

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

LAND APPEAL NO. 27 OF 2021

(Originating from Land Application No. 44 of 2015 of the District Land and Housing Tribunal for Kigoma)

**ANTARY OMARY KANGETA (Administrator
of the Estate of OMARY KANGETA KAMBI-----APPLICANT**

VERSUS

**KANGETA KASSIM KANGETA (Administrator
of the Estate of KASSIM KANGETA KAMBI -----RESPONDENT**

JUDGMENT

16/09/2022 & 06/02/2023

MANYANDA, J.

Antary Omary Kangeta, the Appellant, who is suing as administrator of the Estate of his father, Late Omary Kangeta Kambi, is dissatisfied by a decision of the District Land and Housing Tribunal for Kigoma, hereafter the District Land and Housing Tribunal or simply as the trial Tribunal in Land Application No. 44 of 2015 dated 22/10/2021.

Before the District Land and Housing Tribunal, the Appellant sued the Respondent, who is also suing as

administrator of the Estate of his father, Late Kassim Kangeta Kambi for ownership of a house situated at Plot No. 90 Block J, Msafiri Area in Kigoma Ujiji Municipality hereafter the suit land.

The deceased Omary Kangeta Kambi and Kassimu Kangeta Kambi were sibling brothers, the former being a biological father of the Appellant and the latter a biological father of the Respondent. The two died intestate.

It was a case by the Appellant that the suit land belonged to his father, meanwhile the Respondent also led evidence that the same land belonged to his father. The District Land Housing Tribunal after hearing the evidence of each party and analysing it found in favour of the Respondent. The trial chairman reasoned that since the suit property is surveyed, then, it must have an owner and disbelieved the verbal evidence of the Appellant.

The Appellant has come to this Court on appeal with seven grounds which can be grouped into three namely; it was wrong for the trial tribunal to proceed with one assessor without assigning reasons, it was wrong for the trial tribunal to determine the case without considering the framed issues and the last is failure by the trial Tribunal to evaluate the evidence.

With leave of the court, hearing was conducted by way of written submissions. While the submissions for the appellant were drafted and filed by Mr. Sylvester Damasi Sogomba, learned Advocate, those for the Respondent were drawn and filed by Mr. Ignatius R. Kagashe, learned Advocate.

Submitting on the issue of assessors Mr. Sogomba argued that under section 23(1), (2) and (3) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] the District Land and Housing Tribunal is constituted with a Chairman sitting with two assessors who are required at the end of hearing of the case to give their opinion in writings.

It was the views of the counsel that the trial chairman did not involve two assessors whom he set with, without assigning reasons. To bolster his point, he cited the case of **Edina Adam Kibona vs Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 where the Court of Appeal disbelieved the decision of the trial Chairperson who referred to assessor's opinion which was not on record.

Mr. Sogomba simply copied ground number two and added no words to it. The ground says as follows; that, the trial

tribunal grossly erred in law and facts when it failed to determine the matter by relying on the framed issues, hence, reached at an erroneous decision.

Then, Mr. Sogomba submitted jointly grounds three, five, six and seven which deal with the complaint that the trial chairperson failed to scrutinize the evidence. He went on re-analysing the evidence in his submissions which I need not to reproduce here since I will deal with same in the course of this judgment. He concluded that it was wrong for the trial chairperson to hold that the Appellant was supposed to have a Title Deed not mere land rent or tax payment receipts. He relied on the authority in the case of **Stanslaus Rugaba Kasusula and another Vs Phares Kabuya Kasusula Kabuye** [1982] TLR 338 where it was held, inter alia that it is fatal for a court to leave contested issues un resolved.

Mr. Sogomba submitted shortly on ground 4 basically reiterating the ground of appeal which is to the effect that a licensee is always a licensee. He was of the views that since the Respondent was a licensee, then he did not acquire title over the land in issue.

On his side Mr. Kagashe opposed the complaint in ground one arguing that the provisions of section 23(1) of the Land Disputes Courts Act (supra) was fully complied with because two assessors participated from the beginning to the end of the trial and their opinion were read out and the chairperson considered them in the judgment. He distinguished the quoted authority in the case of **Edina Adam Kibona vs. Absolom Swebe (Sheli)'s** case (supra) that the assessors in that case did not deliver their opinion while in the present case they opined.

As regard to ground two, Mr. Kagashe admitted that even if several issues were framed, but there were crucial issues which were determined and rightly decided the parties' rights.

Mr. Kagashe also replied the submission in the jointly argued grounds three, five, six and seven, just was done by the counsel for the Appellant. Mr. Kagashe also analysed the evidence and concluded that the Appellant failed to prove ownership of the suit property to be his father.

Regarding ground four, the counsel replied that there was no evidence proving elements of licensee. He was of the views that a period of twenty-one (21) years after the Appellant's

father death, that is 1994 to 2015, is long enough to clear any claim of licensee or else his survivors could have claimed for the house. To bring home his argument he cited the case of **Shaban Nassoro vs. Rajabu Simba** (1967) HCD No. 233 where this court said that it is wrong to disturb persons who have occupied land and developed it over a long period of time. He also cited a case of **Hemedi Said vs Mohamed Mbilu [1984] TLR 113** where this Court said evidence of parties cannot tie, but the evidence of whose party is heaviest must win.

Those were the submissions by the parties' counsel. I thank them for, with the usual zeal and eloquence, they have discharged their duty. In the first place, before I go on deliberating this matter, I register my apology for late delivery of this judgment it was due to circumstance out of my control.

Back to the case, it is the complaint by the Appellant that the trial chairperson though presided over the case with aid of two assessors, only considered opinion of one assessor. Mr. Kagashe for the Respondent argued that the chairperson did consider the assessors opinion in accordance with the provisions of section 23 of the Land Disputes Courts Act.

I have perused the said provisions of the law and found the same reads as follows: -

"23(1) The District Land Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be dully constituted when held by chairman and two assessors who shall be required to give out their opinion before the chairman reaches judgement."

Therefore, it is clear that for the District Land and Housing Tribunal to be constituted there must be a chairman and two assessors who must give opinion before a judgement is reached.

My perusal of the record reveals that there were two assessors who sat with the chairperson. They were Magreth and Hope.

On 05/07/2021 it was recorded that the opinion of assessors were read out in court. However, in the file there is written opinion of one assessor only, it is the opinion by Magreth. The chairperson took into consideration the opinion of the said by stating as follows:

"Hadi kufika hapa naungana na maoni ya mjumbe Magreth Heguye kwamba mleta maombi ameshindwa kuthibitisha juu ya umiliki wa nyumba yenye mgogoro".

Literally means that the chairperson accepted the opinion of Magreth Heguye that the Applicant failed to prove ownership of the house in dispute.

In my firm views, though the chairman sat with two assessors, he was correct to deal with the opinion of one assessor because it was the only opinion registered and read out to the parties. The law backs me up. Under section 23(3) of the Land Disputes Courts Act there is an exception to the rule under section 23(2) reproduced above. The exception reads as follows:

"23(3) Notwithstanding of the provision of subsection (2), if in the course of the proceeding before the tribunal either or both members of the tribunal who were present at the commencement of proceedings is or are absent the chairman and the remaining members, if any, may continue the proceeding notwithstanding"

In this matter, one assessor, Hope did not register his opinion nor appeared in court. The provision of the law quoted above

says the Chairman can proceed with the proceeding with the remaining assessor if the other is absent.

This is what the chairperson in this matter did, he continued with the single assessor who registered her opinion which was read out to the parties. The written opinion is in the file. I fail to find any contravention of section 23 of the Land Disputes Courts Act as alleged by the Appellant. I find the first ground none meritorious.

The complaint in ground two is that the trial tribunal failed to deliberate the framed issues. As I have said above, the counsel for the Appellant said nothing to amplify his argument. The Counsel for the Respondent found himself at cross roads, hence, failing to get the target of the complaint, but argued that the main issues were deliberated which enabled the trial Tribunal to decide the rights of the parties.

I have followed up this argument and have gone through the record and found the same to be unfounded.

At page 9 of the typed proceedings three issues were framed namely:

*"1. Whether the suit property [was] owned by the
late Omary Kangeta Kambi.*

2. Whether the suit is time barred

3. Relief".

In the judgment the issues were restated as follows: -

*"1. Je nyumba ya mgogoro iliyopo Kiwanja Na. 90
Kitalu J. Mtaa wa Msafiri katika Manispaa ya
Kigoma/Ujiji ni mali ya Marehemu Omary Kangeta.*

2. Nafuu nyingine:

As it can be seen the main issue at controversy was on ownership of the suit land which is Plot No. 90 Block J, Msafiri Area in Kigoma/Ujiji Municipality and the reliefs to the parties.

These two issues guided well the trial Tribunal to reach at its decision, whether the decision was correct or not is another issue.

An issue which appears to have been abandoned is about time bar of the suit. This was a legal issue, but neither of the parties led evidence about it. In fact, it is not even a complaint

in this appeal. The same issue of time bar was abandoned by both parties and the trial Tribunal as well.

In my views, there was no any prejudicial to the parties because the issue of time was abandoned by both of them right from the beginning, and the two issues guided well the trial Tribunal to deliberate the parties' rights and their reliefs. I also find no merit in ground two. This finding brings me to the grounds which were argued jointly namely, three, five, six and seven, where the complaint is that the trial Tribunal failed to properly evaluate the evidence hence arrived at erroneous decision.

I am aware that this being a first appellate court has a duty of re-evaluating the evidence if satisfied that the trial tribunal failed to do so and may arrive at a conclusion not necessarily the same as that of the trial tribunal. This is per the dictates of the law quoted in the case of **Rashidi Abiki Nguwa vs Ramadhan Hassan Kuteya and National Microfinance PLC**, Civil Appeal No. 421 of 2020 which cited the case of **Standard Chartered Bank of Tanzania Ltd vs National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 in which a famous quote in

The Registered Trustees of Joy in the Harvest vs Hamza

K. Sungura, Civil Appeal No. 149 of 2017 (both unreported) was made, stating as follows: -

*"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (See also **Peters vs. Sunday Post**, (1958) EA 424; **William Diamonds Limited and Another vs. Republic**, (1970) EA 1; and **Okeno vs. Republic**, (1972) EA 32)".*

The evidence led by the Appellant is short and straight that the suit property was acquired by his father late Omary Kangeta Kambi way back in 1940 after purchasing it from one Mabruki. That after purchasing it he left to Kahama leaving his young brother Kassim Kangeta the father of the Respondent living in it. Then it followed that the whole of the family shifted and started to live in it, including the Appellant and the Respondent. During that period the suit property was surveyed, however the evidence of both parties does not mention the name of the new owner. The Appellant's evidence is that he conducted a search at the Land Office but was unable to find the named owner of

the surveyed plot. He left it as it was and proceeded on paying property tax. That after death of the Respondent's father they convened a meeting in 2006 at which it was decided that the suit land to belong to the Appellant's father Omary Kangeta. Then, they lived in harmony until 2015 when this dispute arose.

On the other hand, the evidence is that the Appellant's father died in 1994 at Kahama. The Respondent was born in the suit land in 1965 and has lived in it to date. That the suit land belonged to his father Kassim Kangeta because he was born there and found the house there.

Mr. Sogomba for the Appellant submitted that the suit property belonged to the Appellant's father Omary Kangeta because it was not even included in the list of estate of late Kassim Kangeta in 2006. On the other hand, Mr. Kagashe for the Respondent, submitted that there was not proof that Omary Kangeta purchased the suit property from a person called Mabruki because he never claimed ownership ever the same until his death in 1994. Further, the suit property has been in the hands of the Respondent's father without any claim from heirs of the Appellant's father.

The trial chairperson when deliberating the case stated as follows:

"Mleta maomba alikuwa na jukumu la kuthibitisha mbele ya Baraza hili juu ya umiliki wa eneo la mgogoro kama lilikuwa linamilikiwa na baba yake, ambapo kutokana na ushahidi uliotolewa ni wazi kuwa eneo la mgogoro ni kiwanja ambacho kimepimwa hivyo ni lazima kiwe na umiliki unaothibisha umiliki wa eneo husika, mleta maombi ametoa uthibitisho wa risiti za malipo kama alilipa kodi ya eneo husika..... Hivyo basi kutokana na msingi wa msimamo wa sheria ni wazi kuwa kigezo cha kutoa ushahidi wa risiti za kodi hazitoshi kumthibitishia kama mmiliki wa eneo la mgogoro"

Literally means that the Applicant had a duty of proving that ownership of the suit property belonged to his father. The evidence is clear that the suit property was surveyed hence it was necessary to have the name of the plot owner known, mere payment of property tax is not proof of ownership.

I have followed the arguments by the learned minds representing both parties and the finding of the trial chairperson. As it can be seen both missed the point.

The evidence by the Appellant is to the effect that the Appellant's father acquired the suit property after purchasing it from one Mabruki. This fact is not controverted. The evidence by the Respondent is to the effect that the suit property belonged to his father because he was born and found the house in which whole family lived in.

The evidence shows further that after purchasing the house in 1940, Omary Kangeta Kambi, (the Appellant's father) never returned to Kigoma as he left to Kahama where he died in 1994.

It follows therefore that it is a true fact and uncontroverted that the Respondents family, which include the late Kassim Kangeta Kambi, lived in the suit property throughout the period of absence of Omary Kangeta Kambi until his death in 1994 at Kahama.

A question is how did Kassim Kangeta Kambi and his family including the Respondent get into the house. There is no answer from the Respondents evidence. However, there is an answer from the Appellants evidence. The evidence is that Kassim Kangeta Kambi was invited into the house.

It is this fact that makes me find that the trial chairperson went astray when he based on survey of the plot and payment of property tax. I say because in the evidence of both the Appellant and the Respondent none mentioned about the survey of the Plot and have owner name. Moreover, no any document was tendered to evidence that the suit land was surveyed. What both the Appellant and the Respondent testified is that the suit property was at one time surveyed, but none of them followed up to register the name of the owner. As a result, the Appellant, for instance, ended up paying property tax only.

The question of ownership over the suit property is not based on the fact of the suit land been surveyed. I say so because it was acquired as squatter by then. The act of surveying plots is a Town Plan, which by itself without registering the plots does not give ownership to anybody. Hence the evidence of ownership is from the witness's testimonies.

In my views, the Appellant with elaborated and uncontroverted evidence, made it clear that the suit belonged to his father late Omary Kangeta Kambi who left it to his young brother when he went to live at Kahama and never returned. The

Respondent and his father lived in the house as invitee not owners. I find that there is merit in these grounds, had the trial chairperson analysed properly the evidence would have found as I have done herein.

Having allowed grounds three, five, six and seven, then there remains ground four, which has found its answer in the analysis of the evidence above. The complaint is that once a licensee is always a licensee. Mr. Kagashe for the Respondent pleaded that it is not suitable to evict a licensee who overstayed in the suit property. I agree with him, it may sound sour for a licensee or invitee to be evicted after overstaying in suit property, but that is the law. I have read the cases cited by the counsel for both sides I found them un-useful in the circumstances of this case.


In the upshot for reasons stated above, I find that the appeal has merit. Consequently, I make the following orders

1. The appeal is allowed the suit property belongs to late Omary Kangeta Kambi
2. The Respondent to pay costs of this appeal.

Order accordingly.

Dated at Kigoma this 06th day of February, 2023




F.K. MANYANDA
JUDGE