

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 36 OF 2022

(Originating from Land Application No. 22 of 2021 of the District Land and Housing Tribunal for Moshi at Moshi).

FELICIANA MALLYA.....APPELLANT

VERSUS

LUDOVICK LAKINDI KWAY..... RESPONDENT

JUDGMENT

31/10/2022 & 30/11/2022

SIMFUKWE, J.

This is an appeal against the decision of the District Land and Housing Tribunal of Moshi (trial Tribunal) in Land Application No. 22 of 2021.

Briefly, the respondent herein instituted a land dispute before the trial tribunal against the appellant herein alleging that the appellant had trespassed to his piece of land measuring ¼ acre or 22 paces located at Shirinjoro Kiladeda Chini Mferejini. The respondent alleged that he bought the said land from one Yusufu Mirishoki in 1962.

On part of the appellant, she denied to be the trespasser. She alleged that she bought the said suit land in 1991 from one Eliasimba Elisante Ngowi.

After hearing both parties, the trial tribunal decided in favour of the respondent herein hence this appeal. In this appeal, the appellant advanced six grounds of appeal:

- 1. That the trial Tribunal erred in law and facts by fail (sic) to adhere the principle (sic) of Balance of Probabilities.*
- 2. That the trial Tribunal erred in facts and laws by fail (sic) to account the requirement of add (sic) necessary party in the suit in order to end litigation on the best way.*
- 3. That the trial Tribunal erred in facts and law by declaring the respondent lawful owner of the suit land without proper evaluation of evidence.*
- 4. The trial Tribunal erred in facts and law by failed (sic) to state why it abandoned the assessor's opinions as required.*
- 5. The trial Tribunal erred in fact by fail (sic) to evaluate the fact concern (sic) the boundaries which are within paragraph 3 of the respondent application and that been adduced during hearing. (sic)*
- 6. The trial Tribunal erred in fact and law by receive (sic) the new application while there was ward tribunal decision of 2012 which gave the respondent right to appeal.*

During the hearing of this appeal, the appellant was represented by Mr. Innocent Msaki, learned counsel, while the respondent was represented by Ms. Fay Sadallah, learned counsel.

The learned counsel for the appellant adopted the grounds of appeal to form part of his submission.

On the 1st ground of appeal, he submitted that **section 110 of the Evidence Act, Cap 6 R.E 2019** establishes a principle that the one who alleges must prove. That, **section 111 of the Evidence Act**, provides that the standard of proof in civil cases is on balance of probabilities.

Mr. Msaki averred that there was no evidence adduced before the tribunal to prove that the respondent was the owner of the disputed land. He referred to the case of **Barelia Karangirangi vs Asteria Nyalwambwa, Civil Appeal No 237 of 2017** at page 7 to 11 where it was stated that failure to prove a case on the required standard renders that party to lose a case and pay costs. That, the appellant adduced strong evidence that he bought the disputed land from one Elisante Ngowi. On the basis of the first ground, he prayed the decision of the trial tribunal to be quashed.

On the second ground of appeal which concerns joining a necessary party, Mr. Msaki referred to **Order I Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2022** and the case of **Leonard Peter v. Josepn Mabao and 2 others, Land Case No. 4 of 2020 (HC)** at Mwanza at page 5 to 9, where it was stated that:

"...the court should make an order to join the necessary party in order to end litigation."

Mr. Msaki condemned the trial tribunal for failure to order that necessary parties should be joined. That, at page 7 of the judgment of the trial tribunal it was stated that:

"Inaonekana mgogoro umesababishwa na wauzaji ambao hawakufuata taratibu za kuhusisha majirani na Serikali ya

*mtaa walipoamua kuuza eneo lao hivyo kufanya Mdaiwa
avamie eneo la Jirani yake.”*

He further cited the case of **Leonard Peter** (supra) in which at page 3 the case of **Efatha J. Mlay v Josephin Rasieli and Another, Land Case No. 31 of 2019** (HC) was quoted with approval, and it was held that the consequence of non-rejoinder is to render the suit liable to be struck out.

The learned counsel continued to state that the trial tribunal erred to decide in favour of the respondent while it had noted that the dispute was caused by the sellers who were not joined as necessary parties.

Submitting in respect of the third ground of appeal which concerns improper evaluation of evidence, Mr. Msaki submitted to the effect that the proceedings and judgment of the trial tribunal, considered weaknesses of the case of the appellant instead of basing on important issues proved by the appellant pursuant to the **Evidence Act** (supra). Thus, lead to erroneous and unjust decision.

He referred at page 3 of the judgment of the trial tribunal and argued that evidence of SM2 was fabricated as he had never been a Ward Executive Officer of Machame. That, even the boundaries which he stated contradicts with the boundaries stated in the application filed before the tribunal.

Regarding the 4th ground which concerns failure to consider opinions of assessors without stating reasons, Mr. Msaki referred to **section 24 of the Land Disputes Courts Act**, which provides that:

"In reaching decision, the chairman shall take into account the opinions of assessors, but shall not be bound by it except the chairman shall in the judgment give reasons for differing with such opinion."

He argued that the above provision was emphasized in the case of **Jumanne Mahende Wangányi versus Republic, Criminal Appeal No. 204 of 2020, CAT** at Mwanza (unreported) at page 9 where the Court stated that:

"In all cases where a trial judge comes to a contrary finding on facts to the unanimous opinion of the assessors, it is a good practice for the judge to state in his judgment reasons for his disagreement... Particularly if the assessors have given grounds of their opinion."

In this case, the Chairman is condemned for failure to give reasons for dissenting from the opinions of assessors as required by the law.

Supporting the fifth ground of appeal, it was submitted that the boundaries stated in the evidence contradicts with the boundaries stated at paragraph 3 of the application. That, evidence of the respondent contradicted with the evidence of the Ward Executive Officer and his child. That, the boundaries of the tree and stone were not stated in the application. It was the opinion of the learned counsel that the respondent is enlarging the boundaries *Suo motto*.

On the sixth ground of appeal Mr. Msaki submitted that there was a decision of the Ward Tribunal of 2012 in which the respondent was given right to appeal. Also, in 2015 another dispute was filed before the District Land and Housing Tribunal and it was decided against the respondent. He

appealed before the High Court which ordered the matter to be heard de novo. Then, the instant dispute was filed. Mr. Msaki, was of the view that such trend shows that there were many irregularities.

In conclusion, he prayed the decision of the trial tribunal to be quashed and its orders be set aside with costs.

Responding to the first ground of appeal, Ms. Fay disputed the allegation that the respondent did not prove his case; she argued that the respondent proved his case properly supported by his witnesses. Some of the testimonies of witnesses of the respondent were corroborated by testimonies of witnesses of the appellant. She contended that there was no dispute that the respondent had land at the disputed land. Witnesses of both sides stated that there was a natural tree at the disputed land. Ms Fay elaborated further that, the appellant had the onus of proving his case by calling the persons who sold the disputed land to him and tender documents. Contrary to that, the appellant produced a sale agreement which was not signed. During the trial, the appellant was granted leave to tender the sale agreement but he did not do so. Ms. Fay referred at page 7 of the judgment of the trial tribunal where that issue was discussed.

Responding to the second ground of appeal, it was stated that even the appellant was obliged to apply to join a necessary party. It was the opinion of Ms. Fay that since the respondent did not know how the appellant had acquired the said land then, it was the appellant who had the duty of joining necessary parties. She argued that even in the cited case of **Leonard Peter** (supra), the issue of joining a necessary party was raised by the respondent in the preliminary objection.

Concerning the third ground of appeal, Ms Fay was of the view that the same resembles the first ground. She submitted that the trial tribunal considered the adduced evidence in its decision. She cited the provision of **Section 112 of the Evidence Act** which provides that each party has a burden of proof.

On the fourth ground of appeal which states that the trial chairman abandoned the opinions of assessors, Ms. Fay opposed the assertion and argued that the Chairman dissented from the opinions of assessors and stated in his judgment. He referred to page 6 of the proceedings and argued that the Chairman stated that he did not concur with the opinions of assessors and stated the reasons.

Replying the fifth ground of appeal which concerns boundaries of the disputed land, it was submitted that the main issue was the natural tree which was mentioned by both parties. Thus, the fifth ground of appeal has no merit

On the last ground of appeal, Ms. Fay contended that the same was a new issue. That, the appellant had an advocate before the trial tribunal. Thus, he could have raised the issue before the trial tribunal. She reasoned that no objection was raised before the tribunal in respect of the alleged cases. Thus, the sixth ground of appeal is a new issue and it has no merit.

Ms. Fay referred to **Section 110(2) of the Evidence Act** which states that the burden of proof lies on the person who alleges a fact; and insisted that the appellant was obliged to prove before the trial tribunal that the matter was either res sub judice or res judicata.

Ms. Fay prayed the appeal to be dismissed.

In rejoinder, Mr. Msaki reiterated his submission in chief.

In respect of the 1st ground of appeal he added that it was the respondent who had the burden of proof and not the appellant.

On the second ground of appeal, it was re-joined that the duty to add necessary parties lies to three persons, first, the person who files a case, second, the defendants or respondent, third, the court. He cited **Order I Rule 10(2) of the CPC** (supra) which empowers the court where it finds it just and fit to order joinder of a necessary party as it was held in the case of **Mohamed Masoud Abdallah and 42 Others vs Tanzania Road Haulage (1980) LTD, Consolidated Civil Appeal No. 150 and 158 of 2019** at page 22 (CAT).

On the issue of opinions of assessors, the learned counsel insisted that the trial Chairman did not give any reason why he was dissenting from the opinions of assessors.

On the fifth ground of appeal, it was insisted that nowhere in the application it was stated that there was a boundary of a natural tree. That, as prescribed by the law, the trial chairman was required to visit the locus in quo. That, what was stated in the application should be considered as the boundaries and not what was stated by witnesses in respect of the boundaries.

On the issue of irregularity, it was added that if the first advocate of the appellant did not raise it, they discovered it and raised the same so that courts remain to be courts of justice. He argued that since both parties had submitted on the issue, the court should consider that issue.

Having considered the grounds of appeal, the parties' rival submissions as well as the trial tribunal's records, I am of considered opinion that there are grounds which concern issues of law which are the second and fourth grounds of appeal and there are grounds which concern evaluation of evidence which are the first, third and fifth grounds of appeal. I will start with issues of law.

On the 2nd ground of appeal, the appellant's advocate contended that necessary parties were not joined to the suit. He opined that since at the trial tribunal it was stated that the dispute was caused by the sellers, then the sellers were the necessary party.

Ms. Fay had different opinion on this. She argued that even the appellant was obliged to pray to join necessary parties since the respondent did not know how the appellant had acquired the said land. Thus, the appellant was the one to join necessary parties.

A necessary party has been elaborated in the case of **HAMISI SALUM KIZENGA vs MOSES MALAKI SEWANDO AND 18 OTHERS; LAND APPEAL NO. 51 OF 2019, (Unreported)** as follows:

*"A non-necessary party is a person who has merely to be joined in the suit. He also commonly referred to as a proper party. However, **a necessary party is a person who has to be joined in the suit yes, but whose presence before the court is necessary for it to effectively and completely adjudicate upon the questions involved in the suit.** In other words, a court can effectively and completely adjudicate upon the dispute between the parties even in the absence of a non-necessary party. Nonetheless, **the court cannot do so without a necessary party.**"*

Order I rule 10(2) of the Civil Procedure Code provides that:

*"The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, **whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.**"* Emphasis added

The above provision was discussed in the case of **Farida Mbaraka and Another vs Domina Kagaruki, Civil Appeal No. 136 of 2006** in which it was stated that:

"Under this rule, a person may be added as a party to a suit

- (i) when he ought to have been joined as plaintiff or defendant and is not joined so; or*
- (ii) when without his presence, the questions in the suit cannot be completely decided."*

I wish to state categorically that I fully subscribe to the above position of the law in respect of a necessary party.

I do concur with the following words of the findings of the trial Chairman when he stated that:

"inaonekana mgogoro umesababishwa na wauzaji...."

In the instant matter, both parties that is; the appellant and the respondent were not the original owners of their respective land. The appellant who was the respondent before the trial tribunal alleged that she got the said land from one Elisante Ngowi. This is also proved through the evidence of the respondent herein and his witnesses who testified that the said plot was sold to the appellant herein. Also, the respondent who was the applicant before the trial tribunal asserted that he bought the disputed land from Yusufu Merishoki.

Under the circumstances, and basing on the evidence which was presented before the trial tribunal, the said sellers were necessary parties to be joined in the suit. On the strength of the cases of **Farida Mbaraka and Another** (supra) and **Hamisi Salum Kizenga** (supra), I am convinced that without their presence, the questions involved in the suit could not be completely decided by the trial Tribunal.

Furthermore, I carefully perused the pleadings of the trial tribunal, the respondent herein pleaded under paragraph 6(a) of the application that he bought his land from one Yusufu Mirishoki. The appellant herein under paragraph 3(a) of her Written Statement of Defence pleaded that she got her land from one Elisante Ngowi.

Basing on these facts from the pleadings filed before the trial tribunal, I am of considered opinion that the trial Chairman misdirected himself by not ordering that the sellers of the disputed land be joined as necessary parties in compliance to **Order 1 rule 10(2) of the Civil Procedure Code** (supra).

The effect of failure to join a necessary party is obvious; it renders the suit incompetent. See the case of **Leonard Peter** (supra) which was also cited by the learned counsel for the appellant.

Therefore, basing on the above findings, I find no need of discussing the rest of the grounds of appeal as the second ground suffices to dispose of this appeal.

In the upshot, I invoke the revisionary powers of this court to nullify the proceedings and decision of the District Land and Housing Tribunal and order the matter to be tried de novo before another Chairman with new set of assessors after joining necessary parties in compliance to the law. Appeal allowed to that extent without costs.

It is so ordered.

Dated and delivered at Moshi this 30th day of November, 2022



X



S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE