

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 49 OF 2022

*(Arising from Land Application No. 26 of 2018, Before the District Land and
Housing Tribunal for Morogoro, at Morogoro)*

SENORINA LUGOMELA APPELLANT

VERSUS

DORICA ELVINA SULEMAN RESPONDENT

JUDGMENT

25th August, 2023

CHABA, J.

Dorica Elvina Suleiman, the respondent herein, successfully sued Seniorina Lugomela, the appellant herein, before the District Land and Housing Tribunal for Morogoro, at Morogoro (hereinafter to be referred to as the DLHT) in Land Application No. 26 of 2018 for trespassing into the disputed land estimated to be measuring ten (10) acres situated at Mawasiliano area, Mkundi Ward, within Morogoro Municipality.

Discontented by the decision of the DLHT delivered on the 28th March, 2022 that, among many other things declared her as a trespasser to the land in dispute, on 6th May, 2022, the appellant lodged the present appeal based on the following grounds of appeal: -



1. That, the trial Tribunal erred in law and fact to give judgment in favour of the respondent who did not prove her case on the standard required by the law.
2. That, the trial Tribunal erred in law and fact for declaring the respondent as the owner of the disputed land regardless of the contradictory evidence of the respondent and her witnesses.
3. That, the trial Tribunal erred in law and in fact for failure to analyse evidence properly hence reaching an erroneous decision.
4. That, the trial Tribunal erred in law and fact by deciding in favour of the respondent without considering that, the appellant purchased the disputed land in 2009 prior to the respondent who purchased the same in 2012.

When the matter was called on for hearing, Ms. Neema Ndayanse, the learned Counsel who appeared for the appellant, drew and filed her written submission in support of the appeal on 3th January, 2023, whilst, Mr. Christopher Mgalla, entered appearance for the respondent and also drew and filed reply to the petition of appeal on 18th January, 2023. The appellant's Counsel filed the rejoinder on 26th January, 2023. With the parties' consensus, this appeal was argued and disposed of by way of written submissions. Both parties adhered to the Court's scheduled orders.

I sincerely, thank the learned Counsels from both sides for their efforts in drafting their brilliant submissions. However, for reasons which will be apparent

in due course, I will not dwell on considering the grounds of appeal and the relevant submissions. I say so because, being the first appellate Court, I am mindful of my duty to re-evaluate and put into scrutiny the evidence taken and recorded at the trial Court and afterwards come up with my own finding. [See: **Siza Patrice Vs. Republic**, Criminal Appeal No. 19 of 2010; **Alex Kapinga Vs. Republic**, Criminal Appeal No. 252 of 2005 (CAT); **Napambano Michael @ Mayanga Vs. Republic**, Criminal Appeal No. 268 of 2015 (All unreported), just to mention a few.

I had ample time to read and peruse the records of the trial Tribunal in the course of exercising my duty as hinted above, and noted a fundamental irregularity in the proceedings of the DLHT which in my view, and for the interest of justice, needs to be redressed by this Court. The spotted irregularity concerns with the changes of Hon. Chairpersons who presided over the matter subject of this appeal without assigning any reason(s) for such changes thereof. It came into my attention that, when the dispute was filed before the DLHT and scheduled for mention for the first time on 14th March, 2018 it was placed before Hon. P. J. Makwandi, who presided over the case, and thereby on 17th July, 2018, he framed the issues for determination and recorded in full the evidence of AW1, (Dorica Elvina, the applicant thereon).

It is on record that, the hearing of the matter was not done, until on 27th November, 2018, when the same was tabled before Hon. Mbega (Chairman), who informed the parties that, the presiding Chairman (Hon. Makwandi) was

out of contract, and hence they were waiting for the renewal of his contract. The records reveal further that, the matter continued to be adjourned on divers' dates on 1st April, 2019, and 28th May, 2019, but this time around, the reason assigned shows that, the presiding Chairman was absent with no further explanation, as to why he was absent. It was thus, not made clear as to whether the absenteeism was still caused by the renewal of the said contract (contractual factor) or for some other reasons.

On 17th July, 2019, miraculously, Hon. Khasimu emerged and took over the matter and without assigning any reasons thereof, she proceeded to preside over the matter until the applicant's case was closed. On 16th June, 2021 she continued to hear the matter and accordingly recorded the evidence of DW1, DW2 and DW3 respectively. More-over, it is on record that, on 17th November, 2021 when the matter was set or scheduled for hearing of other defence witnesses, Hon. Mnyukwa, Esq. Chairperson took over the matter and put on record that, with the consent of the parties, the case has been transferred to him. However, as usual, he did not disclose as to what triggered such a consent from the parties. For ease of reference, an extract of what transpired before the DLHT for Morogoro, at Morogoro on the material date is reproduced hereunder: -

17/11/2012

AKIDI: R.D. MNYUKWA.

WAJUMBE:



(1) ...

(2) ...

MUOMBAJI: MR. Marwa Kitingwa, Applicant, yupo.

M/MAOMBI: Yupo, Ms. Neema Ndayanse.

KARANI; V. CHANAI.

Mr. Kitingwa

Mara ya mwisho wajibu maombi walikuja na mashahidi, tupo tayari

Sgd

17/11/2021

Ms. Neema

Tupo tayari.

Sgd

17/11/2021

Baraza:

Shauri lilikuwa mbele ya Mhe. Khasimu limehamia kwangu kwa ajili ya kusikiliza na kutoa uamuzi kwa shauri la zamani kwa ridhaa ya wadaawa.

Sgd

17/11/2021

Mr. Kitingwa

Tumeridhia uendeleo na shauri la zamani.

Sgd

17/11/2021

Ms. Neema Ndayanse.

Hatuna pingamizi.

Sgd

17/11/2021

As demonstrated herein above, it apparent that, from there, Hon. Makwandi continued to take and record as well the evidence of DW4 and DW5 and delivered his decision on 28th March, 2022. For the purpose of understanding, I wish to put it clear that, the law under Order XVIII, Rule 10 (1) of the Civil Procedure Code, [CAP. 33 R. E, 2019] (the CPC), does not bar the case to change hands from one adjudicator to another. The provision reads thus: -

"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 direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

The above provision was well interpreted by the Court of Appeal of Tanzania (CAT) in the case of **Kinondoni Municipal Council Vs. Q Consult Limited**, Civil Appeal No. 70 of 2016 which quoted with approval the case of **M/S Georges Centre Limited Vs. The Honourable Attorney General & Another**, Civil Appeal No. 29 of 2016 (unreported), wherein it held: -

"The general premise that can be gathered from the above provision is that, once the trial of a case has begun before one judicial officer that judicial 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 a case that is party heard by another**". [Emphasis added].

From the above observation on what exactly transpired in the proceedings of the trial tribunal, without further ado and mincing words, legality of the whole proceedings and the subsequent decision therein no doubt that, has been affected as the omission on changing the adjudicators of the matter without assigning reasons thereof has left a lot to be desired, as it has been held, a times without number by this Court and our Apex Court that, the irregularity is fatal and contravenes with the requirement of the law. For instance, in the case of **Mariam Samburo Vs. Masoud Mohamed Joshi & Others (Civil Appeal 109 of 2016) [2019] TZCA 541 (11 September 2019)** (Extracted from www.tanzlii.org), the Court observed that:

"the rationale behind existence of Order XVIII, Rule 10 (1) of the CPC is the effect that, recording of reasons for taking over the trial of the suit by a judge is a mandatory requirement as it promotes accountability on the part of

successor judge. This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtenga, cannot be cured by overriding objective principal suggested by Dr. Lamwai".

The Court went on observing further at page 10 that: -

"Therefore, in the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reason for succession advanced on record of appeal. We think that the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure to by the said successor judge to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity."

Similarly, this Court when was confronted with akin situation in the case of **Daniel Mugittu and Another Vs. Lonagro Tanzania Limited (Labour Revision No. 684) [2020] TZHCLD 399 (2 October 2020)**, [Extracted from Tanzlii.org], held inter-alia that:

"It is trite law that where a case has commenced before one judicial officer and the witness have testified, it can be transferred to another judicial officer after providing the reason for the transfer. **The reason for the transfer will help in not compromising the transparency of judicial proceedings.**" [Emphasis Added].

Applying the above authorities to the matter under consideration, it goes therefore without saying that, the taking over of the matter from Hon. Makwandi to Hon. Khasimu was done contrary to the laid down procedures. I am aware as observed earlier on, that on 27th November, 2018, Hon. Mbega, informed the parties that, the presiding Chairman (Hon. Makwandi) was out of contract, and at the material time they were waiting for the renewal of the same. I am further aware that, the matter continued to be adjourned on 1st April, 2019, and 28th May, 2019, for reason that, the presiding Chairman was absent with no further explanation or assigning the reasons for absenteeism, until on 17th July, 2019 when the same was tabled before Hon. Khasimu who continued with the hearing of the matter without assigning reasons for such a take-over.

On my part, it cannot be said that, the reason given by Hon. Mbega on 27th November, 2018 as to why Hon. Makwandi was not continuing with the matter was enough to confer Hon. Khasimu with the requisite jurisdiction to

handle the matter, as a considerable period of time (more than 6 months) had lapsed from the date he informed the parties of the the reason to the date Hon. Khasimu emerged and proceeded to handle the matter. More-over, Hon. Khamis was duty bound to let the parties know, why she was taking over the matter which was previously assigned to another Chairperson.

At this point, and for the purpose of clarity, I would also wish to expound on the consent of the parties before Hon. Mnyukwa as to the continuation of the matter that was previously handled by Hon. Khasimu. In my view, the fact that on 17th November, 2021 the parties consented the transfer of the case from Hon. Khasimu to Hon. Mnyukwa is not enough to legalize the omission of the Hon. Chairperson to state the reasons for handling the matter which was partly handled by his fellow. In my settled opinion, as a matter of practice, the consent of the parties as to whether they agreed with both a transfer and proceedings with a case from where the previously presiding Chairman ended, was supposed to be preceded by the reason(s) for such a transfer of the matter to him for the purpose of transparency of judicial proceedings. In my considered view, the spotted irregularity goes to the root of the matter and it renders the entire proceedings of the successor Chairpersons and the ruling, a nullity on the ground that the successor Chairpersons (Hon. Khasimu and Hon. Mnyukwa) failed to assign reasons for taking over the trial of the matter, hence lacked the requisite jurisdiction to try the same.

From the foregoing reasons, and owing to the above guidance extracted from the authorities cited herein which I fully subscribe to, I am constrained to invoke the revisionary powers vested to this Court pursuant to the provision of section 43 (1) (b) of the Land Disputes Courts Act [CAP. 216 R. E, 2019], and nullify the proceedings of the District Land and Housing Tribunal for Morogoro in Land Application No. 26 of 2018, taken and recorded from 17th day of July, 2019 where the successor Chairperson (Hon. Khamis) took over the handling of the case and quash the judgment and decree thereof.

Consequently, I order and direct that the case file be remitted back to the trial Tribunal before another Chairperson to expeditiously proceed with the determination of the matter from where the predecessor, Hon. Makwandi ended. In the circumstance, I make no order as to costs, as the error emanated from the trial Tribunal itself. Order accordingly.

DATED at MOROGORO this 25th day of August, 2023.




M. J. Chaba

JUDGE

25/08/2023

Court:

Judgment delivered this 25th August, 2023, in the presence of Ms. Alicia Rugakingira, Learned Advocate for Respondent and in the absence of the Appellant.



A. W. MMBANDO

DEPUTY REGISTRAR

25/08/2023

Court:

Right of Appeal to parties fully explained.



A. W. MMBANDO

DEPUTY REGISTRAR

25/08/2023