

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 17 OF 2020

(From the Decision of the District Land and Housing Tribunal of Nzega District at Nzega in Land Case No. 3 of 2019).

- 1. SALIMA JUMANNE**
 - 2. MRISHO JUMANNE**
 - 3. HAMIS JUMANNE**
 - 4. LUHENDE JUMANNE**
- APPELLANTS**

VERSUS

MARIAM ISSA KITUNDU.....RESPONDENT

JUDGMENT

Date: 13/7/2022 & 19/8/2022

BAHATI SALEMA, J.:

This matter originates from the District Land and Housing Tribunal for Nzega in Land Application No.3.of 2019. The appellants, **Salima Jumanne, Mrisho Jumanne, Hamis Jumanne and Luhende Jumanne** being aggrieved by the decision of the District Land and Housing Tribunal whereby their application was dismissed on 29th July 2020,

The material background facts to the dispute are as follows; Jumanne Seleman died intestate on 13/11/2011 and left behind several estates including the house in dispute. Upon the death of Jumanne Seleman, one Makwaya Jumanne Seleman, the son of the late Jumanne Seleman, was appointed as administrator of the estates of his late father on 22/11/2011 via Probate Cause No. 23 of 2011 by Igunga Primary Court.

After the appointment of Makwaya Seleman, he stayed for almost 6 years and purportedly distributed the suit house to the applicants and the children of the late Jumanne Seleman from another woman, but the widow of the late Jumanne Seleman, the respondent in this case, was given nothing on the ground that she is not the lawful wife/widow of Jumanne despite her staying in the suit since 1990.

Due to this, the respondent refused to vacate the suit house, arguing that she is the lawful wife of the late Jumanne as she claims to have been married on 5 /12/1990 and then stayed in the suit house up to this moment. The applicants at the DLHT prayed for a declaration that the applicants are true owners of the disputed house and that the respondent be ordered to vacate the suit house and hand over the same to the applicants. The DLHT for Nzega determined the matter and declared the respondent the lawful owner of the suit landed property.

Aggrieved, the appellants have come to this court seeking to assail the decision of the DLHT on the grounds that;

- i. *That the learned Chairman erred in law in failing to require the assessors to give their opinion in writing as required by the law.*
- ii. *That the learned chairman erred in law in failing to make an analysis of the evidence as testified by the parties before reaching his decision in the application.*
- iii. *That the learned chairman erred in law in holding that the appellants had not proved their case against the respondent to the required standard.*

When this appeal was scheduled for hearing, the appellant was represented by Mr. M.K. Mtaki who prayed to this court for an additional memorandum of appeal and Joyce Nkwabi, learned counsel, while the respondent was represented by Mr. Fadhili Kingu, learned counsel.

In his submission on the additional memorandum of appeal, Mr. Mtaki asserted that this appeal emanated from the DLHT in 2019. That the learned chairman erred in law in failing to require the assessors to give their opinion. He submitted that this requirement is provided under Rule 19 (2) of the District Land and Housing Tribunal Regulations, which requires the Chairman before giving judgment to provide in writing and those opinions are required to be read to the parties. To buttress his stand, he referred the case of **Edina Adam Kibona Vs Absolom Swebe**,

Civil Appeal No. 286 of 2017. He contended that this requirement was not followed and that the proceedings should be nullified.

On the first ground of appeal, Mr. Mtaki contended that the Chairman erred in making analysis that he did not consider the evidence of PW5 on page 22 of Makwaya Jumanne, as an administrator of the estates of the late Seleman Jumne. He vehemently stated that his evidence was never considered in his judgment. He prayed to this court to consider since this is the first appellate court.

Arguing on the second ground of appeal, he contended that had the trial tribunal properly considered the DLHT, it would have arrived at the right decision. He beckoned upon this court to allow the appeal with costs.

Responding, Mr. Kingu for the respondent was vigorous in respect of the supplementary memorandum of appeal. He submitted that he was in the trial case when the matter was filed and he recalls that on 27th March, 2020 the trial Chairman ordered the file to be remitted to the assessors for opinion and the assessors aired their opinion. He admitted that the law requires the assessors' opinions to be read and he believed the requirement was met. As an officer of the court, he was bound to believe on the court record what transpired. To substantiate his argument, he cited the case of **Halfa Sudi Vs Abieza Chichili**, [1998] TLR 527, where the court held that;

"A court record is a serious likely impeached there is always a presumption that a court accurately represents what happens."

Guided by that statement, he believes that it was conducted.

As to the 1st ground of appeal, Mr. Kingu submitted that the District Land and Housing Tribunal (DLHT) is governed under Rule 20 (1) of the Land Dispute Courts (Land Regulation 2003), which he believed that the DLHT complied with. He stated that the remedy for the trial court's failure to analyze evidence is for the first appellate court to step in the shoes of the trial court to re-appraise evidence. However, he was of the view that even if this court steps into this court, it will come with the same findings as the DLHT.

He further submitted that PW5 tendered exhibit P1, and the exhibit did not mention the house in dispute in terms of description, nor did they exhibit mention the Kommando Area. In such circumstances, the findings were correct.

As to the second ground of appeal. He submitted that a standard of proof is under Section 110 (1) (2) of the Evidence Act, Cap 6 [2019]. The appellants failed to prove what was alleged as in the case of **William Mahengela Vs. Osmas Mwandole**, Land Appeal No. 103 of 109. He submitted that even in PW5 with his exhibit 1, he was supposed to mention and describe the house. PW5 exhibit did not show the

Kommando area; it was only stated that the house was situated at Igunga. However, he failed to describe This was also stated in the case of **Uwesu Idd Mbwana Vs. Zena Yusuph**, Land Appeal No. 181 of 2021. Since they failed to show clearly, it created doubt as stated in the matter. The one who alleges must prove they had a duty to prove on the balance of probability.

Likewise in the case of **Barelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 it was stated that he who alleged must prove. However, in his testimony, PW1 stated he was the lawful owner of the suit without even giving details. The same as to PW2, PW3 and PW4 who stated that the title deed was given to them but it was never tendered in court.

On the contrary, the respondent differentiated the house given to the appellants. He prayed to this court that the appeal should be dismissed with costs.

In his rejoinder, the counsel for the appellants reiterated his submission in chief and stated that on the typed copy of the proceedings, the document reads: Present 46-52 and on page 52 of the typed copy, it reflects the 27/3/2020 Order. Judgment on 24/April. It does not show if the opinions were read to the parties and it was not a proper procedure.

As to the 1st and 2nd, it is true that he who alleges must prove. PW5, as an administrator, demonstrated, despite the fact that the description of the house is insignificant and cannot influence the right decision.

Having heard the rival arguments from both camps, the issue is whether the appeal is meritorious.

I will start with an additional ground of appeal in respect of the assessor's opinion. The law is settled that the provisions impose a mandatory duty on the Chairman presiding over the Tribunal's proceedings to take and consider the opinion of the assessors before he reaches judgment. The latter provides for how assessors who participate during the hearing are required to give their opinion.

In the present appeal, a thorough perusal of the record of appeal in the handwritten script indicates that on 27/3/2020 the Chairman required assessors to give their opinion, as can be seen from the record;

" ORDER

The opinion of the assessors will be delivered today at 14 hrs and on the same date 27/3/2020

Coram :

Assessors: Present

Applicants: Present

Respondent: Present

T/Clerk Nyemo Joel

The case is coming for receiving the opinion of lay assessors.

Having traversed through the court's record, the law is settled to the effect that court records are taken to be sacrosanct. They are believed to reflect what exactly transpired in court and thus can not easily be impeached. This was decided by the court of appeal in the case of **Alex Ndenya v The Republic**, Criminal Appeal No 207 of 2018 (Unreported). The court further revisited its previous decision in **Halfan Sudi V Abbieza Chichili** [1998] TLR 527 and **Shabir F.A Jessa V Rajkumar Deogra**, Civil Reference No. 12 of 1994 (unreported) in which it held that "*A court record is a serious document; it should not be lightly impeached.*"

Therefore my examination of the tribunal record suggests that the appellant's claim is unfounded. The tribunal as it appears on the court records recorded the assessors' opinion as subject to its requirement. I have noted that there is evidence that the alleged opinions were taken in the presence of the parties after the closure of the defence case as required by law. Unfortunately, according to the record of typed

proceedings, the defect is seen. I find no faults in the handwriting in the tribunal in recording the assessors' opinions.

As to the second and third grounds of appeal, I have opted to combine them since they are intertwined. Considering the ground that the learned chairman erred in law in holding that the appellants had not proved their case against the respondent to the required standard.

The position of the law is to the effect that the one who alleges must prove. This means that the party who alleges certain facts has a duty to prove the existence of those facts. This is provided under sections 110(1) and 2 and section 112 of the Evidence Act, Cap. 6. The legal position as settled above was also reiterated and emphasized by the CAT in the case of **Geita Gold Mining Ltd & Managing Director GGM V Ignas Athanas**, Civil Appeal No 227 of 2017.

In the matter at hand, the appellant submitted that the chairman, in analyzing the evidence of PW5 on page 22 of Makwaya Jumanne, as an administrator of the estates of the late Seleman Jumanne did not consider it. On the contrary, as argued by Mr. Kingu, PW5 tendered exhibit P1, the exhibit did not mention the house in dispute in terms of description, and the exhibit did not mention the Kommando Area. In such circumstances, the findings were correct. Upon my scrutiny, I noted that PW5 failed to explain the details of the disputed property. I find this testimony raises questions as to the genuineness of the claim.

PW5 he only testified to the court that he had distributed the properties to all children of the late Jumanne Seleman but the widows and the clan leaders directed him that the respondent and other wives of the deceased are not legal heirs and that they would go and stay with their children where the properties were distributed. As stated earlier, PW1, PW2, PW3, PW4 PW6, and PW7 never testified as to the existence of the Komando area. Failure to clearly prove ownership of land cannot entitle them the suit house.

Nevertheless, DW1 Mariam Issa Kitundu, the respondent, who claimed to be the deceased's wife, testified by tendering the photographs taken in 1990 during their marriage ceremony between the respondent and the late Jumanne Seleman and the marriage certificate from Baraza Kuu la Waislam Tanzania issued on 5/12/1990 when the marriage was celebrated. This connotes that she was aware and submitted all the required evidence to support her case. In my settled view, this can be considered proof. I find this argument has no basis.

As to the third ground, this being the first appellate court, the appellate court in this court has re-evaluated the entire trial evidence on record by reading it and subjecting it to critical scrutiny and if warranted arrive at its conclusion but found with no merit.

All done and said, the appeal fails and is dismissed in its entirety for lack of merit. Following the circumstances of the case, each party to bear its own costs.

Order accordingly.



A. BAHATI SALEMA

JUDGE

19/08/2022

Judgment delivered under my hand and seal of the court in the Chamber, this 19th day of August, 2022 in the presence of both parties, via virtual link.



A. BAHATI SALEMA

JUDGE

19/08/2022

Right to appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

19/08/2022