

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 61 OF 2022

(Originating from District Land and Housing Tribunal in Land Appeal No 216 of 2020,
Original from Mwisenge Ward Tribunal in Musoma Municipality)

JACKSON MWANZALIMA.....APPELLANT

VERSUS

JOSEPHINA BRUNO RESPONDENT

JUDGMENT

17th & 21st April, 2023
F. H. Mahimbali, J.:

The grievance in this appeal is the order of the DLHT of Musoma while dealing with land appeal no. 216 of 2020 (filed before it) which quashed the proceedings and judgment of Mwisenge Ward Tribunal in land case no. 110 of 2007 following the unavailability of its record and ordered the matter to commence afresh by any interested party if still concerned. The quashing order aggrieved the appellant, thus the basis of this appeal.

During the hearing of the appeal, the appellant was represented by Mr. Thomas Makongo learned advocate whereas the respondent appeared in person and unrepresented.

In arguing the appeal, Mr. Makongo submitted that the appellant is aggrieved by the decision of the first appellate tribunal for dismissing appeal no 216 of 2020 for the reason of missing the trial tribunal's proceedings. He argued that the reason that the trial tribunal's record was missing by itself was not sufficient to quash the decision of the trial tribunal but it was supposed to order the reconstruction of the record. So long as the appellant had extracted grounds of appeal, suggests that there was judgment, therefore led to the birth of appeal no 216 of 2020 at the DLHT. It was therefore not proper for the first appellate tribunal to dismiss the appeal simply because there was no record of the trial tribunal. He added that the best way was to construct the record instead of dismissing the appeal and ordering the suit to commence afresh. As this suit started in 2007 at the trial Ward Tribunal, it was not proper and justified in the circumstances of this case.

On this, he prayed that this honorable court be guided by wisdom to reach a proper finding of the law, he concluded.

On her part, the Respondent submitted that as the trial tribunal's records is missing, the best legal remedy was to order trial denovo as done in the circumstances of this case. Therefore, this appeal is of no merit, the same be dismissed with costs.

In his rejoinder submission, Mr. Makongo reiterated his submission in chief and added that since both parties are in possession of the trial tribunal's judgment in which grounds of appeal were extracted, the appeal was proper before the first appellate tribunal. It ought to have been heard and determined. As the respondent appears to be satisfied with the trial tribunal's judgment, the DLHT ought to have considered the appeal filed. He kept on insisting that this appeal be allowed.

Having heard the parties' submissions, the important question to ask is whether the appeal is merited. In our jurisprudence there is no general rule on the way forward when the Court is faced with the problem of missing records of the lower courts as the appeal under scrutiny. The Court of Appeal of Tanzania which is our apex Court in the hierarchy when faced with a similar scenario in the number of cases such as **Robert s/o Madololyo Vs the Republic**, Criminal Appeal No. 486 of 2015 (unreported), **Charles Ramadhani Vs. Republic**, Criminal Appeal No.

429/2015 (unreported), **Mfaume Shaban Mfaume Vs the Republic**, Criminal Appeal No. 194 of 2014 (unreported) after having visited the practice obtained in other jurisdictions, it was of the view that the other viable means of remedying the situation, was for the respective court/tribunal to involve other stake holders in the administration of justice, to reconstruct the records. Part of its order in the case of Robert Madolyolyo (supra), the Court of Appeal held: -

"The hearing of the appeal is adjourned to allow the Deputy Registrar to reconstruct the records of appeal and thereafter, the Deputy Registrar of the Court of Appeal, shall fix the date of hearing of the appeal at the earliest possible session."

According to the record of appeal in this appeal, it is clear that that the procedure proposed in the case of **Robert s/o Madololyo** (supra), was partly adopted whereby, some stake holders were requested by the DLHT to avail him with any available records concerning the original case and the appeal, so that he could reconstruct the record of appeal but to no avail. This is reflected in paragraphs 2, 3, 4 and 5 of the affidavit of Mr. Boniface Lucas, the secretary of Mwisenge trial ward tribunal, which was sworn on 29th March, 2022 where he deponed that: -

"2. Kwamba mimi ni Katibu wa Baraza la Kata la Mwisenge lililopo katika Manispaa ya Musoma.

3. Kwamba nilipokea barua ya kutoka Baraza la Wilaya ya Ardhi na NYumba Musoma barua yenye kumbukumbu namba DLHT/MR/APPEAL/2016/2020. Barua hiyo ilinitaka nipeleke faili la shauri namba 110 of 2007.

4. Kwamba, baada ya kupokea barua hiyo nilitafuta jalada la shauri husika na licha ya jitihada nilizozifanya sikufanikiwa kupata jalada hilo husika, na licha ya jitihada nilizozifanya sikufanikiwa kupata jalada hilo, nililiandikia barua Baraza la Ardhi na Nyumba Wilaya ya Musoma ya tarehe 27/10/2021 kujulisha Baraza hilo kuwa Baraza la Kata ya Mwisenge limetafuta mwenendo wa shauri hilo pasipo mafanikio.

5. Kwamba jalada nililoombwa kulipeleka Baraza la Ardhi na Nyumba Wilaya Musoma halipo kabisa katika Masijala yaliyopo katika Baraza la Kata ya Mwisenge, na mimi sijui lilipo.

The efforts to reconstruct the record of appeal having failed as per the sworn affidavit of the trial tribunal secretary above, the first appellate tribunal (DLHT) decided to quash all the proceedings and set aside the judgment thereof and directed any party still interested to commence fresh proceedings, this being a civil suit. Therefore where possible means of

reconstruction of the record is neither feasible nor possible, the best recourse is to consider the retrial. See the decision of the Court of Appeal in the case of The decision of **Charles Ramadhani Vs. Republic (Supra)** making reference to the Supreme Court of Ghana in **John Bonuah @ Eric Annor Blay Vs the Republic**, Criminal Appeal No. J3/1/2015 of July, 2015, it was held that: -

"Where reconstruction of the record of appeal is neither feasible nor possible, the Court should consider to order for re-trial."

Such alternative method of ordering for trial de novo, happened by our neighboring jurisdiction (Court of Appeal of Kenya) in the case of **Joseph Maina Kariuki Vs the Republic**, Criminal Appeals No. 53 and 105 of 2004, which was cited in **John Bonuah @ Eric Annor Blay** (supra), where upon considering the peculiar circumstances of that particular appeal, the Court observed that: -

"...the appellant could not be kept in prison indefinitely when it was possible for his appeal to have been concluded according to the law."

I am aware that the application of the proposed method of ordering for re-trial, involves consideration of some factors amongst

which include, availability of witnesses, the nature and seriousness or complexity of the of the suit. This being a civil suit, unlike criminal in which if it involved conviction and one has been in incarceration (in prison) for longer period, prudence would have been dictated otherwise. Therefore, in the circumstances of this case (Civil Case on land claim) where no any record is available as per affidavit of Mr. Lucas Boniface, the secretary of the trial tribunal, a mere possession of the photocopied handwritten judgment by the appellant which its source is not known, cannot be conclusively determined that it is the genuine document and that in the absence of the accompanying proceedings, one can hardly determine this appeal. In essence it is incomplete record. It cannot be ascertained definitely that there is any record for consideration of the said appeal.

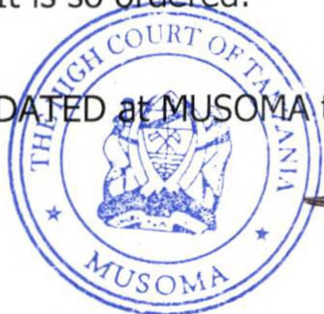
Basing on the circumstances which have been highlighted above, in consideration of what was held in **Mfaume Shaban Mfaume Vs the Republic** (supra), where, upon having failed to locate the missing records of the lower court for purposes of according a fair hearing and determination of the appellant's appeal in the same vein, the failure by the Court to get the records of the lower court which

could have assisted it to fairly and objectively determine the appellant's appeal before him, prudence dictates that justice will triumph if there will be retrial. Thus, the DLHT was justified in reaching that finding. This is because the purported record in his possession is neither authenticated nor complete. Thus, retrial is the best remedy in the circumstances of this case.

That said, the appeal is devoid of any merits and it is hereby dismissed. However, for the interests of justice, parties shall bear their own costs.


It is so ordered.

DATED at MUSOMA this 21st day of April, 2023.




F.H. Mahimbali
Judge

Court: Ruling delivered this 21st day of April, 2023 in the presence of both parties present in person, and Mr. Makunja, SRMA.


F. H. Mahimbali
JUDGE