

IN THE HIGH COURT OF THE UNITED OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 46 OF 2022

*(Arising from the Decision of the Morogoro District and Housing Tribunal in Land
Case No. 142 of 2020)*

THE REGISTERED TRUSTEE OF EVANGELISTIC

ASSEMBLIES OF GOD APPELLANT

VERSUS

HAMIS MWISHEHE RESPONDENT

JUDGMENT

12th Dec, 2022

CHABA, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Morogoro, at Morogoro (the DLHT). The brief historical background which gave rise to this appeal can be summarised as follow: The respondent, Mr. Hamis Mwishehe being the administrator of the estate of the late Nemuhina Abdallah Zangiza sued the Registered Trustees of Evangelistic Assemblies of God Church, the appellant herein over one acre, a parcel of land situated at Kihonda Kilimanjaro within Morogoro Municipality.

Records of the trial tribunal reveals that, sometimes in the year 2009, the appellant trespassed into the disputed parcel land and



constructed thereon church buildings. The respondent instituted Land Application No. 13 of 2013 at the District Land and Housing claiming for the following reliefs: -

1. Declaration that the allocation of the disputed land made by the first respondent to the 2nd respondent and the transaction made between the 2nd respondent and 3rd respondent are null and void;
2. Declaration that the disputed land is the lawful property of late Nemhina Abdallah Zangiza;
3. A permanent restraint order be made so that to restrain all respondents from further developing the land in dispute;
4. Costs of the case be provided for; and
5. Any other relief as this tribunal may deem fit and just to grant.

After a full trial, the matter was dismissed for a reason of being res-judicata on 21/02/2017. Aggrieved, the respondent appealed to this Court, Land Division through Land Appeal No. 56 of 2017, where the Court nullified and set aside the proceedings, judgment and decree of the trial tribunal, and ordered either of the party to file a fresh case.

In pursuant to the order above, Mr. Hamis Mwishehe in his capacity as an administrator of the estate of the late Nemhina Zangiza, filed a suit vide Land Application No. 142 of 2020 against the appellant herein before the DLHT for Morogoro. Upon entertained the matter and

afforded the parties with their rights to be heard, afterwards the tribunal delivered its decision on the 10th March, 2022 in favour of the respondent, and gave the following orders: -

- (i) The respondent was declared to be the owner of the suit land,
- (ii) The applicant be evicted and demolish all developments in the suit land,
- (iii) Costs to follow the event.


Undaunted by the decision of the DLHT, the appellant preferred an appeal to this Court relying on the following grounds: -

- (i) That, the Honourable trial tribunal erred in law and fact for failure to consider and determine the fact that this matter was res-judicata,
- (ii) That, the Honourable trial tribunal erred in law and in fact for failure to consider and effectively incorporate the opinions of assessors in composing her judgment,
- (iii) That, the Honourable trial tribunal erred in law and in fact for failure to join the Kihonda Ward Executive Officer and Edwin Masaki as necessary parties to the suit, and
- (iv) That, the Honourable trial tribunal erred in law and in fact by ignoring evidences presented by the appellant while entertaining evidences presented by a third party, and consequently failure to

determine the true owner of the disputed land to the detriment of the appellant therein.

At the hearing of this appeal, the appellant was represented by Mr. Bahati Hacks, learned advocate, while the respondent appeared in person, and unrepresented. At the commencement of hearing, the counsel for the appellant, opted to drop the fourth ground and argued on the remaining grounds.

Submitting on the first ground, Mr. Bahati highlighted that, one of the relatives of the respondents herein namely, Kulwa Ramadhani unsuccessfully sued the appellant herein in the same subject matter in the former suit that was heard and finally determined in appeal before this Court, Land Division. He averred further that, when Kulwa Ramadhani lost in the suit, the respondent herein filed a new suit registered as Land Application No. 13 of 2013 in the DLHT which he lost and the tribunal decided in favour of the appellant herein. Aggrieved, he successfully appealed to this Court against the decision of the DLHT via Land Appeal No. 56 of 2017, where this Court upheld the appeal and directed either of the parties to file a fresh case.



He contended that, in Land Application No. 142 of 2020, the issue of res - judicata was not brought up, and therefore the issue of whether this matter is res-judicata has not been heard and determined.

Based on the above finding, Mr. Bahati prayed this court to consider the matter being caught by a web of res-judicator. He added that, if the same will be answered in affirmative, then the Court should proceed to set aside the decision of the trial tribunal in Land Application No. 142 of 2020 in favour of the appellant.

As regards to the second ground of appeal, the counsel argued that, the Honourable Chairman of the trial tribunal recorded the opinion of the assessors and stated that he was differing with their opinions, but he did not state the reasons why he was differing with their opinions contrary to section 24 of the Land Disputes Courts Act, [Cap. 216 R. E, 2019]. To fortify his contention, the counsel cited the case of **Tubone Mwambeta Vs. Mbeya City Council**, Civil Appeal No. 287 of 2017, CAT at Mbeya, (unreported), where the Court stated that; the omission to fully and properly to incorporate the opinion of assessors goes to the root of the matter and it occasioned a failure of justice, and that there were no fair trial. The CAT in this case, proceeded to strike out the said



appeal and ordered retrial of the matter before a new chairman and a new set of assessors.

In line with the position of the Apex Court herein above, the counsel prayed this Court to set aside the decision of the trial DLHT with costs.

Concerning the third ground, the learned counsel accentuated that, the Ward Executive Officer at Kihonda being the representative of the District Council Authority in the area, was neither joined as a necessary party to the trial proceedings, nor called as a witness so as to assist the tribunal to resolve the dispute in finality. To cement in this point, he referred this Court to the case **TANZANIA RAILWAYS CORPORATION (TRC) V. GBP(T) LIMITED**, CIVIL APPEAL NO. 218 OF 2020 at page 16, which was quoted approvingly the case of **TANGA GAS DISTRIBUTORS LTD V. MOHAMMED SALIM SAID AND TWO OTHERS**, CIVIL REVISION NO. 6 OF 2011 (unreported), where it was held that: -

"settled law is to the effect that once it is discovered that a necessary part has not been joined in the suit and neither party is ready to apply to have him added as a party, the court has separate and independent duty from the parties to have him added..."



He further added that, the CAT in the case of **TANZANIA RAILWAYS CORPORATION (TRC) V. GBP(T) LIMITED** (supra), on page 17 proceeded to invoke its revisionary powers by setting aside the entire proceedings and judgment of the trial Court and directed the impugned case be set down for retrial after the relevant necessary parties been added to the case.

Based on the foregoing reasons, Mr. Bahati prayed the Court to allow this appeal and set aside the impugned decision of the trial tribunal.

In opposing the first ground of appeal, the respondent denied to have known Kulwa Ramadhani who is claimed to have instituted the case against the appellant herein. He submitted that, being the administrator of the estate of the late Nehemia Abdallah Zazinga,] he is the one who has the locus stand to file a case in the capacity of being an administrator and not otherwise. He concluded that, the claim that the matter at hand is *res – judicata*, is not true and has no merit as well.

I have considered the rival arguments advanced by the parties' counsel and the authorities in support for and against the present appeal, and further I have scanned the trial tribunal's records and



revisited the applicable laws. Having so done, I now propose to start with the issue of res-judicata.

Concerning this pertinent issue, I think it need not detain me much, for one reason that the same has never been raised, discussed and determined before the DLHT. I say so because, upon perusing the proceedings of the trial tribunal, I noted that the same was not among the issues raised up as depicted by the trial tribunal's proceeding as well as the judgment of the Honourable Chairperson.

It is settled position of the law that, issues not raised and canvassed by the appellate Court or tribunal cannot be considered by the appellate court. The CAT in the case of **FARIDA & ANOTHER V. DOMINA KAGARUKI**, CIVIL APPEAL NO. 136 OF 2006 (unreported), the Court had the following to state: -

"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."

Basing on the above authority, I therefore, do not find it proper to entertain that new ground of appeal which was not raised at the trial and the appears to be raised for the first time in this Court. I am of the firm view that, the appellant is introducing a new issue on appeal that

she did not dispute at the trial tribunal, which in law is bad. Indeed, to me this sounds as an afterthought on the part of the appellant. In the circumstance, this ground is baseless.

On the second ground, the appellant's complaint is that, though the Honourable Chairman differed with the opinions of assessors, he failed to assign good reasons why he departed from their opinions.

To answer this issue, I had no other option, other than reverting to records and exhaustively perused the same and judgment of the trial tribunal. From the records, in particular on the relevant date, the same exposes that the Hon. Chairperson sat with two assessors namely; Jane Mngazija and Nsana. As far as their opinions are concerned, both assessors opined and advised the Chairperson to uphold the decision of the trial tribunal because the evidence adduced by the appellant was sufficient to prove his case.

In his judgment, it would appear to me that, the presiding Chairperson did not make any consideration regarding the opinions of the assessors. In my view, the Chairperson just made a sweeping statement that, he is departing from the opinions of the gentlemen assessors without remarking on the substance of the evidence on the basis of which the opinions were made. At page 4 of the typed

judgment, the trial Chairperson generally stated that, he differed with the assessors' opinion as quoted hereunder:

".....ninatofautiana na maoni ya Jane C. Mngazija na Nsana kwamba mjibu maombi alipata kihalali ardhi hiyo kutoka kwa Lilian Masaki na kisha kujenga bila bughudha".

Owing to such omission, I am inclined to find that the failure by the trial Chairperson to give reasons for departing from the opinions of assessors, violated the mandatory legal requirements of the provision of section 24 of the Land Disputes Courts Act, [Cap. 216, R. E, 2019] ("the LCDA") which 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".

As to the legal effect for such irregularity, there is a long line of precedents showing that the omission by the Chairperson to give reasons for rejecting or differing with such opinion renders the proceedings a nullity, because it goes to the root of the matter and in the circumstance of this case, it has also occasioned failure of justice and perhaps the trial was vitiated as no fair trial persisted to the parties.

With this finding, I see no dire need to go into the determination of the third ground. This is because, by so doing, that will be purely an academic excise that will not change my finding reached on the 2nd ground.

Consequently, I hereby nullify the trial tribunal's proceedings, quash the judgment and set aside the decree and orders sprang therefrom. As to the way forward, I order and direct that relevant records are to be remitted to the District Land and Housing Tribunal for Morogoro, at Morogoro for retrial before a different Chairperson and a new set of assessors. Each party shall bear its own costs. **I so order.**

DATED at MOROGORO this 12th day of December, 2022.



A handwritten signature in blue ink, appearing to read "M. J. Chaba", is written over a circular stamp.

M. J. Chaba

Judge

12/12/2022