

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 21 OF 2020**

(Originating from the District Land and Housing Tribunal for Manyara in Application  
No. 80 of 2021)

**SERIKALI YA KIJJI CHA YARATONIC..... APELLANT**

**VERSUS**

**LUKAS HARIYA.....RESPONDENT**

**JUDGMENT**

25/10/2021 & 18/2/2022

**ROBERT, J:-**

The respondent, Lucas Hariya, filed a suit at the District Land and Housing Tribunal (DLHT) of Manyara vide Application No. 80/2021 alleging that the Village of Yarotonic, the respondent herein, trespassed into 1¼ acres of his 1½ acres of land leaving him with undisputed land measuring ¼ acres of land only. He prayed to be declared a lawful owner of the suit land and the respondent to be evicted and barred from the suit land. The trial tribunal passed judgment in favour of the respondent on grounds that, the respondent had legally purchased the suit land.

Aggrieved, the appellant lodged this appeal challenging the decision of the trial tribunal.

Prior to this appeal the appellant had previously lodged her appeal to this Court vide Land Appeal No. 18/2017. This Court (Maghimbi, J) noted that, all witnesses in this matter were heard by Hon. P.J. Makwandi, Chairman of the Tribunal but at the time of visiting the locus in quo, Hon. Makwandi got transferred to another station. His successor, T.J. Wagine, visited the locus in quo without the assessors and proceeded to deliver judgment without hearing a single witness during trial. Thus, this Court quashed the judgment of the trial tribunal and set aside the decree passed thereto. Consequently, the Court ordered the case to be remitted back to Hon. Makwandi wherever he was to construct judgment of the case. Dissatisfied with the decision of Hon. Makwandi, Chairman, the appellant filed lodged this appeal challenging the decision of the DLHT.

When this matter came up for hearing, the appellant was represented by Mr. Mkama Msalama, State Attorney whereas the respondent appeared in person without representation. At the request of parties, hearing proceeded by way of written submissions.

In the course of filing written submissions, the Court noted that the respondent argued three points of preliminary objection which the

appellant objected due to lack of service of the Notice of Preliminary objection but proceeded to respond to in her rejoinder submissions. Having perused records of this matter, the court noted that the respondent had earlier on filed a Notice of Preliminary objection containing three points of preliminary objection which he argued and filed alongside his reply submissions. Given that parties have already argued the points of preliminary objection and the respondent had already filed his Notice of Preliminary objection, this Court finds it convenient to make a determination of the points of objection raised by the respondent first and, if the said objections are not sustained, proceed with the determination of this appeal on merit.

The points of preliminary objection raised by the respondent in the Notice of preliminary objection are to the effect that:-

- 1. The appeal was filed contrary to section 41 (2) of the Land Dispute Courts Act, act No. 2 of 2002 (R.E 2019).*
- 2. That, the appeal was incompetently filed in this Honourable it lacks of necessary documents contrary to order XXXIX rule 1 (i) of the Civil Procedure Code, Cap 33 9 (R.E 2019) as such, the respondent shall pray for striking out the appeal with costs.*
- 3. Appeal was full of argument/ narration contrary to the provision of Order XXIX Rule 1 (2) of the Civil Procedure Code, Cap 33 (R.E 2019).*

*Consequently, the respondent shall pray for an order striking out the appellant's appeal with costs.*

Submitting on the first point of preliminary objection, the respondent argued that, according to section 41 (2) of the Land Disputes Courts Act, an appeal from the DLHT in the exercise of its original jurisdiction may be lodged within forty five days after the date of the decision or order appealed against. However, in the present case, application No. 80 of 2012 was decided by the DLHT on 20<sup>th</sup> March, 2020 and the present appeal was filed at the High Court on the 21<sup>st</sup> May, 2020 which means the appellant was late in filing the appeal for more than forty-five (45) days. He cited the case of **Nahay Qwaray vs Tukula Qwaray**, Land Appeal No. 1 of 2021 (Unreported) where the High Court held that:

*".....where a decision intended to be appealed against is certified after the expiry of or towards the end of the period of limitation, the aggrieved party intending to make use of such decision for purposes of appeal after the period of limitation must obtain leave of the court to file his appeal out of time"*

Replying to this point of objection, Mr. Msalama submitted that, the appeal was filed within the prescribed time since the appellant was supplied with a copy of the proceedings and judgment on 21<sup>st</sup> April, 2020 therefore the period of limitation started to run on the day the appellant received the said copies. To support his argument, he referred the Court

to section 19 (2) of the Law of Limitation Act, Cap. 89 (R.E 2019). He also made reference to the Court of Appeal decision in the case of **The Director of Public Prosecutions vs Nawazo Saliboko @ Shagi and 15 Others**, Criminal Appeal No. 384 of 2017, CAT at page 13 (unreported) where the Court of Appeal held that:-

*"We are therefore settled that the time requisite for obtaining a copy of the proceedings and judgment for appeal purpose has been excluded... the Appellant was therefore entitled to file his appeal within 45 days after receipt of the copy of the proceeding and judgment and he need not apply for extension of the time to do so".*

Section 19 (2) of the Law of Limitation Act, Cap. 89 (R.E.2019) provides that;

*"In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded."*

Guided by the provisions of section 19(2) of Cap. 89 (R.E. 2019) and the Court of Appeal decision in the case of **The Director of Public**

**Prosecutions vs Nawazo Saliboko @ Shagi and 15 Others**, (cited by the applicant), this Court finds that, since the appellant received a copy of proceedings, judgment and decree on 21/04/2020 and the present appeal was filed on 21/4/2020, the appeal was rightly filed within the time prescribed under section 41 of Act No. 2 of 2002 (R.E 2019) in exclusion of the days of waiting for the copies of judgment and decree. Therefore, the first ground of preliminary objection is hereby overruled.

Coming to the second point of objection, the respondent argued that, the appellant failed to attach a copy of the decree and a judgment appealed against which is contrary to Order XXXIX Rule (1) of the CPC. He also cited the case of **Bhogal v Karsan** (1953) 20 EACA and **Admas vs adams** (1959) 1 EA 777 to support his argument. He submitted that, due to that defect the appeal is incompetent and ought to be strike out with costs.

Responding to this ground, Mr. Mkama argued that their appeal was accompanied by the copies of decree and impugned judgment hence the appellant complied with Order XXXIX Rule 1 (1) of the CPC.

Having perused the documents attached to this appeal, this court noted that, as rightly submitted by the counsel for the appellant, this appeal was accompanied with copies judgment and decree appealed

against. Thus, this point of objection will not detain this court. It is hereby overruled for lack of merit.

On the last point of objection, the respondent submitted that, the appellant's appeal is bad in law for being argumentative and narrative particularly, ground number 5,6,7 and 8 which is contrary to Order XXXIX Rule 1 (2) of the CPC.

Replying to this ground, Mr. Mkama submitted that, the grounds of appeal raised by the appellant are in conformity with the requirement of the law. However, he maintained that, if the court finds some irregularities regarding the second and third grounds of appeal they prayed for it to be cured by the principle of overriding objective so as to resolve the matters without technicalities based on Article 107 (2) of the Constitution of the United Republic of Tanzania (see the cases of **Shear Illusion Limited vs Christina Ulawe Umirio**, Civil Appeal No. 114 of 2014, CAT (Unreported) and **Maneno Mengi Limited and 3 Others vs Farida Said Nyamchumbe & Another** (2004) TLR 395).

Order XXIX Rule 1 (2) of the CPC provides;

*"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any*

*argument or narrative; and such grounds shall be numbered consecutively."*

Having examined the appellant's petition of appeal, this court is in agreement with the learned counsel for the respondent that, indeed grounds no. 5,6,7 and 8 of this appeal are argumentative and narrative and therefore offends Order XXXIX Rule 1 (2) of the CPC. A ground of appeal which is argumentative and narrative ceases to be a ground of appeal but an argument or narration. Properly framed grounds of appeal should concisely point out, under distinct heads, specific errors observed in the course of the hearing and specific decisions which the appellant believes occasioned miscarriage of justice. Under the circumstances, the grounds of appeal No. 5,6,7 and 8 presented in this appeal are hereby struck out.

On the basis of the foregoing, the points of preliminary objection raised by the respondent are hereby overruled save for the last point of objection which is allowed to the extent explained above. The Court will proceed with the determination of the remaining grounds of appeal.

Starting with the first and second grounds of appeal, Mr. Mkama Msalama submitted that, Hon. Chairman constructed his judgement contrary to the order of Hon. Maghimbi J, issued on 31<sup>st</sup> August, 2018



through Land Appeal no. 18 of 2017 which directed specifically that Hon. Makwandi, Chairman having heard the matter to its conclusion should construct the judgment of the case. He faulted Hon. Makwandi for constructing judgment of the case based on the records of Hon. T.J Wagine Chairman who visited the land in dispute without assessors.

He submitted further that, the Hon. Chairman indicated in the decree that he was assisted by the assessors while the judgment reveal otherwise which is contrary to section 23 (2) and section 24 of the land Disputes Courts Act, Cap 216 R.E 2019. He cited the case of **Zubeda Hussein Kayagali vs Oliva Gaston Luvakule and Another**, Civil Appeal No. 312 of 2017 CAT at Tabora (unreported) to support his argument.

Responding to the first and second grounds, the respondent admitted that, there should be assessors at the stage of the case to its final decision as per sections 23 (1) and (2) and 24 of the Land Disputes Courts Act, No. 2 of 2002 (R.E 2019). However, where the assessors are absent, the law allows Hon. Chairperson to proceed with the matter to its finality in the absence of one of the assessors (See section 23 (3) of Act No. 2 R.E 2019. Further to that, when Hon. Maghimbi ordered the decision to be prepared by the Hon. Chairperson who heard the suit, the assessors

who were present at the time of the hearing were already retired that's why it was reasonable for the Hon. Chairperson to deliver his judgment without the opinion of the assessors. He emphasized that, Hon. Maghimbi, J had ordered that, *"the case be remitted back to the Hon. Makwandi... so that he can construct the judgment of the matter he has heard to conclusion"*

He maintained that, the instructions given by the Hon. Judge were very clear, the judgment was to be constructed based on what Hon. Makwandi heard only. However, Hon. Makwandi decided to go further by including the evidence which was recorded by Hon. Wagine who visited locus in quo and recorded the evidence of some of the witnesses.

With regards to the question of assessors, he submitted that, at the time of composing another judgment as ordered by the Court assessors had already retired. Therefore it was difficult to recall them to give their opinions. Thus, it was right for the Hon. Chairman to deliver his decision without opinion of assessors under section 23(3) of the Act.

Counsel for the appellant also submitted on the third, fourth, fifth, seventh and eighth grounds of appeal together. However, it should be noted here that, the fifth, sixth, seventh and eighth grounds of appeal have been struck out for being argumentative and narrative. Therefore,

submissions made here will be considered to have been made in respect of the third and fourth grounds of appeal only.

Submitting in respect of these grounds, he argued that, the trial chairman erred to declare the respondent a lawful owner of the suit land based on Exhibit A1 which was objected by the appellant. He maintained that, exhibit A1 was neither signed by the Village Executive Council nor Village Chairman instead it was signed by one Michael Amsi, Hamlet Chairman who was not authorised to sign (See section 8 (1) and (2) of the Village Land Act, Cap 114 R.E 2019.

Further to that, he alleged that there was forgery regarding Exhibit A1 and the matter was referred to the police but the results of investigation were never produced before the court (See page 20-26 of the proceedings). He therefore maintained that, the DLHT ought to have determined the issue of forgery before constructing the impugned judgment because sale of village land without involving the village leaders is void and the court shouldn't have relied on that agreement. To support his argument, he made reference to the case of **Methuselah Paul Nyagaswa vs Christopher Mbote Nyirabu** (1985) TLR 103 and prayed for the appeal to allowed.

Responding to these grounds, the respondent submitted that, the analysis and evaluation of evidence was properly done by the trial tribunal and the finding was made to the effect that that the respondent's evidence outweighed the appellant's evidence since the appellant failed to produce documentary evidence supporting ownership as required under section 100 (1) and 101 of the Evidence Act, Cap 6 R.E 2019. He cited the case of **Hemed Said vs Mohamed Mbulu** (1984) TLR 133 to support his submissions and prayed for the appeal to be dismissed with costs.

In a brief rejoinder, counsel for the appellant reiterated what was submitted in his submission in chief and prayed for the appeal to be allowed with costs.

From the submissions made by both parties, it is not disputed that this Court in Land Appeal No. 18 of 2017 remitted this matter back to the DLHT in order for Hon. Makwandi, Chairman to construct his judgment. Although counsel for the appellant faulted Hon. Makwandi for constructing judgment of the case based on the records of Hon. T.J Wagine Chairman who visited the land in dispute, the decision given by this Court did not prohibit Hon. Makwandi to use records obtained by Hon. T.J. Wagine at the locus in quo to compose his judgment. If that was intended, the Court would nullify or quash the proceedings of the DLHT taken at the locus in

quo in order to enable Hon. Makwandi to record evidence afresh at the locus in quo.

However, of more concern to this Court is the fact that, the impugned decision of the DLHT does not indicate that it took into account the opinion of assessors as required under section 24 of the Land Disputes Courts Act. The respondent's argument that the Chairperson delivered his judgment without the opinion of assessors because at the time of composing judgment assessors who were present at the time of hearing were already retired does not feature anywhere in the judgment of Hon. Makwandi. Even if the Chairman is not bound by opinion of assessors and may be allowed to proceed in the absence of assessors in specific situations, the law requires him to take into account the opinion of assessors. Therefore, where the Chairman cannot take into account the opinion of assessors for any reason, including retirement of assessors, such reasons must be indicated in the judgment of the tribunal. Unfortunately, that was not done.

Further to this, records indicate that hearing of this matter of this matter commenced at the DLHT on 28/1/2013 without indicating if assessors were present. From that moment they continued to be on and off until 23/9/2013 when they appeared for the last time and proceedings

are silent on why they didn't enter appearance in the subsequent proceedings and the case was scheduled for judgment without getting their opinion. In the circumstances, this Court finds that, there were irregularities which vitiated both the proceedings and decision of the trial tribunal. I therefore, quash the proceedings and set aside the decision of the trial tribunal and order a retrial of the case before another chairman and another set of assessors. In the circumstances, I find no pressing need to deliberate on the remaining grounds of appeal. I give no order as to costs.

It is so ordered.

  
K.N/ROBERT  
JUDGE  
18/2/2022

