

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL No. 19 OF 2022

(Appeal from land application No. 15 of the Kiteto District Land and Housing Tribunal at Kibaya)

LESALAMA NDASIKOI & 2 OTHERSAPPELANTS

VERSUS

MASHAKA HAJI@ VITABARO & 4 OTHERS.....RESPONDENTS

JUDGMENT

18th August & 27th September 2022

TIGANGA, J.

In this appeal, the appellant filed this appeal against the decision of the District Land and Housing Tribunal for Kiteto District at Kibaya in Land Application No. 15 of 2019. They raised five grounds of appeal and other additional two grounds as follows:



- i. That, the Honourable trial Chairman erred in law and in facts by failing to analyze the evidence from both sides and ended up reaching at a wrong conclusion.
- ii. That, the Honourable trial Chairman erred in law for not giving weight to exhibit D1.
- iii. That, the Honourable trial Chairman erred both in law and in fact by creating his own evidence.
- iv. That, the Honourable trial Chairman was biased while analyzing the evidence.
- v. That, the disputed land was not properly described not only in the application but also in the testimony non of the Applicants described the land they claimed to own with its borders to make it clear for the execution exercise.

Additionally, the Appellants had below two grounds of appeal, as follows;

- i. That, the Honourable Chairperson erred in law for allowing opinion of the assessors to be read together with judgment at the same time.
- ii. Alternatively, that the Honourable Chairperson erred in law to proceed delivering judgment with which the opinions of the assessors were not



read before the parties prior to the composition and delivery of judgment.

The short background of this matter is that, Parties had a land dispute before Kiteto District land and Housing tribunal at Kibaya vide land application number 15 of 2019 in which Mashaka Haji and 4 others who Respondents in this appeal successfully sued the Appellant and they were declared the lawful owners of the land located at Kimana village within Kiteto District and Manyara Region. Among other consequential orders following that ownership declaration are as follows, that the Respondents have been restricted from entering or doing anything over the suit land, that the Respondents have been ordered to vacate possession of the suit land and that the Respondents were ordered to pay the costs of the case. As a result, the Appellants were aggrieved hence this appeal before this court.

Both Parties were presented by the learned Counsels, they submitted orally in which the submission in chief in support of the grounds of appeal commenced followed by the reply submissions by the Respondents.

In support of the 1st ground of appeal, the learned counsel for the Appellants submitted that, land is not allocated to a person by clearing the bushes but



rather by applying to the competent authority, in this case the 1st Respondent said he got such land by clearing the bushes and he owns such 50% of the said land, the 4th Respondent said he got the land from the 1st Respondent and the number of acres he was given is 50 acres. He further submitted that, the Appellant said he was allocated the said land by the village authority where before they were required to sign the documents there were some rights they disbursed, following such disbursement they went back to their lands and found the 4th and the 1st Respondents in their lands. The Appellants are the one who are in good position that they are the rightful owners of the particular land. It is their further submission that, the District land and housing tribunal failed to exercise its discretion judicially and it could decide in favour of the Appellants. They finalized their 1st ground of appeal by submitting that, the 1st ground of appeal should stand and since this court is the first appellate court it should analyze the evidence afresh.

In support of the 2nd ground of appeal, the learned counsel for the Appellants submitted that, the District land and housing tribunal failed to consider the deed of settlement which is exhibit P1. Pw4 failed to tender the said copy of the deed of settlement unfortunately it was not a public document and its original was under the custody of the office of the District



Executive Director for Kiteto District, PW4 insisted that the said document was a public document. He further submitted that, exhibit P1 which was tendered by PW5, it has been stated by the trial tribunal that it was not given weight because it had no names, it was their further submission that the said exhibit states about the dispute over the land measured 30 acres. They concluded to submit on this ground by requesting this court to agree with this second ground.

In the 3rd ground of appeal, the learned counsel for the Appellants said that, the trial tribunal has fabricated other facts in this matter since there is no on records the witness called Ibrahim Mashaka, the said witness has never been among the parties in the proceedings. It is the rule of the thumb that cases be decided on the adduced evidences not otherwise. They further submitted that since the Chairperson fabricated the evidence, they pray this ground of appeal to stand also.

In the 4th ground of appeal, it was the Appellants' submission that the Chairman of the tribunal had biasness since he did not consider the annexures tendered by the Appellants, the counsel further submitted that the trial tribunal erred when it ordered that the documents were not tendered in court, that omission was also omission by the other party but



the Trial tribunal did not point out such omissions of the other side, they also submitted that at page 4 of the trial tribunal's decision the Chairman talks about the evidence of Zainabu Ramadhani Mhando that she owns the land which measures 245 acres and that the Appellants have invaded 50 acres but there is nowhere Zainabu said she cleared the bush. It was their further submissions that the evidence shows that the piece of land was invaded but not 50 acres. The submission ended on the 4th ground ended up by a prayer that this could has to pass through the evidence and find these grounds meritorious.

With regards to the 5th ground of appeal, the learned counsel for the Appellants submitted that, the Respondents have failed to give description of the said land, they did not show the size and the location of the said land, he further submitted that it is the legal requirement under order VII Rule 3, [cap 33 R:E 2019] that the immovable properties which are in dispute must be described. He even cited civil appeal number 297/2019 at page 13 which was decided by the Court of appeal. The Counsel further submitted that, the failure by the Respondents to describe the said land leads to confusion in the execution process. He ended up praying this court to allow also the 5th ground of appeal.



In support of the 6th ground of appeal, the learned counsel submitted that the decision based on errors as the opinions of the assessors were given at the judgment's stage while the opinions of the assessors were supposed to be read before the delivering of the judgment. The counsel for the Appellant cited section 23(2) of the land disputes Act, [cap 216 R:E 2019], in support of this fact he also cited regulation 19(2) of the Land disputes Regulations. He further submitted that, the trial tribunal's order of 20th October 2021 contravened the rules which requires the assessors opinions be read first before the delivery of the judgment, the order directed that the matter was coming on that date for judgment and reading assessors opinions.

The Appellants ended their submissions in chief by praying this court to set aside the decision because it is fully of irregularities, they also prayed for the costs of this appeal.

In reply submissions the Respondents' counsel had this to say, he concedes with the fact on the 5th ground of appeal that the application did not disclose the boundaries and description of the suit land.

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The counsel for the Respondents also concedes to the fact raised in 6th ground of appeal that the assessors' opinions were read at the judgment stage while they were supposed to be read at the earlier stage not during judgment.

He further submitted that, the faults raised by the Appellants are indeed logical but they were caused by the trial tribunal itself but not the Respondents.

The Appellants reiterated their submissions in chief with an emphasize that the fault that the Respondents failed to describe the land in dispute was not caused by the trial tribunal but by the Respondents themselves.

The court's determination of this matter lays on the issue as to whether this appeal is meritorious

In deliberating upon the submissions by both parties, I find it crucial to ascertain as to which facts need a thorough discussion and which ones need no thorough discussion. The fact that in reply submissions the Counsel for the respondents concedes to all the grounds raised by the appellants on the irregularities of the trial tribunal in the course of its determination of this matter, makes me not detained much to start elaborating deeply on such

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irregularities but rather pinpointing legally on such irregularities as a matter of the commitments of this court in helping the parties to understand on how they could help the court in reaching the just decisions. I beg to commence with the issue of ownership then end up touching on the alleged irregularities.

It is this court's view also that, in suits of ownership to the land the best evidence is the one which shows on how someone came into ownership of that land, the fact that the respondent cleared the bushes over the said land can't justify ownership as argued by the counsel for the appellants. However, I beg to differ with the counsel for the Appellants that, when one looks at the *exhibit D1* it implies that the Government via its authorities specifically the office of the District Executive Director for Kiteto District has recognized the Respondents as illegible to be issued with customary deeds of ownership following the compliance of the required legal procedures.

This presupposes that the Kiteto District Council satisfied itself that the Respondents were entitled to a good tittle of the said land in dispute, the position that the District land and housing tribunal maintained in its decision that the disputed land belongs to the Respondents who were by then Applicants.



On the alleged irregularities, despite the fact that the case was decided in favour of the respondents who were applicants before the trial tribunal, the respondents via their learned counsel concede that there were irregularities, but such irregularities do not vitiate their position in ownership, but they have contravened the rules in handling the trial by the District land and housing tribunal for Kiteto District at Kibaya.

With regards to the opinions of the assessors, **section 23(2) of the Land disputes courts Act**, [cap 216 R.E 2019] reads as follows;

"23(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."

Basing on this position, by relying on the purposive approach to the above section, it is my considered view that, the learned counsel for the appellants has misconstrued the particular section, what I construe is that, in the course of the tribunal's trial the assessors are supposed to give their opinions before the stage of delivering the judgment, it does not mean that in any way the opinions should not be read with the judgment since it is part and parcel of the Tribunal's reasoning for the decision.



Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal), GN No. 174 reads as follows;

"19(2) Notwithstanding sub regulation (1) the Chairman shall, before making his judgment require every assessor to present at the conclusion of the hearing to give his opinion in writing and the said assessor may give his opinion in Kiswahili"

It is my considered view that, as conceded by the learned counsel for the respondent, I maintain the same position that despite the fact that the Trial tribunal has included the assessors opinions in its reasons for the decision but the same were to be seen as per the records of the trial tribunal's proceedings that at the end of the hearing of the matter the assessors have aired their opinions, this court has passed through the proceedings of the trial tribunal and has seen nothing recorded as assessors opinions or even that the assessors did read their opinions in the presence of the parties.

The allegation raised by the respondent that their annexures were not considered by the tribunal holds no water since the records show that the annexures were just attached to their written statement of defense but were not legally tendered before the tribunal. The law is very clear **under order**



XIII Rule 7(1) and (2) of the civil procedure code, [Cap 33 R:E 2019]

which requires a document not having admitted in evidence, not to be treated as forming part of the record of the suit even though, in fact it is found amongst the papers of the records.

The other irregularity raised is the failure to make proper description of the disputed land. It goes without saying the matter at hand is about land but I would rather subscribe to the appellants' position that for the proper records but also effective execution of the Tribunal's decision there should be a clear description of the disputed land, the advantage on doing so is that, there will be also certainty on exactly which plots of land the tribunal has decided upon. I have passed through the submissions of both parties and found that there is contradiction on the size of the land in dispute, there is no also clear location given of the land in dispute, there are no boundaries shown at all four locations of the disputed land that is North, South, West and East, it is not shown as to whom the land is bounded with.

Finally, should not interfere with the trial tribunal's findings that the Respondents are the rightful owners of the said land in dispute, however I think for clarity of the records and avoidance of further disputes, the tribunal



has to recheck the matter and work upon the forestated irregularities for easy of the carrying of the judicial businesses.

In the upshot, the appeal is partly allowed with the effect of retrial before the District land and housing tribunal for Kiteto District at Kibaya.

It is accordingly ordered.

DATED at **ARUSHA** on the 28th day of September, 2022.




J.C. TIGANGA

JUDGE.