

**THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPEAL NO. 127 OF 2015

*(From the decision of the District Land and Housing Tribunal of Kinondoni in
Land Case Appeal No. 156 of 2013 and Original Ward Tribunal of
Mbezi Ward in Application No. 38 of 2013)*

JORAM KAALE APPELLANT
VERSUS
SELEMANI ALLY SELEMANI RESPONDENT

Date of Last Order: 27/02/2018

Date of Judgment: 16/03/2018

JUDGMENT

Makuru, J.

This appeal traces its origin in the Ward Tribunal of Mbezi in Application No. 38 of 2013 whereby the Respondent, Selemani Ally Selemani, successfully instituted a complaint against the Appellant Joram Kaale. The cause of action arose from trespass to land measuring 14 x14 paces. Aggrieved by the decision of the Ward Tribunal the Appellant appealed to the District Land and Housing Tribunal of Kinondoni where he lost again. This is now a second appeal whereby he preferred the following grounds:

1. The Hon. Chairman did not write a reasoned judgment at all.
2. The Hon. Chairman did not consider allegations of misconduct by the Ward Tribunal.

3. The Hon. Chairman did not consider the sale agreement which was between Rahel F. Kisanga and Bibi Veiller Saranje and not between the Appellant and another party; this failure denied the rightful owner of the disputed land the right to be heard.
4. The Hon. Chairman did not consider the grounds of appeal as presented but made a disjointed analysis that ended in a messed up judgment.
5. The Hon. Chairman did not sit with assessors when hearing the Appeal and if so, did not take their opinions. This was in violation of ss 23 (2), 24 and 34 (1) of the Land Disputes Courts Act, 2002.

When the matter was called on for hearing, Mr. Teemba learned counsel appeared for the Appellant while Mr. Jamhuri Johnson learned counsel represented the Respondent.

Starting with the 5th ground of appeal Mr. Teemba argued that, during hearing of the appeal from the Ward Tribunal the Chairman did not sit with assessors. Thus, the decision of the District Land and Housing Tribunal did not comply with the provisions of section 34 (1) of the Land Disputes Courts Act.

On grounds 1, 2, 3 and 4 the learned counsel submitted that, there were issues which were raised but the first Appellate Tribunal did not consider. Such issues, according to him, include the sale agreement between one Rachel F. Kisanga and Bibi Veiller Saranje which was produced and tendered by the Appellant. It is thus, the learned counsel's contention that

it was wrong for the lower Tribunals to accept and rely on the document involving a person who was not a party to this case.

In his further submission Mr. Teemba stated that, the Chairman did not consider seriously the sale agreement and grounds of appeal. Thus, she ended up in an unfair judgment. It was also submitted that the Appellant was not afforded an opportunity to ask questions to the witnesses during the visit to the *locus in quo*. It is the learned counsel's argument that, the Appellate Tribunal violated the provisions of section 23 (2), 24 and 34 (1) of Land Disputes Courts Act. He prayed that the appeal be allowed with costs.

In reply to the fifth ground of appeal Mr. Johnson submitted that, the matter was disposed of by written submissions. He further argued that the Chairman is supposed to take into account the opinion of assessors but he is not bound by it, except that he shall give reasons for differing with such opinion. According to him, the Chairman only records the opinion of assessors if he differs with them.

On the sale agreement it is contended that, raising this issue at this stage is an afterthought as it was never raised at the first Appellate Tribunal. Mr. Johnson argued further that, the said document was admitted and both parties were given an opportunity to go through it.

Regarding visitation of the *locus in quo* it is contended that, it is an afterthought because it was not raised at the first Appellate Tribunal.

In rejoinder Mr. Teemba reiterated his submission in chief and insisted that, the District Land and Housing Tribunal was not properly constituted in the hearing of the appeal as there is no indication that the assessors were present on the day it was agreed for the matter to be disposed of by way of written submissions. It was also stated that the opinion of assessor has to be considered by the Chairman.

In determining this appeal I will deal with the grounds of appeal as presented by the learned counsel for both parties. Starting with the fifth ground of appeal, that the Chairman violated the provisions of sections 23 (2), 24 and 34 (1) of the Land Disputes Courts Act, the provisions require the Chairman to sit with two assessors. The assessors shall give their opinion thereof. However section 24 of the same Act requires the Chairman to take into account the said opinion but shall not be bound by it, but if he differs he shall give reasons for so differing.

In the instant case, the appeal before the District Land and Housing Tribunal was heard by way of written submissions. Upon perusal of the proceedings of the first Appellate Tribunal, assessors have never entered appearance since the commencement of the trial. However, the record shows that the assessors gave their opinion in writing to the effect that the appeal should be upheld. Without elaboration, they further stated that: "Any interested party may open a fresh case with us." The District Land and Housing Tribunal dismissed the appeal with costs.

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From the foregoing it is apparent that, it is not on record that assessors were in attendance and the Chairman differed with the opinion of

assessors. He neither stated so in his judgment nor gave reasons for so differing. This is a gross violation of the provisions of **section 24 of the Land Disputes Act**. I therefore find merits in the fifth ground of appeal.

As for the 1st, 2nd, 3rd and 4th grounds of appeal, I agree with Mr. Teemba that the Appellate Tribunal did not seriously consider the grounds of Appeal. Going through the judgment of the District Land Housing Tribunal the Chairman did not determine all the seven grounds of appeal which were raised therein, including those regarding procedural irregularities. Upon perusal of the Ward Tribunal proceedings it appears that the Appellant was not accorded an opportunity to cross examine the Respondent. This is a gross violation of the Principle of Natural Justice, Right to be heard (*Audi Alteram partem*).

Further to that, in the judgment of the Ward Tribunal it has been stated in the last paragraph of the second page that, the Ward Tribunal visited the locus in quo. However, upon perusal of the record of the trial Tribunal the proceedings do not reflect that the trial Tribunal visited the *locus in quo*. In the proceedings dated 25/7/2013, it was stated that the Tribunal will visit the *locus in quo* on 27/7/2013 but the record is silent on whether the Tribunal did actually make the said visit on the date which was set. From the foregoing I find merits in the a 1st, 2nd and 4th grounds of appeal. The above irregularities are incurably fatal.

For the reason of fatal defects in the proceedings of the trial Tribunal, I find that there was nothing to move to the Appellate Tribunal. Consequently, the appeal is allowed. The proceedings and decisions of

both the lower Tribunals are quashed and set aside with the attendant order that the same are declared nullified. The matter is remitted to the trial Tribunal to be tried de novo. Each party to bear its own costs.



C.W. Makuru
JUDGE
16/03/2018

Court: Judgment delivered in court this 16th day of March, 2018 in the presence of Mr. Teemba learned counsel for the Appellant and holding brief for Mr. Jamhuri, learned counsel for the Respondent. Right of appeal explained.



C.W. Makuru
JUDGE
16/03/2018