

IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT SUMBAWANGA

LAND APPEAL NO. 32 OF 2019

**(From the Decision of the District Land and Housing Tribunal
of Rukwa District at Sumbawanga in Land Application**

No. 23 of 2016)

NYASIO MALALO.....APPELLANT

VERSUS

JOHN MWANANJELA.....RESPONDENT

JUDGEMENT

29th May – 6th August, 2020

MRANGO, J

This is an appeal lodged by the appellant challenging the Judgement and decree of the District Land and Housing Tribunal for Rukwa at Sumbawanga delivered on 20. 08. 2019 in application No. 23 of 2016.

At the Trial Tribunal, the appellant sued respondent over a claim of a piece of land located at Mkunda Village where the respondent was declared the lawful owner of the suitland.

Aggrieved by the decision of the trial tribunal, the appellant has preferred this appeal with a memorandum of appeal comprised of three grounds of appeal as hereunder quoted;

1. That the trial District Land and Housing Tribunal erred in law and fact by holding that the disputed land belongs to respondent who did not give evidence but evidence was adduced by Yohana Mwananjela.
2. That the tribunal erred in deciding the dispute in favour of the respondent while lacked cogent evidence in proving the ownership of the land in dispute.
3. That the tribunal erred in deciding the dispute without analysing and considering evidence adduced by the appellant which proved the ownership.

As the matter was called for hearing, the appellant was represented by Mr. Peter Kamyalile – learned advocate while the respondent appeared in person. Mr. kamyalile prayed for the appeal to be argued by way of written submission of which the respondent conceded. However, only submission of the appellant was filed as

scheduled and ordered by this court. The respondent defaulted to file his submission despite the extension of time granted.

Before arguing in support of the appeal Mr. Peter Kamyale, learned advocate for the appellant by leave of this court under **Order xxxix Rule 2 of the Civil Procedure Code, Cap 33 RE 2019** prayed to draw to the attention of this court on the irregularity of the trial tribunal for failure to read the opinion of assessors in the presence of the parties, and the same be recorded be part of the trial proceeding. He supported his prayer with the case of **Adelina Koku Anifa and Another versus Byarugabaalex, Civil Appeal No. 46 of 2019, CAT At Bukoba**, unreported at page 6-7 which held that;

"Grounded hinged on a point of law as such, the second appellate court ought to have addressed and determined it on merit."

It is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of the parties.

The duty of the court is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below. Where the lower court may have not observed the demands of any particular provision of law in a case, the court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and / or tribunals"

He submitted that the record of the typed proceeding of the trial tribunal shows that when the defence case was closed on 19th day of May 2019, the Chairperson fixed the date of judgement without inviting the assessors to give their opinion in the present of parties and without recorded the same to be part of the trial proceeding which is fatal and render the whole proceedings nullity. The position was laid in the case of **Tubone Mwambeta versus Mbeya City Council, Civil Appeal No. 287 of 2017 the Court of Appeal at Mbeya** held thus;

"In view of the settled position of the law, where the trial has been conducted with the aid of assessors.... They must actively

and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before judgement is composed.... Since Regulation 19(2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict"

He submitted further that the court at page 12 observed that "as such, their opinion must be on record"

In addition to the above, he said the court at page 16 held that;

"We say so because the law was contravened as neither were the assessors actively involved in the trial nor were they called upon to give their opinion before the Chairman composed the judgement. This cannot be validated by assuming what is contained in the judgement authored by the Chairman as he alone does not constitute a tribunal. Besides, the lack of opinion he resuscitated at this juncture by seeking the opinion

of the Chairman as to how he received opinion of assessor as suggested by Mr. Mushokolwa. This adversely impact on this appeal as there was a miscarriage of justice"

Arguing with regard the first ground of appeal, Mr. Kamyalile submitted that the record shows that the respondent in application form was John Mwananjela, the name which was admitted on the written statement of defence. However, he said the record shows that the one who testified on defence case were Yohana Mwananjela as DW1 and Obard Feliciano Malal as DW2. The respondent John Mwananjela did not testify per tribunal record, but the trial tribunal declared him as the lawful owner of the disputed land.

He submitted further that the judgement of the trial tribunal had treated the evidence of Yohana Mwananjela DW1 as the evidence of respondent one John Mwananjela. Such changes of party to the case from John Mwananjela to Yohana Mwananjela were not recorded and there was such leave of the tribunal sought which makes the proceeding nullity. He wondered as to where the respondent's evidence narrated in the judgement of the trial tribunal came from. The position was laid down in the case of **Anthony Kingazi versus**

Milka Maiga, Misc. Land Case Appeal No. 84 of 2016, the High Court of Tanzania sitting at Dar es Salaam at page 3 held that;

“Also after perusing the proceedings of the trial tribunal it is nowhere indicated that the appellant testified in court. I wonder as to where the appellant’s evidence narrated in the judgement of the lower tribunal came from”

He added that in the case of **Andrew Namalozo versus Wenceslaus Kasake, Misc. Land Appeal No. 15 of 2009**, High Court of Tanzania at Sumbawanga, unreported, at page 4, this court held that;

“After perusal of the records from Ward Tribunal, I discovered that the respondent is Wilbroad Mbela Kasake and sometimes the respondent is mentioned as Wenceslaus Kasake as mentioned in this appeal.

Despite the above concern indicated, the Chairman made no further order or directions. Worse, there was no response from the parties so involved. Despite the anomaly the DLHT proceeded with the matter with no relevant comment in the

judgement. I find this a fatal irregularity. Any change of party to the suit should be justified and recorded accordingly.”

He submitted that it is trite law that any evidence which is not on the record cannot be relied upon as evidence and cannot be a basis of a decision. The evidence on record does not support its decision since the evidence of John Mwananjela is not on the records. Then he did not prove that he is the lawful owner of the disputed land. The position was laid down in the case of **Japan International Agency (JICA) versus Khaki Complex Limited {2006} TLR 343**, where the Court of Appeal held that;

‘The inevitable conclusion is that the evidence properly before the trial court did not justify the learned judges affirmatively answer to the first and second issues before him”

With regard ground three, he submitted that the trial tribunal erred in law by holding that the appellant did not prove on how he acquired the disputed land while in fact the appellant tendered the exhibit D1 the judgement of the High Court which declared him as the lawful owner of the disputed land. Hence appellant proved on the

balance of probability on how he is the lawful owner of the disputed land.

He submitted further that the record shows that from the evidence of both parties it appears that there is no certainty on the description of the disputed land in terms of size and boundaries. The appellant alleged that the land in dispute is 10 acres and the respondent said that the land in dispute is 40 acres. Since there was uncertainty of the description of the disputed land it was the duty of the trial tribunal to visit the *locus in quo* failure to do so render the whole proceeding a nullity. That was laid in the case of this court of **Abisai Ntele Temba versus Amour Lutego Lubinza, Misc. Land Appeal No. 141 of 2015, at Dar es Salaam**, unreported at page 6 – 7 where it was held that;

“From the evidence of both sides, it appears that there is no certainty on the description of the disputed land in terms of the size and boundaries. However, the record does not indicate that the trial tribunal visited the *locus in quo* in order to satisfy itself as to the disputed land because it is being referred to by the respondent. Given the nature of the case; therefore, I

think it was incumbent for the trial Ward Tribunal to visit the locus in quo in order to ascertain boundaries and the size as well as the location of the disputed plot so that it comes up with a clear and just decision. That was not done. Under the circumstances, therefore, I have no option than to nullify the proceedings of the lower tribunal and order that the matter be remitted to the Ward Tribunal for the same to be heard de novo and enable the tribunal to visit the locus in order to satisfy itself as to the description and boundaries as well as the size of the disputed land"

He also cited the case of this Court of **Anthony Kingazi versus Milka Maiga, Misc. Land Division at Dar es salaam**, unreported at page 3 It was held that;

"Given the nature of this case and in order to identify the boundaries demarcating the parties' pieces of land. I think it was necessary for both parties to state the size of their respective pieces of land and the trial tribunal ought to have visited the *locus* in order to clearly identify the boundaries and the same be reflected in its decision.

Having said all that, I quash the decisions of both the lower tribunals and hereby order that the matter be remitted to the Ward to be expeditiously tried *de novo*”

He finally said based on the submission above and plethora of relevant authorities pinned in, he prayed for the appeal to be allowed, revise and quash the decision of trial tribunal and order trial *de novo*.

Having considered submissions of both parties the issue for consideration by this court is whether the appeal has merit.

Firstly, let me consider the first ground of appeal as raised by the appellant. Learned advocate for the appellant submitted that the respondent by name of John Mwananjela as recorded in the written statement of defence is not the one who testified in the defence case. He further submitted that the one who testified in the defence case and who has been recorded by the tribunal is Yohana Mwananjela. My scrutiny of the copy of the tribunal’s proceedings shows that Yohana Mwananjela is the one who testified as respondent in the defence case. Also on examining a copy of the judgement shows that Yohana Mwanandenje testified as respondent in the defence case. However, as per a copy of application no. 23 of

2016 filed at the trial tribunal, the proper respondent sued by the applicant was in the name of John Mwananjela. The question I may ask myself is whether Yohana Mwanandenje, Yohana Mwananjela and John Mwananjela is one and the same person? The answer is definitely No! There are three different persons. What appear to this court is that, the trial tribunal mistakenly recorded the name of the respondent, John Mwananjela as Yohana Mwananjela in the proceedings and as well as Yohana Mwanandenje in the judgement which is fatal irregularity which renders the entire proceedings and judgement of the trial tribunal a nullity as rightly argued by the learned advocate for the appellant.

I joined hands with the learned advocate for the appellant that, the anomaly indicated above is as if the respondent did not testify at the trial tribunal. Unfortunately, the trial tribunal declared the respondent who in fact did not testify at the trial tribunal as the lawful owner of the disputed land which is wrong as per the authorities cited to me by the learned advocate. See **Anthony Kingazi versus Milka Maiga, Misc. Land Case Appeal No. 84 of**

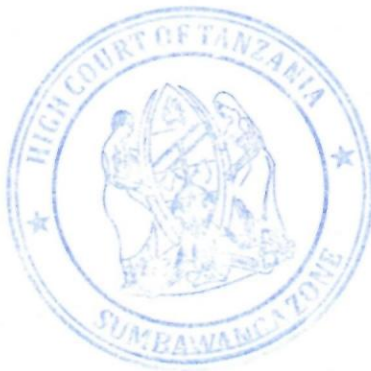
**2016, Andrew Namalozo versus Wenceslaus Kasake, Misc.
Land Appeal No. 15 of 2009 [supra].**

I am of the strong view that this ground of appeal may suffice to dispose of this appeal entirety. There is no need whatsoever of indulging into discussing other remaining grounds of appeal as it will be of wasting my energy and precious time of this court.

Having said so, I nullify the entire proceedings and the judgement of the trial tribunal for being nullity and hereby order the matter be remitted to the trial tribunal to be tried *de novo*.

In the premises, the appeal is allowed with no order as to costs.

It is so ordered.




D.E.MRANGO

JUDGE

06. 08. 2020

Date - 06.08.2020
Coram - Hon. D.E. Mrango – J.
Appellant } Both present in persons
Respondent }
B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 06th day of August, 2020 in
presence of both the parties in persons.

Right of appeal explained.




D.E. MRANGO
JUDGE
06.08.2020