

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

LAND APPEAL NO. 10 OF 2021.

[Arising from Misc. Land Appeal No 61/2018, Originating from
Land Case No. 13 of 2018 of Nkinga Ward Tribunal]

1) DAUDI JOHN

2) AMOSI KASENGA.....APPELLANTS

VERSUS

ANDREW KANYALA RESPONDENT

.....
JUDGEMENT
.....

Date of Last Order: 6/12/2022

Date of Delivery: 14/12/2022

AMOUR S. KHAMIS, J.

Daudi John and Amosi Kasenga have lodged their second appeal against the judgement of the District Land and Housing Tribunal for Nzega that was delivered on 06/08/2019, which dismissed their appeal by upholding the decision of the trial Tribunal.

The history of their dispute is that the appellants herein instituted a suit against the respondent herein for encroaching land belonging to Daudi John (1st appellant) which he bought from Amosi Kasenga (2nd appellant) at Nkinga Ward Tribunal. After hearing both parties, the trial Tribunal decided that the land in

dispute be divided into two between the 1st appellant and the respondent, for the reason that both of them purchased the same piece of land without involving the neighbours to the premises.

After their first appeal to the District Land and Housing Tribunal being dismissed, the appellants under the representation of Learned Advocate Flavia Francis, raised the following grounds of appeal to this Court;

- 1) That the Hon. Chairman of the Tribunal erred in law and fact by dismissing the appeal while there was evidence in record which supported the same.*
- 2) That the Hon. Chairman of the Tribunal erred in law and fact by not taking into consideration that the 1st appellant had documented evidence to support his appeal while the respondent had nothing to support it.*
- 3) That, the Hon. Chairman of the Tribunal erred in law and fact by deciding the matter without considering the strong evidence adduced by the appellants hence the injustice in the judgment.*

They also prayed for the Court to allow their appeal, quash and set aside the appellate Tribunal's decision, costs of the appeal and any other reliefs the Court deems fit.

At hearing of the appeal via a video conference, the appellants were represented by Ms. Flavia Francis while the respondent enjoyed the services of Mr. Samwel Ndanga, both learned advocates. The parties agreed to dispose their appeal by way of written submission and did so timely.

Ms. Flavia acting for the appellants argued all the three grounds of appeal jointly in support of the appeal. She submitted

that the decision on division of the disputed land due to non-involvement of the neighbours by the trial tribunal that was upheld by the appellate tribunal was not proper, since the requirement of involving neighbours as witnesses in a land sale agreement is not mandatory.

She cemented that the sale agreement between the 1st and 2nd appellants that was admitted as an exhibit at the trial tribunal has all ingredients of a legal sale agreement.

She averred that the 2nd appellant bought the disputed land under a sale agreement that took place on the 3rd day of September 1996, the same was witnessed and stamped by the village executive officer of Nkinga village. The 2nd appellant then sold the same piece of land to the 1st appellant 16 years later and their sale agreement was dated 11th November 2012, signed and stamped by the chairman of Uwanja wa ndege. Therefore, both agreements were legit before the trial tribunal as they were not disputed.

Ms. Flavia further stated that the respondent's agreement prevails that it commenced on the 10th day of May 1998 but it was neither signed by the purchaser nor buyer and that the witnesses to it were only mentioned plus it did not bear a stamp by any authority, therefore it was just a document provide to injure the appellants' rights. The appellate tribunal also failed to observe the serious illegality conducted by the trial tribunal hence the appeal at hand.

She cited the case of **Registered Trustees of Holy Spirit Sisters Tanzania Vs January Kamili Shayo and 136 others**, Civil Appeal No. 193 of 2016 CAT unreported where at page 8, it was held that; *"A disposition of a right of occupancy shall not be*

operative unless it is in writing and until it is signed by the governor." The learned advocate construed the above citation in relation to her submission that neighbours of a land in sale are not mandatory witnesses to that agreement, therefore the trial tribunal error when it gave its decision basing on that hence deterring that the appellants of their rights.

The appellants' advocate went ahead stating that the records of the trial tribunal show that the respondent alleged to have bought the disputed land in 1998 while the 2nd appellant's sale agreement shows that he bought the land in 1996 two years before the respondent did so. This meant that the 2nd appellant was the first to purchase the land and the respondent's sale agreement had many queries as it was never stamped nor witnessed.

She then concluded her submission saying the appellate Tribunal had no reasonable ground to uphold the trial tribunal's decision, therefore its judgement should be quashed with costs.

Replying to the appellants' advocate, Mr. Ndanga opposed the petition of appeal stating that the records of the trial tribunal avail that the appellants trespassed on to the respondent's land that he owned since 1998, of which he bought the land from the late Mwanadobe.

Mr. Ndanga added that the appellants are the ones who drugged the respondent to Court in 2018 although the respondent was in use of the same piece of land since 1998. He argued that the 2nd appellant failed to bring a witness to prove the validity of his sale agreement on the disputed land that h sold to the 1st appellant.

The learned advocate concluded his submission stating that an agreement could be either oral or written, the core issue is to prove that you purchased the same piece of land. Hence the trial tribunal divided the land which in real case belonged to the respondent.

Ms. Flavia then had a short rejoinder where she clearly stated that the appellant never trespassed into the land in dispute but rather was using it since he bought it from the 2nd respondent. She insisted that the respondent never used the land in dispute.

She further insisted that a land sale agreement cannot be orally made, therefore the respondent's proof for ownership was not proper hence the division of the land into two by the trial tribunal was not proper at all since the respondent did not buy the same.

Having gone through the submissions of the learned counsels for the parties, the major issue is on ownership of the land in dispute between the appellants and the respondent and whether it was proper for the appellate Tribunal to uphold the trial Ward Tribunal's decision which divided the disputed land into two between the 1st appellant and the respondent (win-win situation).

The law under **Section 3(2) (b) of the Evidence Act, Cap 6 R.E 2019** has established a principle that civil cases must be proved on the balance of probability. From this principle, the law demands that a person whose evidence is heavier than the adversary must win the case. The same was also well stated in the case of **Hemedi Said vs Mohamedi Mbilu [1984] TLR 113** where the Court held that:

“According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win.”

In the appeal at hand, the trial Ward Tribunal decided that the land in dispute be divided equally between the 1st appellant and the respondent simply because both of them bought the same piece of land without involving the neighbours from all boundaries.

Unlike the disposition of registered land which is provided for by The Land Act, Cap 113 R.E 2009, disposition of unregistered land under customary right of occupancy has no formal procedures to follow.

With no guidance on how disposition of customary right of occupancy should be done, the best way is to revert to the general principles on the elements of contract as provided for under **Section 10 of the Law of the Contract Act, Cap 345 R.E 2019** which provides that;

“All agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

However, we should also be reminded that the Village Council is imposed with the obligation of managing all village land. **Section 34 of the Village Land Act** gives emphasis on this as it provides that;

“Unless otherwise provided for by this Act or regulations made under this Act, a disposition of a derivative right shall require

the approval of the Council having jurisdiction over the village land out of which that right may be granted.”

From the records of the trial Ward Tribunal, the land in dispute is village land and it's the 1st appellant who claimed that the respondent trespassed into his land which he bought from the 2nd appellant. He relied on a sale agreement between him and Amos Kasenga (2nd appellant) which commenced in 2012. The 2nd appellant also issued a sale agreement showing that he bought the disputed land from one Emanuelli Mpembela back in 1996.

On the other hand, the respondent while proving his case addressed about a sale agreement dated 1998. I have scrutinized all the three sale agreements and in my opinion as the records of the trial Tribunal shows, the sale agreements of the 1st and 2nd appellants were all witnessed and approved by village chairmen while the respondent's sale agreement lacks approval from the village chairman and also it only has a single name of the person who sold the same piece of land to him.

I find it that the trial Ward Tribunal erred when it decided that the land in dispute be divided yet there was an abnormality in the respondent's sale agreement as it had not been approved by the village chairman.

In the case of **Bakari Mhando Swanga vs Mzee Mohamedi Bakari Shelukinfo and 2 others, Civil Appeal No. 389 of 2019, [2020] TZCA 28 (28 February 2020)** the Court of Appeal sitting at Tanga had this to say on a matter almost similar to this;

“Even if we assume that the purported sale agreement was valid, which is not the case, then the same was supposed to be approved by the village council.... Under normal

circumstances, it was expected for the appellant after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village council of Kasiga to get its blessings... The observation we make here is that there is no due diligence on the part of the appellant in the whole process of executing the purported deed of sale. In our view, he ought to have consulted the village council before embarking on the transaction."

In that regard, had the trial Ward Tribunal considered the sale agreements adduced before them as evidence, then they would have not reached to the decision that they did. The District Tribunal which is the 1st appellate Tribunal ought to have rectified the same instead of upholding the trial Ward Tribunal's decision.

Despite the fact that the appellate Tribunal assessors were against the decision of the trial Ward Tribunal, the presiding chairman departed from the decision of the assessors with no reason to it contrary to **Section 24 of the Land Disputes Courts Act, Cap 216 R.E 2019** which clearly states that;

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

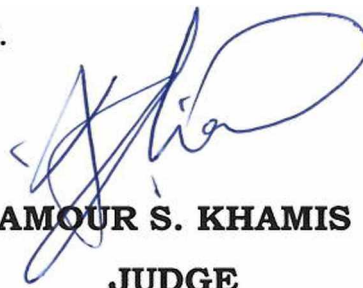
The chairman also ought to have given his reasons as to why he differed with the opinions of the assessors and upheld the decision of the trial Ward Tribunal.

Basing on the reasons given above, I find merits in the grounds adduced by the appellants. The appeal is thus allowed

and I hereby set aside the decisions of both lower tribunals. I declare the appellant herein, as the lawful owner and the respondent should vacate from the disputed land forthwith. I also make no orders as to costs.

Ordered accordingly.



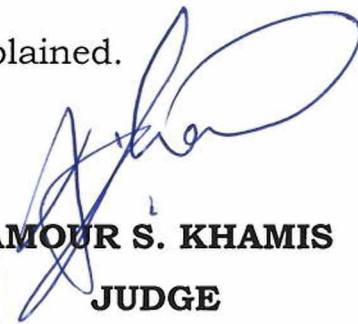

AMOUR S. KHAMIS
JUDGE
14/12/2022

ORDER

Judgment delivered in open Court in presence of Ms. Flavia Francis, advocate for the appellants and the respondent in person.

Right of Appeal is explained.




AMOUR S. KHAMIS
JUDGE
14/12/2022