

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

LAND APPEAL NO. 14 OF 2022

MOHAMED IDRISAAPPELLANT

VERSUS

LULU LOHAY.....RESPONDENT

**(Appeal from the Judgment of Kondoa District Land and Housing Tribunal-
R.S. Mandari-Chairman)**

Dated 8th day of February, 2022

In

Land Application No. 17 of 2020

JUDGMENT

20th April & 02nd June, 2023

MDEMU, J.:

In the District Land and Housing Tribunal (DLHT) of Kondoa, the Respondent herein sued the Appellant herein for alleged trespass to his land located at Chubi village within Kondoa District. The application was decided in favour of the Respondent. This was on 08th February, 2022. Aggrieved by the said decision, the Appellant lodged this appeal on the following grounds:

- 1. That, the Honourable trial Chairman of Kondoa District Land and Housing Tribunal erred in law in failing to request the witnesses to read out to the parties' exhibits tendered by them after their admissions as required by the law.*

2. *That, the Honourable District Land and Housing Tribunal erred in law and in facts in changing the trial Chairman without giving reasons for so doing.*
3. *That, the Honourable District Land and Housing Tribunal erred in law and in facts by refusing to allow the Appellant herein to produce all his witnesses to testify in the tribunal.*
4. *That, the Honourable District Land and Housing Tribunal erred in law and in facts in declaring the Respondent herein as the winner in the case while the Respondent failed to indicate the borders of the land for which he was claiming in the trial Tribunal which borders, he failed even to indicate them in the evidence.*
5. *That, the Honourable District Land and Housing Tribunal erred in law and in fact in declaring the Respondent herein as the winner of the case while the Respondent herein had contradictory claims as to how he got the piece of land he was claiming and while he failed to prove his claims in evidence.*
6. *That, the Honourable District Land and Housing Tribunal erred in law and in facts in failing to properly involve the Assessors in the trial of the suit.*

On 20th April, 2023, the appeal was heard. The Appellant was represented by Ms. Josephine Mzava, learned Advocate whereas the Respondent was represented by Mr. Godwin Fissoo and Mr. Kasanda, learned Advocates as well. Arguing grounds of appeal seriatim, Ms. Josephine submitted in the 1st ground of appeal that, all documents which were

admitted were not read in court namely, exhibits P1, P2, P3, P4, D1, D2 and D3. She said, this is contrary to the law as per the case of **Bulungu Nzungu vs. R, Criminal Appeal No. 39 of 2018** (unreported).

On the second ground of appeal, she argued that, reasons for change of trial Chairman were not stated at page 15 of the trial Tribunal's proceedings. It was her argument that, this is against the law by citing the case of **Mariam Sambulo, Legal Representative of Ramadhani Abbas vs. Masoud Mohamed Joshi**, Civil Appeal No. 109 of 2016 (unreported).

On the third ground of appeal, she argued that, the DLHT prohibited the Appellant to summon his witnesses by ordering closure of his case at page 20 of the proceedings though he prayed time to locate such witnesses. She said this violates principles stated in **David Mushi vs. Abdallah Mswamu Kitwanga**, Civil Appeal No. 286 of 2016 (unreported). She added that, the Appellant's right to be heard was curtailed.

As to the fourth ground of appeal, she submitted that, the Respondent never showed boundaries of the suit property as legally required so as to make the decree executable. On this, she cited the case of **Hamisi Omary vs. Mohamed Mtiaga**, Land Appeal No. 55 of 2019 (unreported) and Order VIII, Rule 3 of the Civil Procedure Code, Cap. 33.

She submitted in the fifth ground of appeal that, there was contradictory evidence which made the case not proved as even the size of the disputed land was not determined. She said that, other witnesses said to be thirty (30) hectares while others said it was 240-350 paces and forty (40) acres respectively.

In the last sixth ground of appeal, it was her submissions that, the chairman did not read opinion of assessors to all parties as required by law rather, before the Respondent only. She cited the case of **Sikudhani Said Magambo and Another vs. Mohamed Rudley**, Civil Appeal No. 197/2018 (unreported). She thus prayed the appeal be allowed with costs.

In reply, Mr. Kasanda conceded in the first ground that, all documents which were admitted were not read in Court. However, he said that, such failure alone may not be the basis for nullifying proceedings. The court may consider the remaining oral evidence on record in determining who is the rightful owner. He cited the case of **Edward Antony Mweisumo and Seven Others vs. Joel Samumba**, Civil Appeal No. 9 of 2021(unreported) and **Bulungu Nzugu vs. R** (supra). He said that, the reason is one that, proof in civil cases is on balance of probabilities. He contended further that, reading documents in Court after its admission is not a statutory requirement, but rather it is practice of courts. He also cited the Exhibit

Management Guidelines, 2020 stating that, it is silent in civil cases as to whether it is mandatory to read an exhibit after its admission.

On the remaining oral evidence, it was his submissions that, PW1, PW2, PW3 and PW4 testified to the effect that, the land in dispute is at Chubi village in Kwambula Hamlet. As to size of the disputed land, witnesses testified that, the area measures 38 acres while PW4 estimated the land to be 40 acres which, in his view, didn't prejudice the Respondent's case. On boundaries, he submitted that, PW1 and PW3 named neighbours to be Muna in the West, North Adamu, South Adam and East there is forest. As to mode of acquisition of the suit land, he argued that, PW1 stated to have acquired the land after clearing a virgin land in Chubi Village and also from Lwavu, Hassan and Idd Bakari. This evidence, he said, was corroborated with that of PW3.

Regarding time of acquisition, he observed that, PW1 stated to have acquired the land in 2004 after clearing a bush between 2004 and 2007 and PW3 testified to the effect that, he met people clearing land, amongst them, the Respondent inclusive. Likewise, PW4 also stated to have met PW1 clearing the said land. He also stated that, village leaders witnessed PW1 acquiring land, clearing and using it. It was his submissions therefore that, oral evidence was thus credible, thus the case was proved.

In the second ground of appeal, he submitted that, the applicable law in land disputes is Land Courts Disputes Act, Cap. 216 and Land Court Rules GN. No. 174/2002. In them, there is no rule requiring giving reasons on change of Chairman. He also said that, section 51(2) of Cap. 216 allow application of the Civil Procedure Code, Cap. 33 where there are deficiencies in land laws. He said, the Appellant's Counsel didn't cite any provision in the Civil Procedure Code requiring reasons to be adduced in case of change of chairman during trial.

It was his submission's further that, prior to 2021, it was not mandatory to assign reasons. However, the amendment to Order XVIII, Rule 15(1) of the Civil Procedure Code requires assigning reasons. He argued that, at pages 14-15 of the proceedings, the Respondent agreed the matter to proceed before another Chairman, so was the Appellant. He said therefore, reasons got assigned. He also said that, the Appellant has not stated how they were prejudiced by that anomaly.

Regarding the third ground of appeal, he said that, the Appellant was not denied right to call witnesses as he was absent on 30th day of November, 2021. The Tribunal then asked opinion of Assessors and scheduled a judgment date. He referred the case of **Republic vs. Biman Chrispin and Others** [1980] TLR 116 to that effect. He said that, Order VII, Rule 3 of the

Civil Procedure Code allows courts to proceed to determine the matter even when a certain party fails to produce evidence.

Mr. Fissoo also submitted on the fourth, fifth and sixth grounds of appeal. On the fourth ground he said that, witnesses testified as to boundaries. He bolstered his argument by citing the case of **Audax M. Tibanyendela vs. Hamza Sued and Ten Others**, Land case No. 13/2019 (unreported).

In the fifth ground of appeal on contradiction of evidence regarding acquisition of land, he stated that, the Respondent explained how he acquired the said piece of land, series of events which occurred and that, it was a part of forest reserve. He added that, they were once arrested, then the land was handed over to those who were found in it, the Respondent inclusive. He added that, the Appellant's evidence is wanting as he was not there in all those events. On contradiction regarding size of the disputed land, that is, thirty-eight and forty acres, he said, the same is a minor one and have not gone to the root of the matter.

In the last ground of appeal, he submitted that, Assessors were involved. Parties were examined by Assessors and on 19th January, 2022, Assessors gave their opinion and they were considered by the trial

Chairman. He said therefore section 23(2) and 24 of Cap. 216 and Rule 19(2) of G.N No.174 of 2003 were duly complied with.

It was his further submissions that, the complained irregularities cannot make proceedings invalid unless they prejudice the Appellant of which the Appellant have not contended so. He cited the case of **Stanley Muridhi Mwaula vs. R**, Criminal Appeal No. 144 of 2019 (unreported) to bolster his argument. In rejoinder Ms. Mzava reiterated her submissions in chief.

After a thorough regard to parties' submissions, records as well as applicable laws, the issue to be determined is whether this appeal has merits. I will determine the third ground of appeal first. From submissions by both parties, it is not disputed that the case was adjudicated by more than one chairman. The record indicates that on 23rd February, 2021, R. Mandari-Chairman took over adjudication of a case from O. Mbega-Chairman. No reason for the take over got recorded in the case file. What transpired is that, the case was adjourned up to 23rd March, 2021 for hearing. It was adjourned again to 22nd April, 2021 and later 25th May, 2021 respectively when hearing of Respondent's case resumed. What transpired is quoted as hereunder for easy references:

25 MEI, 2021

Akidi- Mh. R.Mandari-Mwenyekiti

Washauri:-

1.Y.Msalu

2.H.Hassan

WADAAWA:-

Mdai-Yupo

Wadaiwa-Yupo

Karani-F.Haule

MDAI-Naridhia shauri hili liendelee kwa kusikilizwa na wewe Mwenyekiti Mpya.

Mdaiwa-Shauri hili liendelee na wewe Mheshimiwa na liendelee kwa kuendelea pale lilipokomea.

Baraza-Shauri linaendelea kusikilizwa leo 25/5/2021 kama lilivyopangwa.

Reading the above record from the parties suggest that, they were informed about change of trial chairman the reason why there are corresponding answers. The immediate issue to be asked is, was this proper. The law under Order XVIII, Rule 10(1) of Civil Procedure Code, Cap. 33 provides: -

Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his discretion under the said rules and may proceed with the suit from the stage at which his predecessor left it.

This was the position before 2021 where there were no express provisions requiring assigning reasons on the change of trial Magistrate /Judge. I have quoted the above provisions because case subject to this appeal was filed on 25th June 2020. Although the cited provisions does not indicate expressly the requirement to record reasons or transfer of the case from one magistrate/chairman to another, I agree with the Appellant's Advocate that, it is necessary to record reasons for reassignment of cases and the same need to be communicated to the parties and be reflected in Court's records. The importance of assigning reasons for transfer of a case was stated clearly in the case of **M/S George Centre Limited vs. Attorney General, Civil Appeal No. 29 of 2016** (unreported) where the Court of Appeal, reasoning on the requirements of Order XVIII, Rule 10(1) of the Civil Procedure Code, Cap. 33, held that: -

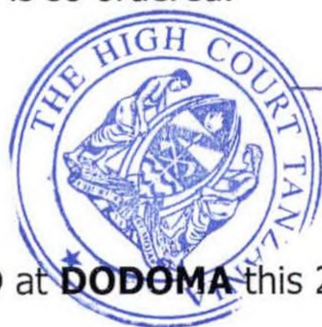
The general premise that can be gathered from the above provision is that, once the trial of case has begun before one judicial officer that officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge or Magistrate an obligation to put on record why he/she has to take up the case that is partly heard by another. There are number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing the one who sees and hears the witnesses is in best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is transparency justice may be composed.

In the appeal at hand, and as said earlier, the case was partly heard by Mr. O. Mbega who heard PW1, PW2 and PW3. Later on R.S.Mandari heard PW4, DW1, DW2, DW3 and DW4 and proceeded to compose a judgment. As per the decision of the Court of Appeal cited above, reasons for taking over are mostly relevant when a case is partly heard. In that regard, Mr. Mandari was duty bound to give reasons for taking over from another chairman. Failure to state reasons suggest that, the case file has never been reassigned

to any other chairman and that, the other chairman had no jurisdiction to adjudicate the case. This makes all proceedings that continued where Mr. Mbega ended to be nullity. Thus, the third ground of appeal is allowed. I find this ground suffices to dispose the appeal hence, no need to determine the remaining five grounds of appeal.

For that reason, I hereby invoke revisionary powers of this court to quash proceedings, judgment and any other orders issued by Mr. Mandari in Application No. 17 of 2020. I order that, the case be tried denovo before another Chairman starting where Mr. Mbega ended. Reasons have to be assigned by the succeeding chairman. Given the circumstances of this case, I award no costs.

It is so ordered.



Gerson J. Mdemu
JUDGE
02/06/2023

DATED at DODOMA this 2nd day of June, 2023.



Gerson J. Mdemu
JUDGE
02/06/2023