors who were*



not present at commencement of the trial occasioning failure of justice.

- 3. That, the learned trial chairperson erred in law by entering judgment based on the opinion of assessors who were not present when PW1 testified subsequently occasioning failure of justice.*
- 4. That, the learned trial chairperson erred in law by entering judgment without considering the opinion of assessors who were present when PW1 testified subsequently occasioning failure of justice.*
- 5. That, the learned trial chairperson erred in law and fact by declaring the Respondent as owner of a registered land in absence of any transfer by the registered owner contrary to the law occasioning failure of justice.*
- 6. That, the learned trial chairperson erred in law and fact by declaring the respondent as owners of registered land by adverse possession contrary to the law occasioning failure of justice.*
- 7. That, the learned trial chairperson erred in law and fact by failure to properly evaluate the evidence consequently reaching an erroneous judgment occasioning failure of justice.*
- 8. That, the learned trial chairperson erred in law and fact by acting on objected and inadmissible evidence consequently reaching an erroneous judgment occasioning failure of justice.*

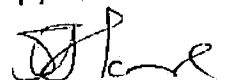


9. That, the learned trial chairperson erred in law and fact and was actuated by bias hence ignoring Applicant's evidence consequently reaching an erroneous judgment occasioning failure of justice.

The background of the dispute in a nutshell as captured from the records is that, the appellants claimed ownership over 100 acres of land situated at Kibosho Moshi (Farm No.165 Unit No.6 Moshi.L.O.No.11509 (disputed land). They instituted a land dispute before the trial tribunal claiming that the respondent herein trespassed to the disputed land. The appellants alleged that in 1988 they welcomed the respondent to their 20 acres on agreement that the respondent will be paying little amount of money to the appellants. That, the respondent trespassed to other 80 acres of the appellants. The story of the respondents was to the effect that in the disputed land, they were invited by 27 villages to Manage the school (***Shule ya Ufundi Kibosho***) which was later on replaced by Sangiti Secondary School. That the same is owned by the respondent on behalf of the 27 villages. At the end of the trial, the trial tribunal decided in favour of the respondent herein hence this appeal.

During the hearing of this appeal which was done orally, the appellants were represented by Mr. Kipoko, the learned counsel, while the respondent was represented by Mr. Aristides Ngawiliau the learned counsel.

Mr. Kipoko for the appellants started to submit in support of the 1st 2nd and 3rd grounds of appeal jointly. Under these grounds, he challenged the decision of the trial tribunal for being unlawful due to improper involvement of assessors. He stated that it is undisputed and it is apparent



on the face of the record that assessors who were present at the commencement of the trial were not the one who gave opinions at the closure of the trial. The learned advocate was of the view that such act is a clear violation of the laws of the country which renders the whole decision and proceedings null and void. To fortify this position, Mr. Kipoko referred to the decision of the Court of Appeal in the case of **Edgar Kahwili vs Amer Mbaraka and Azania Bancorp Limited, Civil Application No. 21/13/2017** in which the Court reiterated the position of the law that change of assessors is fatal and a number of Court of Appeal cases were cited to that effect. He argued further that the legal consequences of such irregularity is to nullify the whole proceedings and judgment thereof and order trial de novo of the case before another chairman and new set of assessors and costs to be in the course. He thus prayed for the court to order retrial of the case expeditiously bearing the position of the highest Court of the country.


Under the second cluster of grounds of appeal, the learned advocate challenged the decision of the trial tribunal for holding that the land is owned by the respondents through a doctrine of adverse possession. Mr. Kipoko submitted to the effect that it was not disputed that the whole land subject of this litigation is a registered land and thus there are special conditions for claimants under adverse possession to succeed. He was of the view that if the tribunal properly evaluated the evidence before it and applied the laws of this country accordingly, it would have reached a different conclusion and declared the appellants herein lawful owners of the whole land subject of this litigation.

He made reference to the case of **Registered Trustees of Holy Spirit Sisters Tanzania vs January Kamili Shayo and 136 Others, Civil**

Appeal No. 193 of 2016 in which the Court of Appeal reiterated the position of law governing applicability of the doctrine of adverse possession. In that case, the respondents as in this case were claiming to own a portion of registered land via adverse possession. That, the respondents were given the land and they were using it for a long period and thus they acquired ownership of the same. Those claims are similar with the claims of the respondents in the present case. The Court of Appeal ruled that for adverse possession to prevail, the claimant should not have been given the land. The land should be used adversely against the owner as such, there should be an abandonment of that land. Lastly, the claimant should comply to laid down procedures for which the claimant in that particular case did not and in this particular case they also did not comply with all of those conditions to wit; the land is still registered under the name of the appellants and there is no any disposition approved to that effect. As such the decision was nullified and the registered owner was declared a lawful owner of the whole land.

Thus, Mr. Kipoko prayed the court to be guided by the case of **Registered Trustees of Holy Spirit** (supra) and decide accordingly.

Submitting on the last part of argument, the learned advocate challenged the decision of the trial tribunal in the sense that the same was reached through failure of evaluation of evidence and as such ignored the applicant's evidence which occasioned failure of justice. He made reference to Exhibit P1 which is a Deed of Transfer of the suit land to the respondents and argued that the same was not objected and was admitted as evidence. If read together with Exhibit P13 (letter from the District Land Officer) together with Exhibit P7 (a letter from Assistant Registrar of Titles Kilimanjaro Region) it affirmed that the registered

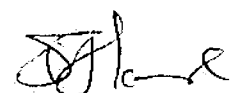


owners of the suit land are the appellants. The learned advocate further submitted that this piece of evidence which were not contested sufficed to establish a concrete title of the suit land to the appellants.

He also stated that without going into details of the respondents' exhibits, all the documentary evidence produced by the respondents had the following defects, *first*, neither of them described the suit land, *second*, neither of them was original, *third*, some of them particularly exhibit D4 purport to be from 27 villages none of them was signed and *fourth*, the evidence was extraneous as villages were not party to the proceedings. Therefore, it was the opinion of Mr. Kipoko that the said exhibits did not carry any evidential value to warrant a judicious decision with the effect of nullifying the registered interest over the land.

Basing on the above arguments the learned advocate for the appellants argued that the appellants' evidence was watertight to protect their interest over the suit land. That, evidence of the respondents fails short of any legal validity to confer the title over the registered land.

In summary, the learned advocate also raised the following arguments; That, due to irregularity of involvement of assessors he prayed for nullification of the judgment, proceedings and decree and order trial de novo. In case it is found that the irregularity did not vitiate the proceedings and judgment, Mr. Kipoko implored the court to consider other two clusters of arguments which show and prove that evidence of the appellants over the suit land was more legitimate and heavier than that of the respondent and allow this appeal by declaring the appellants the owners of the suit land with costs.



In reply, Mr. Aristides briefly stated the history of the matter. That, the matter was heard by Hon. Makwandi-Chairman who presided during the proceedings of PW1 and PW2. The appellants wrote a letter that the presiding Chairman should recuse from presiding over the matter. Though there were no sufficient reasons given, Hon. Makwandi recused himself and the matter was reassigned to Hon. James Silas who presided over the matter to the end sitting with his two assessors. The learned advocate prayed that it should be noted that those assessors who were with Hon. Makwandi did not shift to Hon. Silas.

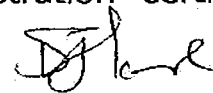
Opposing the 1st, 2nd and 3rd grounds of appeal, Mr. Aristides stated that Hon. Silas entertained this matter involving two assessors who sat with him at the tribunal. On 24/8/2021 when it was time to read opinions of assessors, the counsel for the applicants now the appellants requested for an opportunity to address the tribunal in respect of change of assessors. That, the counsel for the applicants was of the view that those assessors who heard the case to the conclusion were competent to give opinions to the Chairperson in line with **Regulation 19 (2) GN No. 174 of 2003**. The learned advocate referred to page 45 of the proceedings dated 24/8/2021.

He further submitted that it is trite law that no party to a case can benefit of his own wrong doing. Thus, since it is the learned counsel who prayed that the Hon. Chairperson should recuse from presiding over the case, then he cannot use the same as a spear to benefit from the same. Therefore, it was the comment of Mr. Aristides that the 1st 2nd and 3rd ground of appeal are devoid of merit and should be dismissed. He added that even the cited case of **Edger Kahwili** (supra) has not specified the page number or paragraph of the judgment and circumstances of change

of assessors which are fatal have not been specified. Thus, the same is distinguishable to the present case.

Submitting on the 4th, 5th and 6th grounds of appeal, Mr. Aristides disputed the argument by Mr. Kipoko that the appellants are the owners of the disputed land. He condemned the appellants for failure to discharge their duty to prove the case on the required standard thus on balance of probabilities. That, their witness PW1 tendered exhibit P1 (Deed of Transfer) as can be referred at page 18 of the proceedings dated 18/11/2018. However, they did not tender a title Deed as prima facie proof of ownership of the disputed land as required under **section 35 of Land Registration Act** which provides that the owner of an estate in any parcel shall be entitled to receive a certificate of title under the seal of certificate Land Registry in respect thereof showing the subsisting memorials in the land register relating thereto and co-owners may if they so desire, receive separate certificates of Titles in respect of their respective shares.

The respondent's counsel continued to condemn the appellants for tendering the Deed of Transfer which does not prove ownership of the disputed land. That, the appellants tendered exhibit P13 which is a letter from Assistant Registrar of Titles of Kilimanjaro which states that the disputed land is not registered in Moshi which means that it does not exist. Also, PW2 and PW3 together testified that they do not have certificate of Occupancy or Title Deed. Also, they did not tender any land rent receipt to prove payment of land rent; instead, they tendered Land Rent assessment as Exhibit P2. Surprisingly, the names on that Deed of Transfer and names on the Land rent assessment are absolutely different. That, PW3 tendered exhibit P4 which is registration certificates of



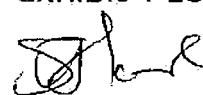
appellants who were registered in 1983 and at the same time, they alleged that they purchased the disputed land on auction in 1969 while by that time they never existed.

It was submitted further that, the appellants failed to show receipts used to purchase the disputed landed property. In short, failure to do all what had been noted by the learned counsel, shows that they failed to prove their claims on the requires standard in civil suits as provided for under **section 112 of the Evidence Act, Cap 6, R.E 2019**. He also referred to the Court of Appeal case of **Africarries Limited vs Millenium Logistics Limited, Civil Appeal No.185 of 2018**, at page 14 and 15 where it was stated that:

"Let's begin by re-emphazing the ever-cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act, Cap 6 Revised Edition, 2002."

Regarding the cited case of **Registered Trustees of Holy Spirit Sisters Tanzania**, Mr. Aristides submitted that the circumstances of the cited case are distinguishable to the instant matter since the appellants have failed to prove ownership of the disputed land.

On the 7th, 8th and 9th grounds of appeal that the appellants managed to establish ownership by tendering Exhibit P1 (Deed of Transfer) and Exhibit P13 (a letter from Assistant Registrar of Titles); Mr. Aristides argued that the Deed of Transfer is the document which shows transfer of Title from one person to another person. Thus, the appellants have not established their ownership by tendering a Title deed. Even exhibit P13 which is a



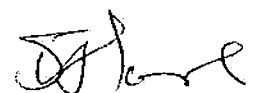
reply letter to Advocate Kipoko states that the disputed land does not exist in the Registry. Basing on that reason, the learned advocate for the respondent reiterated that the appellants failed to prove ownership of the disputed land. He thus prayed the appeal to be dismissed with costs.

Countering the allegation that the respondent tendered documents which were not original, the learned advocate argued that before the Tribunal they gave notice that they would rely on secondary evidence and gave reasons for the same.

Concerning the allegation that Exhibit D4 was not signed by any person, Mr. Aristides said that it is not true since the same was signed and the names of signatories were indicated therein. Finally, he submitted that, the 27 villages who gave the land to the respondents were not party to the proceedings. It was not the duty of the respondent to force the appellants who they should sue and how to choose witnesses on part of the respondent.

In addition, he argued that they are confident that they have been occupying, developing and investing heavily on the disputed land for the past 32 years legally, peacefully and without any quarrel from any person whatsoever. He thus prayed this appeal to be dismissed with costs.

In rejoinder, Mr. Kipoko reiterated what has been submitted in chief in respect of the irregularities of assessors. He admitted that it was true that he pointed and clarified the position of the Court of Appeal that such irregularity was fatal at the closure of proceedings when assessors were giving opinions. That, the trial Chairman invited counsels of both parties if they so wished to file submissions on that aspect of which on their side



the then applicants found that such irregularities were incurable under the law. As a result, they did not file any submission.

As to how the appellants established ownership of the suit land, Mr. Kipoko referred the court to exhibit P1 and argued that the same is self-explanatory. On top of Exhibit P1, he argued that there is a letter from Assistant Registrar of Titles which clearly state that the suit land is owned by the appellants through a Deed of Transfer and that the Title Deed is held by his office for any one to inspect. That, such deed of Transfer was admitted uncontested.

On the issue of difference in names of the appellants on exhibit P1 it was submitted that there is a letter from the District Land Officer which explains the names of appellants from when they bought the land to their current names.

Concerning the names of the respondents on their exhibits, Mr. Kipoko submitted that not only were their exhibits not original but also, they were not proved since they failed to prove the contents of the documents. He opined that they were supposed to call those witnesses.

Regarding the point on how the respondents came into possession, the appellants' counsel argued that in the Amended Application, the appellants indicated that they invited the respondents. In their evidence particularly exhibit D4 there is indication to that effect.

Moreover, the learned counsel reiterated on the issue of adverse possession as well as his prayers as submitted in submission in chief.

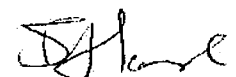


Having given due consideration of the submissions of both parties together with the trial tribunal's records, I will thus deal with the grounds of appeal as submitted by the learned counsels.

On the first cluster of submission under the 1st, 2nd and 3rd grounds of appeal, the appellants' counsel condemned the tribunal for improper involvement of assessors. That, the assessors who were present at commencement of the trial were not the one who gave opinions at the closure of the trial which is fatal. Mr. Aristides for the respondent noted the same that assessors who sat with Mr. Makwandi did not shift to Hon. Silas. However, he was of the view that since they were given an opportunity to address the tribunal in respect of such change of assessors where Mr. Kipoko said those assessors were competent to give opinions, and since the recusal by Mr. Makwandi was initiated by Mr. Kipoko, then he cannot benefit from his wrong.

I have gone through the records; the record loudly speak itself in respect of what has been submitted by the learned counsels that assessors who were present at the commencement of the case were not the ones who gave opinions at the end of the trial. To be more specific, the assessors by the name **S. Lukindo** and **S. Mchau** had opportunity to hear the evidence of PW1 and PW2 as the coram dated 3/11/2020, 23/3/2021 and 28/4/2021 reveals. On part of appellants' evidence, the new assessors, **T. Temu** and **J. Mmasi** who sat with successor Chairman had opportunity to hear only one witness (PW3). Surprisingly, they managed to give their opinions.

Having established what transpired in the trial tribunal in respect of change of assessors, I hasten to say that the involvement of assessors is



purely the matter of law. This requirement is provided for under **section 23 (1) (2) and (3) of The Land Disputes Courts Act [CAP. 216 R.E. 2019]** read together with **Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations** (supra). As a matter of reference, I wish to quote these provisions. **Regulation 19(2)** provides that: -

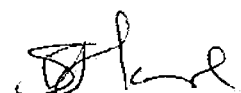
"Notwithstanding sub regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."

Section **23(1)(2)(3) of the Land Disputes Courts Act** (supra) provides that: -

(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a 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.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.

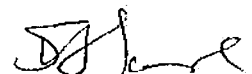


In the instant matter, since the assessors who opined never sat throughout the hearing, no way could their opinion reflect the evidence presented. I am therefore of settled opinion that their opinions are lacking and have negative impact on tribunal's proceedings. That, change of assessors is fatal and renders the trial proceedings, judgment and orders thereto null and void. This was also expounded in the case of **JOSEPH KABUL V. REGINAM [1954-55] EACA Vol. XX1-2** that:

"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity."

It will not be prudent if I stay dumb in respect of what transpired at the trial tribunal. It seems that the honourable Chairman and learned Counsels were of the same views that change of assessors were not fatal. This situation reminds me of the famous English sayings that, ***"Wrong is wrong even if everyone is doing it."*** Thus, despite the fact that the parties' learned counsels and honourable Chairman agreed to proceed despite noting such irregularity, still the same cannot validate the said irregularity since parties cannot agree to contravene what has been provided for by the law. Once a nullity always a nullity.

Also, I have noted that the learned advocates who are representing the parties in this appeal are the same advocates who represented the parties before the trial tribunal and the learned advocate, Mr. Kipoko seems to be aware that change of assessors is fatal as he submitted before this court. However, he did not draw such attention to the tribunal. Astonishingly, he is seen to raise the same concern coupled with authorities to substantiate that change of assessors is fatal. With due respect, I wish to remind the learned advocates that they are Officers of



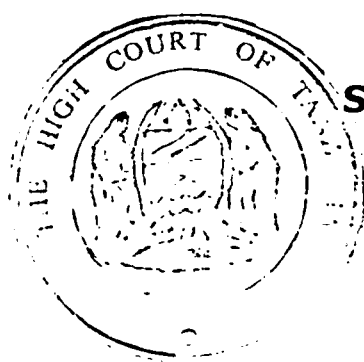
the Court who play a vital role in administration of justice hence not expected to interpret the law into the directions which serve their own interests. The learned counsels ought to have acted judiciously instead of misleading the trial tribunal that the above irregularity was not fatal and yet pose the same issue as one of the grounds of appeal in this Court. This kind of behaviour is not excused since it wastes the precious time of this honourable court and is an abuse of court process which I highly abhor.

Basing on the above circumstances I am of the considered view that, since the proceedings have been concluded to be a nullity as established hereinabove, I therefore consider the 1st cluster of grounds of appeal to be sufficient to dispose of the appeal. Discussing the rest grounds of appeal will amount to a mere academic exercise.

In light of the above, I proceed to allow the appeal by nullifying and quashing the proceedings, decision and orders emanating from Land Application No. 15 of 2020 of the trial tribunal. I hereby order a retrial before another Chairman sitting with different set of assessors. Considering the circumstances of this case, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 13th day of June, 2022.



A handwritten signature in black ink, appearing to read "S. H. Simfukwe".

S. H. SIMFUKWE

JUDGE

13/6/2022