

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO.46 OF 2022

(C/f Land Application No.70 of 2017 in the District Land and Housing Tribunal for Karatu at Karatu.)

KARATU AWTU..... APPELLANT

(Administrator of the estate of the late Maria Awtu)

Vs

MATLE AWTU..... 1ST RESPONDENT

PANDY SIMON TSAKHARA

(the administrator of the estate of the late Juliana

Tsakhara).....2ND RESPONDENT

MARTIN LAWAY.....3RD RESPONDENT

RAPHAEL FAUSTIN MISLAY.....4TH RESPONDENT

JUDGMENT

Date of last order: 22-5-2023

Date of judgment: 19-6-2023

B.K.PHILLIP,J

Aggrieved by the judgment of the District Land and Housing Tribunal for Karatu District at Karatu (Henceforth "The Land Tribunal"), the appellant herein lodged this appeal to challenge it. The grounds of appeal are reproduced verbatim hereunder;

- (i) *That, the chairman of the tribunal having read the judgment on 17th March 2022 in favour of the appellant was biased in*

reversing the contents of the typed judgment and declared the respondents the lawful owners of the Suit land.

- (ii) That, the chairman of the tribunal erred in law in recording the proceedings imprecisely thereby arriving at an erroneous decision.*
- (iii) That, the chairman of the tribunal erred in law in failing to make an order for amendments of the pleadings after detecting that prior to the filing of the application the appellant was appointed as administrator of the estate of his late mother named Maria Awtu so as to make the record proper.*
- (iv) That the trial chairman having being satisfied that the letter of administration of the estate of the late Maria Awtu which was granted to the appellant vide Karatu Primary Court in Probate Cause No. 19 of 2014 reflecting that deceased died on 28th March 2011 erred in law and fact in holding that the deceased died in the year 1986.*
- (v) That the chairman of the tribunal erred in law and in fact in holding that the suit was time barred without taking due care that limitation of time runs from the date of appointment of the administrator of the deceased estate.*
- (vi) That the judgment of the tribunal is bad in law in that the opinion of the second assessor was not recorded hence proceedings and judgment is nullity.*
- (vii) That the tribunal erred in law and in fact in deciding the case in favour of the respondents against the weight of evidence tendered by both parties.*

- (viii) *That, the trial chairman of the tribunal having not recorded the evidence of some of the witness and examine their credibility erred in law and in fact in ousting its role in visiting the locus in quo in order to arrive at fair decision.*
- (ix) *That the judgment of the tribunal is bad in law for want of tribunal's stamp reflecting the date judgment was certified and signed so as to defend the time factor to the parties to exercise the right of appeal.*

Briefly stated, the background to this appeal is as follows; The appellant herein was the applicant at the Land Tribunal. He sued as administrator of the estate of late Maria Awtu .He instituted a case against the respondents claiming that 1st respondents (his step mother) snatched her mother's land measuring 6 acres and sold it to the 2nd ,3rd and 4th respondents. It was the appellant's case that his late father Awtu Haya had married to six wives and his mother was among those wives and before his death he had distributed his land to his wives and each wife got 6 acres of land. At one point his mother fell sick and she leased her farm to Mr. Mandoo Awtu, the administrator of the estate of appellant's father the late Awtu Haya. Later on the 1st respondent sold the said farm/land to 2nd 3rd and 4th respondents.

On the other hand, the 1st respondent's testimony was to the effect that he was given 18 acres of land by his late husband Awtu Haya. That out of those 18 acres he sold 6 acres to 2nd , 3rd and 4th respondents. That the appellant had already sold 6 acres which belonged to her mother to various people. DW2 testified that his father Awtu Haya distributed his land/farm to his wives before his demise. He was in agreement with the 1st respondent's testimony that the suit land belongs to her. The

appellant sold all the land that was given to his mother by their father. The testimonies of the 3rd and 4th respondents were similar. All of them testified that each one bought land from the 1st respondent measuring one (1) acre only. After full trial the Land Tribunal decided the case in favour of the respondents.

At the hearing of this appeal the learned advocate Gabriel F. Rwahira appeared for the appellant whereas learned advocate Samwel S. Welwel appeared for the 1st, 3rd and 4th respondents. The 2nd respondent did not enter appearance despite being served with the memorandum of appeal thus, the hearing of the appeal proceeded ex-parte against him. The appeal was heard by way of written submissions. Mr. Rwahira started his submission by pointing out that he decided to abandon the 5th, 8th and 9th grounds of the appeal.

Submitting for the 2nd and 6th grounds of appeal conjointly, Mr. Rwahira's arguments were to the effect that the proceedings indicate that there was an interpreter who conducted the interpretation /translation of the proceedings for the 1st respondent but the proceedings do not indicate that the interpreter was sworn as required by the law. To cement his arguments he referred this court to page 25 and 26 of the proceedings. He expressed his worry that since the proceedings do not indicate that the interpreter there was sworn then, possibly the advocate for the respondents assumed the double roles as an advocate and also as an interpreter. That is a very obvious irregularity in the eyes of the law, Mr. Rwahira's contended. To support his argument, he cited section 4 (b) of the Oath and Statutory Declarations Act Cap 34 R.E 2019. He insisted that the law is clear that

an interpreter must take oath as an interpreter before making any interpretation before the court of law. He was emphatic that in this case the interpreter if at all participated in the hearing of the case then, he did not take oath since the chairman has failed even to disclose the name of that interpreter. The proceedings do not show the name of the interpreter.

Moreover, Mr. Rwahira contended that when the applicant started to adduce evidence on 30th October 2018 and when issues were framed the contents of the application was not read over and explained to the respondents in contravention of Rule 12 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which makes it as mandatory requirement. He argued that the chairman continued to take evidence while the respondents did not understand the type of claims facing them.

Another irregularity pointed by Mr Rwahira is issue of assessors' opinion. Mr. Rwahira's contended that it is doubtful if the assessors fully and dully participated in the proceedings as law requires. He referred this court at page 37 of the typed proceedings and went on submitting that on the date of receiving the assessors' opinion only one assessor appears in the record named Mrs. R. Panga. He further argued that the proceedings shows that when defence case opened on 16th December 2020, Mrs. R. Panga and Mrs. Mushi who were assessors in the case had retired but the chairman continue with defence case and surprisingly the proceedings indicates that Mrs. Panga had a chance to asked questions to the witnesses as an assessor.

Mr. Rwahira further contended that when Hon Makombe took over the case file from Hon Ling'wentu he did not give reasons for taking over

the case file. Moreover Mr. Rwahira argued that Hon. Makombe continued with the hearing of the case with Mrs. R. Panga as an assessor and a new assessor namely Mr. J. Akonaay. He was of the view that Mr. J. Akonaay joined in the hearing of the case un-procedurally in the middle of the hearing of the case and no reasons were given as for the change of assessors. To bolster his argument, he cited the cases of **Sebastian Kudike vs Mamlaka ya Maji Safi na Maji Taka, Civil Appeal No. 274 of 2018** (unreported), **Bura Nade Vs Elikana Gadiye, Land Appeal No. 41 of 2020** and **Sikuzan Saidi Magambo and another Vs Mohamed Roble, Civil Appeal No. 197 of 2018**.

With regard to the 3rd and 4th grounds of appeal Mr. Rwahira faulted the chairman of the Land Tribunal for not ordering amendments of the pleadings after being aware that the applicant was an administrator of the estate of late Maria Awatu. He contended that the proceedings reveal that when the applicant was adducing evidence, he made it clear that he is administrator of the estate of the late Maria Awatu.

With regard to 1st and 7th grounds of appeal, Mr. Rwahira submitted that Land Tribunal did not weigh the evidence properly. The appellant's evidence was heavier than respondents' evidence but the chairman opted not to announce the appellant as a winner on the record while on the date of delivery of the judgment he pronounced him as a winner. Upon receipt of the copy of the judgment he was surprised to see the same indicates that he lost the case. Mr. Rwahira contended that though it is very hard to prove what he is alleging here because the court's record are assumed be true and correct, he thought it is

better to bring to the attention of this court that concern and leave it to the wisdom of this court to decide.

In rebuttal, with regard to the 2nd and 6th grounds of appeal Mr. Welwel submitted that issues/concerns on the interpreter and failure to read the application to the respondents before commencement of the trial are new grounds of appeal which cannot be argued without leave of this court. He contended that the same were not raised in the memorandum of appeal and do not relate to the 2nd and 6th grounds of appeal. Thus, he invited this court to disregard them.

In the alternative he contended that even if the above newly raised grounds of appeal were to be considered by this court still there is no way the same prejudiced the interests of either party. He was of the view that those new grounds of appeal are based on legal technicalities which this court should not entertain them for the interest of justice. He referred this court to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977, to cement his arguments.

With regard to the issue of assessors' participation in the hearing, Mr. welwel contended the proceedings reveal that there was no any procedural irregularity as far as assessors are concerned. He argued that the proceedings show that at the beginning the case was before Hon.Ling'wetu who sat with the aid of two assessors namely Mrs. Panga and Mrs. Mushi. On 16th December 2020 when the defence case opened Mrs. Panga as an assessor was presented and Mrs. Mushi had already retired from his position as an assessor. He further contended that it is not true that both assessors had retired. Only Mrs. Mushi had retired.To cement his arguments he referred this court to page 27 of the typed proceedings. He went on submitting that the fact that Mrs. Mushi

had retired was put into record and the chairman was justified in law to proceed with the remaining assessor. To support his position, he cited section 23 (3) of the Land Disputes Courts Act, Cap 216 R.E 2019.

Furthermore, Mr. Welwel contended that there has never been change of assessors. That in the Land Tribunal's coram dated 26th October 2021 and 22nd February 2021 the name of Mr.J. Akonaay appears as one of the assessors but he did not pose any question to any witnesses. It is only Mrs. Panga who posed questions to the witnesses. He added that the Land Tribunal normally deal with many cases on a single day with different set of assessors thus, the coram written by the secretaries/clerks in the case files might have some typing errors but, as it can be discerned from the court's records on the dates in question Mr. J. Akonaay never participated in the hearing of the case. It is only Mrs. Panga who gave her written opinion which forms part of the records and therefore the chairman had justification to make reference of Mrs Panga's opinion in his judgment. Mr. Welwel insisted that assessors were not changed as contended by Mr. Rwahira. He pointed out that it is evident from the proceedings that Mr.J. Akonaay did not participate in the hearing of the case. He did not ask any question to the witnesses and only Mrs. Panga was given chance to give her opinion. It is Mr. Welwel's contention that if Mr. J. Akonaay would have been requested to give his opinion on the case then, he would be considered that he participated in the hearing of the case. He was emphatic that Mr. J. Akonaay did ask even a single question to the witnesses and did not give opinion. Mr. Welwel further argued all cases cited by Mr. Rwahira are irrelevant in this case since in the case at hand none of

the mandatory legal requirements discussed in those cases were contravened.

Moreover, Mr. Welwel submitted that the first chairman Hon. Ling'wentu was transferred to another work station, Hon. M.R Makombe took over as the new chairman and he recorded the reasons for the change hands of the case file. He referred this court to page 31 of the typed proceedings, to cement his arguments.

With regard to the 3rd and 4th grounds of appeal, Mr. Welwel submitted that the appellant wrongly blamed the chairman of the Land Tribunal for failure to order the amendment of pleadings in order to indicate that the appellant was suing in his capacity as the administrator of the estate of the late Maria Awtu. He contended that it is not correct to blame the chairman of the Land Tribunal rather it is the appellant himself who has to bear the blames for failure to move the Land Tribunal to grant an order for amendment of his application. Mr. Welwel further submitted that the appellant had no *locus standi* to file this appeal in his capacity as the administrator of the estate of late Maria Awtu since the judgment and decree against which the appeal is preferred bears the name of Karatu Awtu and therefore it is only Karatu Awtu in his personal capacity is allowed in law to file an appeal against the decision of the Land Tribunal. He invited this court to rule out that this appeal is incompetent for being filed by wrong party.

With regard to the 1st and 7th grounds of appeal, Mr. Welwel submitted that there was strong evidence on the part of the respondents to warrant them to be declared as the lawful owners of the disputed land compared to the weak evidence of the appellant. That the appellant had

onus of proof of his case before Land Tribunal but he failed to do so. He further added that even in this appeal Mr. Rwahira did not demonstrate the strength of the appellant's case.

In conclusion of his submission, Mr. Welwel submitted that all points discussed by Mr. Rwahira were based on technicalities only and it is now time for our court to look into justice of the matter and do away with technicalities as provided under Article 107A (2) (e) of the Constitution of United Republic of Tanzania of 1977 because neither party in this case was affected by the technicalities argued in court by Mr. Rwahira.

In rejoinder, Mr. Rwahira maintained that the issues on procedural irregularities he pointed out in his submission in chief are fatal. He contended that Mr. Welwel noted the said defect/irregularities but he tried to hide what cannot be hidden. He insisted that he has not submitted on new grounds of appeal. The two issues pin pointed out by Mr. Welwel as new grounds of appeal are not new grounds at all and if this court take into consideration the same, will come to realize that the whole proceedings of the Land Tribunal is a nullity.

Moreover, Mr. Rwahira insisted that Mr. Akonaay participated in the hearing of the case. To cement his arguments he referred this court to page 34 of the proceedings. He contended that participation in a case starts from appearance. Moreover, he argued that Mr. Akonaay heard the evidence of DW4 and DW5 and chairman of Land Tribunal asked him if he had any question but he did not have any question. Mr. Rwahira refuted Mr. Welwel's contention that the name of Mr. Akonaay appears in the coram on the dates in question due to typing errors that might have been committed by Tribunal clerk/secretary. He requested

this court to check the handwritten proceedings. It is Mr. Rwahira's contention that if the said assessor did not participate in the proceedings why did he appear at hearing of the case twice on different dates and what was he doing at the Land Tribunal during the hearing. Furthermore, he added that this court is like a second trial court it can step into the shoes of the Land Tribunal and re-evaluate what transpired before the Land Tribunal and determine if proper procedure was followed during the hearing of the case. He prayed this appeal to be allowed and the judgment of Land Tribunal be set aside with costs. I have carefully analyzed the rival arguments made by the learned advocates as well as perused the court's record. Now, it is time to determine the merit of this appeal.

To start with, let say outright that I am in agreement with Mr. Welwel the two issues raised by Mr. Rwahira, to wit; that the interpreter was not sworn and his name is not known, and that the contents of the applications were not read over and explained to the respondents at the beginning of the hearing are new issues. The same cannot be blended in either the 2nd or 6th ground of appeal. Thus will not dealt with them because the law is very clear that parties are supposed to submit on the grounds of appeal filed in court and can only submit on new grounds of appeal upon seeking and obtaining leave of the court to do so. In this case Mr. Rwahira did not obtain the leave of this court to submit on the new grounds of appeal aforesaid.

With regard to the 2nd and 6th grounds of appeal, upon perusing the handwritten proceedings I noted that it is only Mrs. Mushi who had retired. Mrs. Ipanga was still serving as an assessor and is the only one who continued participating in the hearing of the case. Thus, it is the

finding of this court that Mr. Rwahira's contention that both Mrs. Panga and Mrs. Mushi had retired and that Mrs Panga continued to participate in the hearing of the case while she was retired has no merit. Regarding Mr.Rwahira's contention that there was introduction of a new assessor in the case called Mr.J. Akonaay, upon perusing the court's record I noted that the name J. Akonaay appears in the coram dated 7th December 2021 and 22nd February 2022.However, as correctly submitted by Mr. Welwel the court's records show that he did not participate in the proceedings, in the sense that he neither ask questions to the witness nor gave opinion at the end of the trial. Under the circumstances , it is obvious that no party in this case was prejudiced by his name being in the coram and /or appearance at the hearing date , and I am of settled opinion that there was no miscarriage of justice in anyway.

In addition to the above, the court records reveal that the reason for change of hands of the case file from Hon. Ling'wentu to Hon. Makombe was explained and recorded by Hon. Makombe on 26th October 2021, to wit; that Hon. Ling'wetu was transferred to another place.

With regard to the 3rd and 4th grounds of appeal, it is true that the appellant's testimony reveal that he was suing as administrator of his mother's estate though he filed the case in his person, that is without indicating at the title of the case that he was suing as the administrator of the deceased estate. With due respect to Mr. Rwahira, the chairman of the Land Tribunal cannot be faulted for not issuing on order for amendment of the application because at the first place , it is the applicant who was supposed to file his application in his capacity as the administrator of the deceased estate. However, the position of the law is

that such an omission is not fatal. It cannot vitiate the proceedings. Similarly, the fact the appellant has lodged this appeal in his capacity as the administrator of the deceased estate is not fatal since it is not in dispute that he is the administrator of the deceased estate as revealed in the proceedings.

With regard to the 1st and 7th grounds of appeal, I am in agreement with Mr. Welwel that the evidence adduced by the respondents was heavier than the appellant's evidence. The appellant failed to prove his case to the standard required by the law. It is on the record that the evidence of DW1 was corroborated with the evidence of DW2 who testified that appellant had already sold his mother's land so as to obtain money for treatment of her mother. In addition, DW4 testified that he leased the disputed land/farm to the 1st respondent from 2000 to 2012. Exhibits D1 and D2 also supported DW1's testimony that she has been in possession of the disputed land for quite a long time sold the same to the 3rd and 4th respondents. On the hand, the appellant failed to prove that the disputed land/ farm was owned by his mother. He alleged that there was a time his mother was sick thus, he leased the disputed land to Mr. Amandoo Awtu so as to obtain money for her treatment. However , his allegation aforesaid was not supported by his witnesses. All in all as correctly submitted by Mr. Welwel even Mr. Rwahira failed to show the strength of the appellant's case.

In the upshot this appeal is dismissed with costs for lack of merit.



Dated this 19th day of June 2023

B.K.PHILLIP

JUDGE