

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF TABORA

AT TABORA

LAND APPEAL NO. 11 OF 2020

*(From the Decision of the District Land and Housing Tribunal of Tabora
District at Tabora in Land Case No. 71 of 17)*

HAMIS ATHUMAN MWIHAAPPELLANT

VERSUS

RAMADHAN ATHUMAN MWIHA1ST RESPONDENT

DOTTO ATHUMAN MWIHA.....2ND RESPONDENT

JUDGMENT

Date: 15/02/2022 & 1/4/2022

BAHATI SALEMA, J.:

This is the second appeal. It is brought against the decision of the District Land and Housing Tribunal of Tabora in Appeal No. 71 of 2017 delivered on 5th February, 2019 before M.H. Waziri, (Chairperson). The appellant, **HAMISI ATHUMAN MWIHA**, is aggrieved by the judgment of the Tabora District Land and Housing Tribunal. Before this court, the

appellant is seeking an order from this court to allow this appeal with costs.

As it may be gathered from the facts, the appellant and the respondents are brothers from different mothers. The dispute is over ownership of the land. The respondent, Ramadhani Athuman and another were declared lawful owners of the disputed land by the Urambo Mjini Ward Tribunal in Land Case No.06/2016. The case was heard ex- parte for the failure of the defendant to appear before the tribunal. The Ward Tribunal proceeded with the matter and, upon the conclusion of its hearing; a decision was made in favour of the respondent. Aggrieved by that decision of the Urban Ward Tribunal the appellant herein preferred an appeal before Tabora District Land and Housing Tribunal. The appellate tribunal on 05/02/2019 upheld the decision of the Ward Tribunal. The respondent was finally declared the lawful owner of the said land in Case No. 6/2016.

Resenting the District Land and Housing Tribunal decision Land Appeal No 71 of 2017, the appellant has preferred an appeal to this court, pegged with seven grounds that ;

- 1. The District Land and Housing Tribunal erred in law and fact by failing to properly evaluate the evidence that provided that the appellant was the owner of this disputed land inherited from his*

mother, as it was given to her during the distribution of the properties of the late Athuman Mwiha the father of the appellant.

- 2. The District Land and Housing Tribunal erred in law and fact by failing to properly evaluate the evidence that provided that the disputed land was divided between the mother of the appellant by the administrator of the estate of their father as part of the properties of her late husband.*
- 3. The District Land and Housing Tribunal erred in law and fact by delaying on the wrong measurements testified by the person who was not the witness during the distribution of the disputed land by the administrator of the estate of the late Athuman Mwiha.*
- 4. The appellant has been using the land which he inherited from his mother undisturbed since 1999 until 2015 when the respondent started invading the land.*
- 5. The District Land and Housing Tribunal erred in law and fact by holding the decision that was given out relying on hearsay evidence.*
- 6. The District Land and Housing Tribunal erred in law and fact by holding the decision of Urambo Ward Tribunal in Land Case No. 06 of 2016, which had already been struck out by the same ward*

Tribunal in Land Case No. 17 of 2015, which had already been appealed. Both decisions are hereby annexed and marked as A1 and A2, seeking leave of this court to form a part of this appeal.

7. The District Land and Housing Tribunal erred in law and fact by holding the decision of Urambo Ward Tribunal which was given on uncorroborated and contradicting evidence which was given by the village chairman and he testified himself that he was not there to witness the distribution of disputed land when he was testifying in the ward tribunal during land case No. 17 of 2015 at pages 18 and 19 of the proceedings. The proceedings are hereby annexed and marked as A3 seeking leave of this court to form part of this appeal.

On the date when the appeal was scheduled to be heard, both parties appeared in person.

In submitting on the first ground of appeal, the appellant stated that the evaluation was not properly done. The division of the land was done by their clan leader, who had an approximation of the length and width of the said land, and the respondent did not get the biggest share of the remaining heirs.

He further contended that the area in dispute was the property of their late father, who had five wives, and upon his demise, the children of the late Athuman Mwiha decided to distribute the plot of their late father. All the children went and positioned themselves in their mothers' areas where the administratrix of the estate of their late father divided the said shamba among all the five wives, that being first, Nassoro Mwiha (53 meters), second, Rashid Athuman Mwiha (56 meters), third, Dotto Athuman and her relatives, and last, Yusuph Athuman Mwiha (64. 5 meters). He further referred this court to page 30 of the Ward Tribunal proceedings where Nassoro Athuman Mwiha was mentioned as a witness.

As to the third ground of appeal, he submitted that the ward tribunal received the evidence from the village chairman, who was not present on pages 18-19 of the proceedings when he was called and stated that he was not present. The first decision of the Ward Tribunal was delivered on 27/11/2015 while the second decision was delivered on 26/9/2016.

On the fifth ground of appeal, the appellant submitted that the court decided on hearsay evidence, relying on the village chairman, who was not present when the clan leader was dividing the disputed land among the heirs.

On the sixth ground, he further submitted that this case was already decided by the Ward Tribunal in 2015, and in 2016, instead of filing a fresh case, the plaintiffs were supposed to appeal since the Ward Tribunal had already determined the matter.

On the seventh ground, he submitted that the District Land and Housing Tribunal erred in law on the contradiction. He submitted that the decision of the Urambo ward tribunal was uncorroborated and based on contradictory evidence that was given by the Village Chairman, while in fact, at that time he was not in the village, and he testified himself that he was not there to witness the distribution of disputed land when he was testifying in the ward tribunal during land case No. 17 of 2015 at pages 18 and 19 of the proceedings.

In reply, the respondent submitted that the case started in primary court as a criminal case. The case was referred to the Ward Tribunal, which heard the case ex- parte since the appellant never attended and awarded them and the court did not err in law and fact. He further stated that the ward tribunal visited the disputed area and measured area, and also that the District Land and Housing Tribunal visited the said area and established that the appellant had built a foundation and decided on merit. He stated that it is not true that the

court decided otherwise. On the issue of the village chairman, he stated that he was present during the distribution of the disputed land.

He further submitted that the disputed area is 270 meters. Every family took 54 meters. He said in the family, they were 4. He stated that the appellant, Hamis Athuman Mwiha, had taken his 13 meters and had left with only 14 meters. He prayed to the court to dismiss the appeal.

In his brief rejoinder, he had nothing but stated that the respondent had submitted that the area was 270 meters. He asked where he got such meters since he did not notify others.

Having heard the submissions made by both parties herein, the determination of the appeal rests on the issue of the first appellate tribunal's evaluation of the evidence laid before it.

In the course of disposing of this second appeal, it is worth noting that this appeal hinges on the issue of a failure on the part of the first appellate tribunal to evaluate the evidence laid before it which was adduced before the trial tribunal. From this, one immediate question I am confronted with is whether this court, as a second appeal, can re-evaluate the evidence on record if, at all, the first appellate tribunal failed to evaluate it as alleged by the appellant.

A response to these questions is available from the case of **Pandya v R [1957] EA 336**. The principle established in this case is that, where the first appellate court has failed in its legal obligation to properly re-evaluate evidence on the first appeal, that is an error justifying the second appellate court to re-evaluate the evidence and reach its own decision. However, the second appellate court can only re-evaluate evidence in exceptional circumstances where the first appellate court had not evaluated or had left out the most important parts of the evidence.

Having established the above principles, the next critical question I am called upon to address is whether there was indeed a failure on the part of the first appeal tribunal to evaluate the evidence laid before the tribunal.

To start with the first, second, and fifth grounds of appeal, which will be combined since they center on the same issue, the court, having perused through the records, has noted that, it is true that the land was divided among all the heirs left behind by their late father, who died intestate, leaving behind the land and children. However, the Ward Tribunal, through Case No. 06/2016 on 11/7/2016 after hearing the evidence of Ramadhani Athuman Mwiha *exparte* on 5/9/2016 visited the *locus in quo* and verified that the claimed area is 270 meters and

divided among the five wives. As a result, each mother gained 54 meters. The Ward tribunal noted that the disputed area is within the area allocated to Ramadhan Athuman's mother, and this evidence was supported by the Hamlet Chairman of Mabatini who told the tribunal that in 1995 he was invited by the family of Athuman Mwiha with his secretary on the division of the land where they measured 54 meters each until they reached the area where there was a passage of road which belonged to the family of Hamis Mwiha, who according to the evidence, was compensated by TANROAD.

I have critically reviewed the whole proceedings of the District Land and Housing Tribunal and noted that the Chairman of the District Land and Housing Tribunal also visited the *locus in quo* to ascertain the dispute in Urambo Mabatini where the Chairman observed that;

"The late Athuman Mwiha had five wives, and the whole plot was distributed to the children of the five wives, each of whom was given 54 meters. The disputed plot has 14 meters on which the appellant has trespassed and erected the foundation of the house."

Therefore, from the evidence, the court is satisfied that it was not hearsay. Having addressed the first, second, and fifth grounds of appeal, I find the grounds of appeal have no basis at all since the proper

evaluation of the evidence by the Ward Tribunal and the District Land and Housing Tribunal was met.

As to the third ground, the District Land and Housing Tribunal erred in law and fact by relying on the wrong measurements testified by the person who was not the witness during the distribution of the disputed land by the clan leader of the estate of the late Athuman Mwiha.

From the records of the trial tribunal as well as from the records of the District Land and Housing Tribunal, the evidence of the Hamlet Chairman of Mabatini (J.O Mbaga) who testified in the ward tribunal that in 1995 with his secretary Mathias Kituka were called by the family of Mwiha where he found Bwana Abdala Mwiha Omary and Jumanne Mwiha with their mothers, who were four in number, except the fifth mother who was at Mbeya (Mama Almasi). According to the evidence, this court is of the view that the measurement was done since it was on the record. As clearly stated in the case of **Ali Abdallah Said V Saada Abdallah Rajab** [1994] TLR. 132 CA, where it was held that;

"Where the decision of a case is wholly based on the credibility of the witnesses, then it is the trial court which is better placed to assess their credibility than an appellate court, which merely reads the transcript of the records."

Therefore, in this case at hand, since it was noted that the whole area was the property of the late father of the parties, who had five wives, decided to distribute the plot of the late father for 54 meters for every child, including the appellant and the respondents, respectively, the decision of the DLHT was right.

As to the fourth ground of appeal, the appellant has been using the land that he hired from his mother undisturbed since 1999 until 2015, when the respondent started invading the land.

It is noted from the evidence of the respondent; he was at Kigoma when his sister informed him of the invasion in 2015. That is when I find it possible in 2015 when the respondent started invading the land.

On the sixth ground of appeal, the District Land and Housing Tribunal erred in law and fact by holding the decision of Urambo Ward Tribunal in Land Case No. 06 of 2016, which had already been struck out by the same Ward Tribunal in Land Case No. 17 of 2015.

This court, having traversed through its records, noted that it is true that the Ward Tribunal received an order from the Primary Court-Urambo in respect of Criminal No. 23/2016 following the preceding in Land Case No. 17 /2016 B/K Urambo which was instituted to solve the boundary dispute. Having received the said order from the Primary

Court, the Ward Tribunal on 11/7/2016 summoned the parties to appear, but the appellant declined to attend for the reason that he could not agree with the said order since the same tribunal struck out his civil matter No. 17/2016 so he was not ready to proceed with the tribunal as he wanted to hire an advocate. The tribunal agreed and gave him 45 days to call for his advocate, otherwise, the court would hear ex parte. Instead, the appellant filed a case at the District Land and Housing Tribunal over the matter, which was dismissed. The court has neither made nor found any decision in its file but has noted the decision in Land case No.6/2016 upon which the appellant is relying was struck out and the case was heard ex parte and the respondent was declared a lawful owner by the Ward Tribunal as well as the District Land and Housing Tribunal where he appealed to.

As to the ground that the District Land and Housing Tribunal erred in law and fact by holding the decision of the Urambo Ward Tribunal, which was based on uncorroborated and contradictory evidence given by the village chairman, and that he testified himself that he was not there to witness the distribution of disputed land when he was testifying in the ward tribunal during land case No. 17 of 2015, pages 18 and 19 of the proceedings.

As said earlier, on the issues raised, the court, upon examining the records, noted that the grounds upon which the appellant has relied upon are unsupported since both the lower courts proceeded to consider the sources from which the evidence was made available, that is, the oral submission from both parties, the records from the Ward tribunal, and the exhibits adduced during the trial. The first appellate tribunal had a statutory duty to re-evaluate the whole evidence, which it did.

Based on the decision of the first appellate tribunal, I am not persuaded to state that the appellate tribunal (DLHT) erred in law by misdirecting itself when it recognized the plaintiff (Ramadhani Mwiha) as the owner of the said shamba. It is clear from the outset that the tribunal discharged its duty against the weight of evidence tendered and that clear consideration was made regarding the parties' submissions as well as the record of the Ward Tribunal.

In the final analysis, I find that this appeal lacks merit as being a second appeal, and therefore, it is hereby dismissed with the usual consequences as to costs.

Order accordingly.

A. Bahati

A. BAHATI SALEMA

JUDGE

01/04/2022

Judgement delivered under my hand and Seal of the court in Chamber this 1st day April, 2022 in the presence of both parties.

A. Bahati

A. BAHATI SALEMA

JUDGE

01/04/2022

Right to appeal is fully explained.



A. Bahati

A. BAHATI SALEMA

JUDGE

01/04/2022