

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

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 12 OF 2023**

*(C/F Application No. 264 of 2016 at the District Land and Housing Tribunal of Arusha at Arusha)*

**HAMISI ATHUMANI.....1<sup>ST</sup> APPELLANT**

**SHABANI ATHUMANI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ATHUMANI IDD (the Administrator of the Estate of**

**the late Idd Athumani..... RESPONDENT**

**JUDGEMENT**

30/10/2023 & 10/11/2023

**KINYAKA, J.:**

The Respondent, the administrator of the estate of the late Athumani Idd, sued the Appellants at the District Land and Housing Tribunal of Arusha (the District Tribunal) for unlawful occupation of the disputed land. In its decision pronounced on 26/01/2023, the District Tribunal granted the application and declared the disputed land as belonging to the late Idd Athumani. Consequently, the District Tribunal ordered the Appellants to vacate the disputed land.

On appeal before the Court, the Appellants preferred four grounds of appeal, namely: -

1. That the trial Tribunal erred on point of law in giving its decision without considering that the disputed land does not fall within the estate of the late Idd Athumani;
2. That the trial Tribunal erred on points of law and fact to decide in favour of the Respondent and against the Appellant while the Respondent had failed to prove the ownership of the disputed land;
3. That the trial Tribunal erred in point of law and fact for failure to properly evaluate the evidence adduced before the Tribunal and in turn led to erroneous decision against the Appellants; and
4. That the trial Tribunal grossly erred on point of law in delivering its decision without giving reasons as to why the Tribunal departed from the assessors' firm opinion.

At the hearing, the Appellants were represented by Advocate Mariam Saad and the Respondent was represented by Advocate Fredrick Lucas.

Submitting on the first ground of appeal, Ms. Saad stated that the Respondent, PW1, testified that the disputed land property belonged to Tanganyika Flowers. She contended that the said fact was also testified by DW2 that the properties are among the 80 acres within the land property of the investor. According to her, the Respondent should have joined Tanganyika Flowers. The Counsel stated that it was wrong for the Respondent to include the disputed land among the estate of the late Idd Athumani while the land belongs to Tanganyika Flowers. She concluded that the District Tribunal erred to declare the late Idd Athumani as the lawful owner while it is very clear that one cannot give land he does not own.

Counsel submitted in support of the second ground of appeal that the Respondent's testimony that the late Idd Athumani bought one acre and a quarter, and was given two acres by his employer of Arusha Coffee Estate, lack documentary evidence as required under section 115 of the Evidence Act Cap. 6 R.E. 2019, which imposes a duty of proof to a person alleging a certain fact. She stated that the allegation of transfer or purchase of the registered land alleged to have been given to his father by Arusha Coffee Estate, does not conform to section 64 of the Land Act Cap. 113 R.E. 2019 which require a contract of disposition of land to be in writing. Counsel

submitted that the Respondent failed to prove ownership of land by the late Idd Athumani citing the decision of the Court of Appeal in the case of **John Martin Ndunguru v. Mustapha Athumani Nyoni & Another, Civil Appeal No. 17 of 2021** on page 12.

In respect of the third ground, Counsel submitted that the District Tribunal failed to evaluate evidence including the evidence of the Respondent that the disputed land belongs to Arusha Coffee Estate. The Appellant's testimony was that before his death, the late Idd Athumani moved to Mbuguni village leaving behind the Appellants who also worked for Tanganyika Flowers, the successor of Arusha Coffee Estate.

The Counsel submitted further that there are variance between the Respondent's pleadings and testimony whereby, in his land application, he claimed one acre and a half while in his testimony he claimed one acre and a quarter. Counsel cited the case of **Barclays Bank Tanzania Limited v. Jacob Muro, Civil Appeal No. 357 of 2019** where on page 11 of the decision, the Court of Appeal held that parties are bound by their own pleadings, and in cases of the difference between pleadings and testimony, the court is bound to ignore both.

On the fourth ground, Counsel faults the decision of the District Tribunal for not stating reasons for departing from the opinion of the assessor's contrary to section 24 of the Land Dispute Courts Act Cap. 216 R.E. 2019 (herein after, the 'LDCA'). The Counsel cited the decision of the High Court in **Eng. Justin D. Rweyemamu v. James Rugakingira and 3 Others, Land Case Appeal No. 61 of 2021** where it was held on page 7 that failure by the Chairperson to give reasons for departing from the opinion of the assessors is an irregularity which vitiates the proceedings. The Counsel prayed for the appeal to be allowed with costs.

In his reply to the first ground, the Respondent submitted that the testimony of the Respondent was that the disputed land was previously owned by Tanganyika Flowers. He submitted that the evidence is supported by the testimony of DW2, who testified how the late Idd Athumani got the land from his employer measuring two acres, and another from Mzee Mangi measuring one and a quarter acre. He contended that there is no evidence that the Respondent admitted the disputed land to belong to Tanganyika Flowers. According to him, there is no evidence to prove that there exists a title evidencing that the land property belongs to Tanganyika Flowers. He submitted that if the Appellants were aware of another owner of the disputed

land, they ought to have joined him in the suit as a necessary party. Counsel contended that the Respondent was not duty bound to join Tanganyika Flowers as non-joinder of a party is not fatal.

Attacking the second ground, Counsel for the Respondent submitted that the evidence adduced by the Respondent and PW2 before the District Tribunal was direct that PW2 was a colleague and co-worker of the late Idd Athumani from 1972 to 1982, and therefore knowledgeable of the history of the disputed land. He submitted that section 64 of the Land Act Cap. 113 R.E. 2019 (herein after the 'Land Act'), does not apply to the present dispute as the provision relate to mortgage proceedings. He added that in order for section 64 of the Land Act to apply, the land must possess a certificate of title to prove transfer. He distinguished the case of **John Martin Ndunguru (supra)** as the dispute in that case relate to a land that had a certificate of title.

Regarding the evidence on purchase of the two acres from Mzee Mangi, Counsel stated that the evidence of PW2, DW2, and DW3 established that, the late Idd Athumani bought the disputed land when he was an employee of Arusha Coffee Estate. He added that PW2, DW2, and DW3 testified that, the late Idd Athumani used to live in Maksoro village which is within 80 acres

given by Arusha Coffee Estate to the workers in which the disputed land is located. There is no evidence that there is a certificate of title over the ownership of 80 acres.

In opposing the third ground, the Counsel reiterated that the Respondent did not admit that the disputed land belongs to Tanganyika Flowers but belonged to Tanganyika Flowers previously. According to him, Tanganyika Flowers cannot own 80 acres while the same 80 acres was given to the workers by Arusha Coffee Estate. Counsel was of the view that a mere transfer of the late Idd Athumani from Mkasoro village to Mbuguni village did not prevent him from owning his land in Maksoro village.

Counsel admitted that parties are bound by their own pleadings but disagreed that the difference between facts stated in the pleadings and those in the testimony have an effect of being ignored by the Court. He stated that the effect of the decision in **Barclays Bank Tanzania Limited (supra)** is to ignore evidence not pleading. In respect of the fourth ground of appeal, Counsel submitted that although he agrees with the dictates of section 24 of the LDCA, but in present dispute, the Chairperson partly departed from the opinion of the assessors. The Counsel contended that the case of **Eng.**

**Justin D. Rweyemamu (supra)** is distinguishable as in the present case, the Chairperson did not state what she disagrees because the opinion of the assessors were read over to the parties. Counsel prayed for dismissal of the appeal with costs.

In her rejoinder, Counsel for the Appellant faults the submissions of the Respondent for misdirecting the Court. She submitted that the testimony of PW1 found on page 15 of the proceedings is to the effect that the disputed land belongs to Tanganyika Flowers. She submitted that since the Respondent knew the owners of the disputed land, he ought to have joined Tanganyika Flowers as a necessary party.

Regarding the second ground of appeal, Counsel for the Appellant submitted that the testimony of DW3 on page 39 of the proceedings reveal that the 80 acres have a lease or certificate of title of the investor, Arusha Coffee Estate. Counsel reiterated that section 64 of the Land Act not only apply to mortgage, but also to the alleged transfer of the disputed land property to the late Idd Athumani. She submitted that it was incorrect for the Respondent to distinguish the case of **John Martin Ndunguru (supra)** based on lack of certificate of title. According to her, section 64(1) of the



Land Act require every disposition of land should be in writing, not only those with certificate of title.

Counsel stated further that if the late Idd Athumani got the land in her capacity as a worker, the Appellants were also workers in the disputed land and are entitled to own the disputed land. Counsel stated that the case of **Barclays Bank Tanzania Limited (supra)** is not distinguishable with present dispute. She submitted that, it is held on pages 11 and 12 of the decision that, if there are contradictions between pleadings and testimony, the Court is bound to ignore facts both in the pleadings and testimony.

Counsel reiterated her submissions on the fourth ground that, section 24 of the LDCA require a Chairperson to give reasons if he departs from the opinion of the assessors. According to her, the provision does not state that a chairperson may depart partly or fully. Counsel concluded that the fact that the opinion was read to the parties, does not waive the requirement under section 24 of LDCA. She prayed for the Appeal to be allowed with costs.

Having heard the submissions of the parties, the duty of the Court is to determine whether the appeal is meritorious. In determining the issue, I am

persuaded to determine the fourth ground of appeal first, as it touches on the legality of the proceedings and the resultant decision appealed against. The outcome of the fourth ground, will determine the fate of the first, second and third grounds of appeal.

In the fourth ground of appeal, the Appellants attack the decision of the District Tribunal for the Chairperson's failure to give reasons for departure from the opinion of the assessors. The Respondent contends that the Chairperson partly departed from the opinion of the assessors, and as long as the opinions of the assessors were read over to the parties, there was no need to give reasons for departure.

Under section 23(2) LDCA, the District Tribunal is duly constituted when held by a Chairperson and two assessors who shall be required to give their opinion before the Chairperson reaches a judgment. Further, section 24 of the LDCA require that, the Chairperson should give reasons for differing with opinions of the assessors in the judgement. Section 24 of the LDCA provides:-

*'In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that*

*the Chairman shall in the judgment give reasons for differing with such opinion.'*

I find it crucial to reproduce the relevant excerpt of the decision of the District Tribunal complained in the fourth ground of appeal:

*'Wakati wa kusikiliza shauri hili, nilikaa na waungwana wazee wawili wa baraza ambao ni Mzee A. Lekasio na Mrs. W. Irafay. Wazee hao wametoa maoni yao yanayofanana katika shauri hili kwamba, kwa vile shamba bado linasubiri mgao wa serikali, basi mleta maombi angepokea sehemu ya eneo alilopewa na baba zake wadogo; halafu wakati wa mgao wa serikali adai kupewa eneo la baba yake. Bibi Irafay aliongeza kwamba, marehemu Idd Athumani alizikwa kwenye eneo la Kijiji cha Maksoro, hivyo, mwanae Athumani Idd ana haki ya kupewa eneo la baba yake hivyo wadaiwa wasimdhulumu mtoto wa marehemu.*

***Kutokana na majibu katika kiini cha 1 na 2 katika shauri hili, nitatofautiana kidogo na maoni hayo ya wazee wa baraza; japo nakubaliana kwa kiasi na maoni ya Bibi Irafay kwamba mleta maombi ana haki ya kukabidhiwa eneo la baba yake. Kwa sababu hiyo, maombi haya yanakubaliwa; baraza hili linatamka kwamba, maeneo/eneo lenye mgogoro ni sehemu ya mali za marehemu Idd Athumani, hivyo yanapaswa kukabidhiwa kwa mleta maombi kwa usimamizi. Wajibu maombi***

*wanaamriwa kuachia maeneo hayo na kuyakabidhi kwa mleta maombi bila masharti yoyote. Vilevile wajibu maombi wanaamriwa kulipa gharama za shauri hili.*’ [Emphasis added]

It is clear from the above quoted paragraphs that the trial Chairperson departed from the opinion of the assessors. It is also clear that the departure was made by the Chairperson without giving reasons for such ‘a little’ or ‘partly’ departure. It was required of the Chairperson to state the reason as to what extent and on what matters of the opinion of the assessors he is departing. The Chairperson’s failure to give reasons for differing with the opinions of the assessors, renders the proceedings and the resultant judgement a nullity. I am fortified by the decision of this Court in **Eng. Justin D. Rweyemanu (supra)** where it was held in the last paragraph of page 7 through to 8 that: -

*‘..... The chairman seemed to depart from the assessors’ opinions which are nowhere to be found and he does not give reasons for his departure. These two irregularities vitiate the proceedings of the trial court. I hereby quash the proceedings and set aside the decision of the Tribunal.’*

I am not convinced with the argument of the Counsel for the Respondent that a partial departure without reason is sufficient, as long as the opinions

were read over to the parties. Section 24 of the LDCA does not encompass such exception. The Chairperson should have complied with the statutory requirement to state, in brief reasons for his differences with the opinion of the assessors for the parties to understand. I therefore allow the fourth ground of appeal.

In view of my finding that non-compliance of section 24 of the LDCA vitiates the proceedings of the District Tribunal, I hereby quash the proceedings and set aside the decision of the District Tribunal. I further order retrial of the suit before another Chairperson and new set of assessors.

Having nullified the proceedings and resultant judgement of District Tribunal, I find no necessity of determining the remaining grounds of appeal. This being a dispute involving family members, I make no order as to costs.

It is so ordered.

Right of Appeal fully explained.

**DATED** at **ARUSHA** this 10<sup>th</sup> of November 2023.



*H. A. Kinyaka*  
**H. A. KINYAKA**

**JUDGE**