

**IN THE HIGH COURT OF TANZANIA  
TABORA DISTRICT REGISTRY  
AT TABORA**

**LAND CASE APPEAL NO. 10 OF 2020**

(Arising from Judgment and Decree of the District Land and Housing Tribunal for Tabora in Land Appeal Case No. 01 of 2019 (Waziri M. H – Chairman dated 22/11/2019) and the original Decision of the Itetemia Ward Tribunal in Land Dispute No. 6 of 2018)

**CLEMENT AUGUSTINO ..... APPELLANT**

**VERSUS**

**SIPIRIAN RAPHAEL.....RESPONDENT**

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**JUDGMENT**  
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Date of Last Order: 01/04/2022

Date of Delivery: 08/07/2022

**AMOUR S. KHAMIS, J:**

In this second appeal, Clement Augustino challenges a judgment and decree of the District Land and Housing Tribunal for Tabora which confirmed a decision of the trial Itetemia Ward Tribunal in respect of the disputed ten acres of land located at Isukamahela hamlet, Tabora Region.

The dispute was instituted in the ward tribunal by Sipirian Raphael who alleged that Clement Augustino @ Masanja trespassed in his wetland area.



Upon trial, the ward tribunal exercised "its wisdom" by dividing the disputed land into two equal parts and thus allocating the five (5) acres to Clement @ Masanja simply because he improved and took good care of it for a considerable long period of time!

Apart from the apportionment order, the trial ward tribunal was satisfied the complainant, Sibirian Raphael, lawfully bought the disputed land from Magreth Kaunga, alleged to have inherited it from her late father, Saimon Kaunga.

On the reasons for allocating half of the farmland to Clement Augustino @ Masanja, the ward tribunal stated that:

*"Mlalamikiwa Ndugu Clement Masanja apewe hekari tano (5) hizo kwa sababu Baraza limebaini kuwa ni mtu aliyekuwa akilitunza na kulihudumia kwa kipindi kirefu. Hivyo Baraza kuona kuwa siyo busara kukosa kutokana na nguvu yake kubwa aliyoitumia kulisafisha eneo hilo na kuwa kama lilivyo hivi sasa."*

On appeal by Clement Augustino @ Masanja, the District Land and Housing Tribunal confirmed the trial tribunal's decision and dismissed the appeal in its entirety.

Determined to fault the two tribunals below, Clement Augustino @ Masanja, knocked the doors of this Court equipped with five grounds of appeal, which can be rephrased as hereunder:

- i) That the learned Chairman of the District Land and Housing Tribunal erred in law and in facts in not taking into account its order of 13/07/2018 which ordered Magreth Kauga to be joined as a necessary party rendering proceedings nullity on account of non-joinder.
- ii) That the learned Chairman of the tribunal erred in law and fact in failing to recognize 12 years' time limitation as the appellant used the disputed land uninterruptedly since 1975.
- iii) That the learned Chairman erred in law and facts in dividing the suit land to the respondent and appellant equally while the land belonged to the appellant.
- iv) That the learned Chairman generally erred in law and facts in deciding into the land not in dispute.
- v) That the learned Chairman erred in law and facts in determining the case while the evidence of two of the appellant's witnesses: Nelson Kapwaga and Maganga Jonas were missing in the record resulting to unfair decision.

Throughout this appeal, Clement Augustino was well represented by Mr. Timoth Sichilima, learned advocate, whereas Mr. Saikon Justine Nokoren, learned advocate of this Court, acted for the respondent, Sipurian Raphael.



With parties' consent, the appeal was canvassed by way of written submissions. I am grateful to the two rival counsel for timely presentation of the written arguments which will be referred to in the course of addressing relevant issues herein.

The grounds of appeal raised several issues for determination, including: whether proceedings in the two lower tribunals were a nullity due to non - joinder of a necessary party, whether Magreth Saimon Kaunga had no capacity to sale the disputed property to Sipurian Raphael, whether the tribunals below omitted to take into account some important evidence including those of Nelson Kapwaga and Maganga Jonas and lastly, whether the appellate District Land and Housing Tribunal failed to evaluate the evidence on record.

I propose to start with the last two issues which from their nature, will be consolidated.

In this integrated issue, the appellant's allegation can be better understood by reproducing a portion of Mr. Timoth Sichilima's submissions in page 4, thus:

*"In the record of the trial ward land tribunal of Itetemia, the appellant's witnesses Nelson Kapwaga and Maganga Jonas were called by the appellant (Clement Augustino) as his witnesses. Their statements of evidence were recorded by the trial ward tribunal and they were cross examined but to the reasons better*



*known by the ward tribunal, their statements were not in the record of judgment (their statements are attached hereto...)"*

Mr. Sichilima asserted that the trial tribunal's failure to consider evidence of the two witnesses resulted to great miscarriage of justice.

On the other hand, Mr. Saikon Justine Nokoren submitted that the evidence before the trial ward tribunal was properly evaluated and considered in favour of Clement Augustino such that he obtained five (5) acres of land.

He contended that on weight of the evidence on record, the appellant was not entitled to the apportioned five acres of land or any part thereof.

This is a second appeal. The duty of this Court in such stage was well stated by the defunct East Africa Court of Appeal in **R V HASSAN BIN SAID (1942) 9 EACA 62**, thus:

*"On second appeal, the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings, though it may think possible, or even probable, that it would not have itself come to the same conclusion. It can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law."*



The above stated legal position was followed by the Court of Appeal of Tanzania in **DPP V JAFARI M. KAWAWA (1981) TLR 149**, thus:

*"This was a second appeal....The appeal therefore lay to the Court only on a point of law. Obviously this position applies only where there are no misdirections or non directions on the evidence by the first appellate Court. In cases where there are misdirections or non directions on the evidence, a Court of second appeal is entitled to look at the relevant evidence and make its own findings of fact".*

Prior to analyzing the role of this Court in this matter, it is not out of place to question whether the District Land and Housing Tribunal effectually discharged its mandate as the first appellate body.

This issue is relevant in view of the Court of Appeal decision in **DAMSON NDAWEKA V ALLY SAID MTERA, CIVIL APPEAL NO. 5 OF 1999** (unreported), wherein it was held that:

*"The High Court as the first appellate court was bound to analyse the evidence of both sides with a view to satisfy itself that the finding of the trial court was justified on the evidence"*



Upon examination of the impugned Judgment of the District Land and Housing Tribunal, I noticed that the appellate chairman avoided to analyses the evidence on record.

In a very casual manner, the appellate chairman played down Clement Augustino @ Masanja's case in one paragraph, thus:

*"Generally, I have no reason to depart from the decision of the trial ward tribunal since the case was decided basing on believability of evidence whereby the respondent seems to have more believable evidence than that of the appellant as the respondent adduced and or tendered the sale agreement of 16/8/2001 which shows that he bought the shamba and or plot in dispute on 16/08/2009 from one Magreth Simon Kaunga but the appellant has nothing rather a mere story."*

The excerpt above is all that the appellate chairman stated about the evidence on record. However, the ward tribunal's proceedings show that during trial, the tribunal visited the locus in quo and received evidence from witnesses of the rival sides.

Records show that Sipirian Raphael, a complainant, featured one witness; Magreth Saimon Kaunga. On the other hand, Clement Augustino @ Masanja, lined up three witnesses, namely: Nelson Kapwaga, Maganga Jonath, Mzee

Andrea Kikwara Augustino and himself, Augustino Clement @ Masanja.

There was also evidence from the chairman of Isukamahela hamlet whose name and or side of testimony were not disclosed.

The importance of describing a witness during trial cannot be overstated. Unless there is lawful reason to hide proper identity of a witness, his name, age, nationality, residence and religion (for the purpose of being sworn in) are necessary particulars that should feature in the proceedings.

These particulars are important to establish competency and compellability of a witness to testify in the case. When a similar question was addressed to the Supreme Court of India in the case of **JWALA MOHAN AND OTHERS V THE STATE, AIR 1963**, it was held that:

*"...whether a person is a competent witness or not may be a question of law governed by the Evidence Act. Once it is found as a matter of law that he is competent to give evidence, whether his evidence on a certain matter is admissible or not is again a question of law governed by the Evidence Act, which contains the provisions as to what statement which is admissible in evidence. A third question arises, it being whether it should be believed or not and this is a question of fact. Neither the Evidence Act nor any other Act lays down*





*any law governing the question which statement of a witness should be believed. Whether a statement of a witness should be believed or not depends upon so many circumstances that it is impossible to lay down hard and fast rules...."*

On further examination of the lower tribunal proceedings, I observed that in its practice, the trial tribunal recorded the name, age, tribe, religion, occupation, residence, name of his/her street chairman and personal telephone number for each witness who appeared before it.

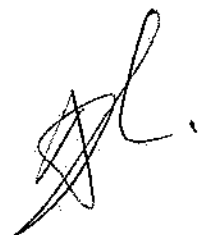
However, for the Isukamahela hamlet chairman, apart from failure to disclose his name and side of testimony i.e for the complainant or respondent, the ward tribunal did not record his/her age, occupation, residence, tribe, gender and religion.

The hamlet chairman's testimony was also not referred to in the final decision of the trial tribunal.

As rightly asserted by Mr. Sichilima, oral testimonies by Nelson Kapwaga and Maganga Jonath were left out in the trial tribunal's decision.

In addition, the ward tribunal omitted to consider and or disclose the facts obtained during a visit to the locus in quo.

As regards to testimony of the Isukamahela Hamlet Chairman, I am of the view that, an omission to supply



necessary particulars regarding his identity, rendered such evidence incomplete.

The legal effects of such incomplete evidence were considered by the Supreme Court of India in **RABI CHANDRA PADHAN AND OTHERS V STATE OF ORISSA, AIR 1980 SC1738, (1980) 1 SCC 240** wherein it was held that:

*"...Now, undoubtedly we would have examined the evidence of these eye witnesses a little more in detail, however, we would refrain from doing so because it is not necessary to do so in the facts of this case.....This view of the learned trial Judge is utterly unreasonable and untenable and in reaching this conclusion surmises were drawn from incomplete evidence which would not be permissible..."*

A legal principle drawn from the above decision is that incomplete evidence on record would not be permissible in reaching a conclusion of the case.

I do understand though, that in some circumstances, particularly where the witness has not deliberately avoided to supply relevant details or did not avoid cross examination, the trial Court or tribunal may be justified in forming an opinion about the probative value of such evidence in the peculiar factual background.

However, in the present case, the irregularities pointed out above leads to a conclusion that the first appellate

tribunal completely failed to assess the evidence on record. Had the District Land and Housing Tribunal properly exercised its appellate mandate, such weaknesses in the trial tribunal's proceedings would not have ended in this Court.

On that account, the proceedings, decisions, judgment, decrees and or orders of the District Land and Housing Tribunal in Land Appeal Case No. 01 of 2019 cannot stand and are thus hereby quashed and set aside.

Section 42 of **THE LAND DISPUTES COURTS ACT, CAP 216 R.E 2019** empowers this Court to take or order the District Land and Housing Tribunal to take and certify additional evidence.

In the circumstances of the case and in view of the legal position stated above, I am of the opinion that this is a fit case for application of Section 42 of **CAP 216 R.E 2019** (supra).

Consequently, records in this matter are hereby remitted to the District Land and Housing Tribunal with orders to take necessary additional particulars relating to the chairman of Isukamahela Hamlet who testified in the trial ward tribunal on 13 November 2018 and further particulars relating to the ward tribunal's visit to the land in dispute.

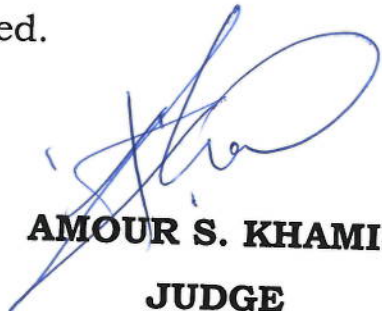
Upon taking such additional evidence, the District Land and Housing Tribunal presided over by the chairman



and members different from the previous ones, should critically assess the entire evidence on record and make its findings as if the matter was before it as the first appellate body.

With these findings which dispose of the entire appeal, I see no need of addressing the remaining issues that were earlier on listed. Therefore, this appeal is allowed to the extent herein stated. I make no order as to costs.

It is so ordered.

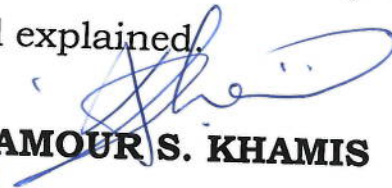


**AMOUR S. KHAMIS**  
**JUDGE**  
**8/7/2022**

**ORDER**

Judgement delivered in Chambers in presence of Mr. Timothy Sichilima and Mr. Saikon Justine learned advocates for the appellant and the respondent respectively.

Right of Appeal explained.



**AMOUR S. KHAMIS**  
**JUDGE**  
**8/7/2022**

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