

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 13 OF 2021

(From Land Application No. 11 /2016, District Land and Housing Tribunal for Karatu
at Karatu)

GEREMIA PHILIPO.....APPELLANT

VERSUS

BONIFACE DAMIANO NGAO.....RESPONDENT

JUDGMENT

24.05.2022 & 05.07.2022

N.R. MWASEBA, J.

The appellant herein upon being dissatisfied by the decision delivered by the District Land and Housing Tribunal of Karatu at Karatu lodged this appeal based on the following grounds:

1. That, the trial tribunal erred in law for failing to frame issues properly according to the pleadings.
2. That, the trial chairperson of the District Land and Housing Tribunal erred both in law and fact by granting relief (s) which was not prayed by a party to the suit.
3. That, the trial chairperson of the district land and Housing Tribunal erred both in law and fact by entertaining Application No. 11 of 2016 while the same had

already been entertained and concluded by Qurus Ward Tribunal in land Complain No. 4 of 2015.

4. That, the judgment and decree of the trial tribunal is incompetent in law for contravening mandatory requirement or provision of the law.
5. That, the trial chairperson of the District Land and Housing Tribunal erred both in law and fact by failing to analyse evidence on record properly and ended up in rendering erroneous decision.
6. That, the trial chairperson of the district land and housing tribunal erred both in law and fact by relying on documentary evidence which was not tendered to the tribunal.

Briefly, the records reveal that, the respondent herein sued the applicant at the District Land and Housing Tribunal of Karatu at Karatu claiming to be declared the lawful owner of the piece of land measured at 2 ¼ acres bought in 1995 from one Massay Axwesso (now deceased). On the other hand, his claim was contested by the appellant herein who alleged that the suit land belongs to him as he bought it from Maria Massey (deceased's wife) on 20.03.2010. At the end of the trial the tribunal declared the respondent as the lawful owner of the suit property and ordered the appellant to vacate the suit property and restrain him from disturbing the respondent. The costs were to be borne by the appellant. Being aggrieved the appellant lodged the present appeal based on the grounds adduced above.

During the hearing of this appeal which proceeded orally. The appellant was represented by Mr Sabato Ngogo, learned counsel whilst the respondent appeared in person, unrepresented.

Submitting in support of the appeal Mr Ngogo abandoned the last ground and remained with only five of them. Starting with the first ground of appeal he alleged that the trial chairperson added the issue of "*whether the sale agreement between Maria Massay Axwesso and the 1st respondent was valid in the eyes of the law*" while it was out of the content of the pleadings. The said act denied the parties a right to submit regarding the said new issue. They prayed for the said issue to be disregarded and for the court to find merit on the first ground.

Coming to the 2nd ground, the learned counsel told the court that the trial chairperson granted relief which were not prayed for when he declared that Maria Massay Axwesso had no good title to pass to the appellant herein. As the parties are bound by the pleading no one prayed for the sale agreement to be declared void, so the 2nd ground has merit too.

On the 3rd ground of appeal, Mr Ngogo told the court that at the trial tribunal it was revealed that there is a case already decided between the parties at Qurus Ward Tribunal which is at the stage of execution (Complain No. 4 of 2015 and Execution No. 19 of 2016). However, despite

of that the trial Chairman proceeded to determine the application against **Section 9 of the Civil procedure Code**, Cap 33 R.E 2019. Thus, it was their submission that there is merit on the 3rd ground too,

On the 4th ground of appeal, he submitted that the judgment of the trial court was delivered contrary to **Regulation 20 (1) of the land Disputes Court (Dispute land & Housing Tribunal) Regulation 2003** which need a judgment to contain a brief statement of facts, findings of the issues, decisions and reasons for decisions. He added that the trial tribunal's judgment did not have reasons for its decision which make it to look just like a normal writing. Further to that the assessors were not given a chance to give their opinions as required by the law. He cited the case of **Dora Twisa Mwakikosa Vs Anameri Twisa Mwakikosa**, Civil Appeal No. 129 of 2019 (CAT at Mbeya Unreported) where the court held that failure to read the opinion of the assessors the whole proceedings become nullity.

On the last ground of appeal, Mr Ngogo contended that the trial court failed to analyse properly the evidence before it. He added that the respondent (PW1) said he bought the land from DW1 and later on agreed that Massay Axwesso had a wife called Maria Massay Axwesso. He further admitted that the sale agreement was neither signed by Maria Massay

Axwesso nor other family members. The learned counsel proceeded to say that DW2 alleged that the respondent never bought the said land but he was using it on lease. Had the trial chairman evaluated the evidence he could have realized that the appellant bought the land from DW2 (Maria Massay Axwesso) and not otherwise. He prayed for the trial tribunal's decision to be quashed and set aside as the appellant is the lawful owner of the disputed property.

Replying to what was submitted by the counsel for the appellant, the respondent asserted that their case started since 2003. He is satisfied with the decision of the trial tribunal and that their case was never determined by the Ward Tribunal. He alleged that he bought the disputed land in 1965 and the sale agreement has no signatures of village leaders due to the arrangements of the Village Office. Being aggrieved by their previous decision the appellant appealed to the high Court where Maige J, allowed him to go for execution but the appellant stayed the execution. Further, he contended that the assessors were present when the case was determined.

In his brief rejoinder Mr Ngogo submitted that DW2, the wife of the respondent, admitted that the disputed property was sold to the appellant herein. And regarding the allegation that he bought the suit property in

1965 was not true since in 2016 the respondent was 61 which means in 1965, he was 10 years old and no evidence to prove he bought the land in 1965. So, he reiterated what he submitted earlier for the appeal to be allowed with costs.

Having considered the rival arguments advanced by the counsel for the appellant and the respondent and examined the record, the main issue that calls for determination of this court is whether the appeal has merit. This issue will be determined upon discussing the grounds of appeal brought by the appellant.

Starting with the sequence adopted by the parties, the first ground of appeal the appellant complained that the trial tribunal failed to frame the issues properly. He added that the trial tribunal framed an issue which was out of the parties' pleadings, the alleged issue was *whether the sale agreement entered between Maria Massay Axwesso and 1st respondent was valid in the eyes of the law.*

This court upon revisiting the trial court records particularly the pleadings found that the respondent/applicant's claim was based on the ownership of the disputed land that he bought the same in 1995 from Massay Axwesso. In his reply, the appellant pleaded that the land belongs to him as he bought it on 20/03/2010 from Maria Massay and he attached a copy

of his sale agreement. This being the contents of the pleadings, it was obvious that the court must have determined about the sales agreement as it was an annexure to the pleadings.

It has also been noted that the issues of the tribunal were framed on 21.12.2016 prior to the hearing of the case and both parties were present.

As long as the disputed issue was framed at the earliest stage prior to the hearing, the parties had a chance of either refusing it or submitting evidence regarding the alleged issue. To claim at this stage that the trial tribunal raised its own issue is just an afterthought on the part of the appellant. Thus, the court finds no merit on the first ground of appeal.

Coming to the 2nd ground where the appellant's counsel complained that the trial tribunal granted reliefs which were not pleaded by a party to a suit. The appellant averred that the act of the chairperson to declare the contract between Maria and the appellant were void hence Maria had no good title to pass were not pleaded by the appellant thus it was wrong to grant the said relief.

This court did revisit the trial tribunal's proceedings and noted that since among the issues raised at the trial tribunal was who was the lawful owner of the suit land then it was the duty of the trial tribunal after evaluating the evidence to find out whether the sale agreement (contract) between

the parties were valid or not and whether Maria who sold the land to the appellant had a good title to pass to the appellant. Thus, this court finds that those were not new reliefs added by the tribunal but they were the points helping the tribunal in arriving to the decision. However, the said sales agreement was an annexure to the appellants reply so it was subject for the Tribunal's determination of its validity. Thus, this ground has no merit.

As for the 3rd ground of appeal, it was complained that the trial tribunal decided on the matter which were already decided by the Qurus Ward Tribunal via Land Complain No. 4 of 2015. Having gone through the evidence adduced at the trial tribunal DW1 (the 1st appellant herein) did mention at the trial tribunal that the matter was already decided by the Ward Tribunal however he never tendered any documentary evidence to prove his allegation as he the respondent disputed the said facts. The principles of proof of claims are equally applicable, that he who alleges must prove as provided under **Section 110 and 112 of the Evidence Act**, Cap.6 [R.E 2019] that: -

"110 -(1) Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

The same has been decided in the case of **Serengeti District Council and Another Vs. Maruko Sendi** [2011] TLR 334 that: -

"It is an elementary principle that he who alleges is the one responsible to prove his allegation."

Thus, without any document to prove if the complaint at the ward tribunal was between the same parties and the same subject matter the allegation will be just an afterthought.

Coming to the fourth and fifth ground of appeal where the appellant alleged that the trial tribunal's judgment did not meet the test of being a judgment since no reasons were adduced by the chairman on how he reached into the said judgment and that the evidence was not properly evaluated particularly the evidence of PW1 and DW2.

It is well known that every person has his/her own style of composing judgment. However, what matters is for the court to observe and abide by the format of writing a judgment as stipulated under **Regulation 20 (1) of the Land Disputes Court (District Land and Housing Tribunal) Regulation, 2003** which stipulates that:

"The judgment of the Tribunal shall always be short, written in simple language and shall consists of;

a) a brief statement of facts

- b) *finding on the issues*
- c) *a decision; and*
- d) *reasons for the decision."*

I have gone through the trial tribunal's judgment and found that the same contain a brief statement of facts, and the issues which were answered summarily prior to giving the reasons or evaluating the evidence. He winded up by reasoning that:

"The tribunals assessors namely as Peter Mushi and Mrs Rukia Panga was given a chance to opine, both of them unanimously opine in favour of the view that the applicant be declared a lawful owner of the suit land. On my side, I don't have a reason to depart from the opinion of the lay assessors: their opinion went hand in hand with my above observation. Therefore, the applicant is hereby declared to be lawful owner of the suit land..."

It is apparent that the chairman gave his reason briefly as stated above but did not thoroughly evaluate the evidence. It is a settled principle that the first appellate court is entitled to re-evaluate the entire evidence before the trial tribunal on record by reading it together and subjecting it to a critical scrutiny. In the case of **Philipo Joseph Lukonde Vs. Faraji Ally Saidi** (2020) TLR, 576 the Court of Appeal held that:

"This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions."

Being guided by the above decision, this being the first appellate court will go through the entire evidence on the record and come to the conclusions. The counsel for the appellant has challenged that the evidence was not properly evaluated particularly the evidence of PW1 and DW2 hence the Tribunal ended up in rendering erroneous decision. The main issue that was raised by the trial tribunal was *between the applicant and the respondents who was the lawful owner? And depending on the first issue, whether the sales agreement entered between Maria Massay Axwesso and the 1st respondent is valid in law.* Going through the tribunal's proceedings, the respondent stated that he started to use the suit land in 1995 after buying it from Massay Axwesso (DW2's husband). The sale agreement to that effect was admitted as exhibit P1. However, it is challenged that the said contract was not signed by Maria and by the village leaders. DW2 has not disputed that the respondent herein has been using the said land. She said her husband did not sell it to the respondent rather, it was leased to him for cultivation purposes. However, she did not have any proof that the respondent was using the said land under such capacity. The respondent said he has been using the farm

since 1995 up to 2015 and tendered the sales agreement and the Judgment of the primary court which shows in 2001 the suit land was trespassed by the 2nd respondent at the Tribunal one Hamis Juma and he won the case.

The counsel for the appellant has challenged the said sale agreement as it was not signed by the Village leaders. Going through it, I concur with the learned counsel that it was not signed by the village leaders. However, the same was signed by the respondent as a buyer and the late Massay Axwesso as the seller. PW2 Jones Bakuru was among the witnesses who signed the said sale agreement. It is my considered view that the said sale agreement was binding as it was entered freely by the parties regardless that the village leaders did not sign. In the case of **Philipo Joseph Lukonde Vs Faraji Ally Saidi**, (Supra) the Court of Appeal bought the idea set out in the case of **Michira V. Gesima Power Mills Ltd** [2004] eKLR where the Court of Appeal of Kenya discussed the construction of agreement for the sale of land which the trial court had found as matters of fact that the contract was "home-made" and contained several contradictory clauses framed in unusual terms. Thus, The Court of Appeal of Tanzania had this to say:

"Where parties have freely entered into binding agreements, neither courts nor parties to the agreement, should not interpolate anything or interfere with the terms and conditions therein, even where binding agreements were made by lay people."

That being the legal position, this court will not hesitate to declare that the agreement between the respondent and the late Massay Axwesso was binding. Thus, I concur with the decision of the tribunal that the suit land belongs to the respondent.

The second issue raised by the trial tribunal depended on the answer to the first issue. So, if the suit land belongs to the respondent, then Maria Massay was wrong to re-sell it to the appellant as it was alleged by the appellant herein.

Having foresaid, this appeal lacks merit and it is dismissed with costs. The decision of the DLHT is left undisturbed.

Ordered accordingly.

DATED at **ARUSHA** this 5th day of July 2022.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

N.R. MWASEBA

JUDGE

05.07.2022