

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
(Holden at Ifakara)

MISC. LAND APPEAL NO. 126 OF 2019

(From the decision of the district Land and Housing Tribunal of KILOMBERO District at ULANGA in Land Case Appeal no. 330 of 2017)

SAID SAREHE NAPUKA *(As Administrator of the Estate of the late SALUM SALEHE NAMTUKA)* **APPLICANT**
VERSUS

FITINA MAITANA **RESPONDENT**

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

Being dissatisfied by the decision of the District Land and Housing Tribunal or Kilombero /Ulanga at Ifakara (herein after the 1st appellate Tribunal) in Land Appeal No. 330 of 2017 ("the appeal") delivered on 29th April 2019; the appellant appeals to this court against the whole judgment on the following grounds;

1. That the District Land and Housing Tribunal for Kilombero/Ulanga erred both in law and in fact for dismissing the Land Appeal No. 330/2017 despite the fact that the proceedings of the trial ward tribunal were defective as it was improperly constituted.
2. That the District Land and Housing Tribunal for Kilombero/Ulanga erred in law and in fact for dismissing the Land Appeal No. 330/2017 without according the appellant the right to be heard.

On those grounds, the appellant had the following prayers:

1. That the appeal be allowed with costs.
2. That the appellant court declares the appellant is the legal owner of the land in dispute.
3. Any other reliefs this honorable may deem fit to grant.

In this appeal the appellant was represented by Mr. Pascal Luhengo learned Counsel while Mr. Haidery Mwinyimvua, learned Counsel represented the respondent. The appeal was disposed by way of written submissions upon a court order dated 20th November, 2020.

On the onset of his submissions, Mr. Luhego prayed to abandon the 1st ground of appeal and argued only the 2nd ground of appeal that before the appeal was dismissed, the first appellate court did not afford the appellant the right to be heard. He submitted that the records of the appellate tribunal show that the appellant was represented by Mr. Funuki Sikujua, learned counsel. That when the appeal was called for hearing, the appellant appeared in the tribunal but the proceedings are silent as to why the appellant who was represented, appeared in person and prosecuted the case himself. He argued that the appellant was denied his right to be represented by advocate after paying the advocate fee concluding that the appellant was denied a right to be heard. He supported his submission by citing the case of **Republic Vs. Abdulrahamani Fuad Rubeya, Criminal Session No. 139/2015** where the High Court held:

"for legal representation is intended to add value to the right to a fair hearing in the execution of the right to be heard"

He submitted that the tribunal which sits with assessors includes the effective participation of the assessors. Going through the proceedings of the first appellate tribunal the assessors never gave their opinion. He argued further that the Chairman never considered the opinion of the assessors when composing his judgment. Citing the decision of the High Court in the case of **Dotto Shija Vs. Cosmas Tenga, Land Appeal No. 129/2019** (unreported), he argued that the irregularities go to the root of the tribunal proceedings making the whole proceedings of the tribunal a nullity including the judgment and decree. He prayed that the appeal is allowed.

In reply, Mr. Haidery, learned Counsel representing the respondent complained on the manner in which the ground was introduced to this court. He submitted that while concluding his submission on the ground that the right to be heard was not accorded, the respondent has technically and without leave of the court, and hence contrary to the provision of the law, introduced and submitted another ground of Appeal about assessors. That the issue relating to assessors was never mentioned in the Memorandum of Appeal and therefore cannot be introduced or discussed herein as it is a new, separate and fresh ground of appeal. He supported his submissions by citing the decision of the Court of Appeal of Tanzania, sitting at Bukoba in the case of **Godfrey Wilson Vs. Republic, Criminal Appeal No. 168 of 2018 (unreported)** where at page 6 and 7 they had this to say:

"we think that those grounds of appeal being new grounds for having not been raised and decided by the first appellate Court, we cannot took at them"

He then argued that in the instant appeal, it is wrong at this juncture to raise a new ground of appeal which was not at all raised at the first appellate Court – District Land and Housing Tribunal for Ulanga Kilombero at Ifakara, wherefore, this second Appellate Court should not entertain the new ground of appeal.

Without prejudice to the above submission, Mr. Haidery reply submissions were that the assessors were there in all stages of the hearing of the case and that, the proceedings are clear on that on each date when the case was scheduled proper and full participation as required by the law was being considered. He pointed out that on the hearing date, Mr. Mohamed Kawele and Ms. Otilia Mhomela were there and participated in all required stages and steps. As the appeals were heard under the specified session which was set to clear the backlog of cases, the tribunal took all reasonable and required considerations in making sure that hearing is conducted fairly and the opinion of the assessors is taken care in the final decision. He prayed that this appeal should be dismissed with costs.

At this point, I must first determine the concern raised by Mr. Haidery on the manner in which the ground was raised. With respect to the learned Counsel, his argument is distinguishable from the case at hand. While the cited case talked of the ground that should have been raised, but was not raised at the first appellate court; Mr. Luhago's complaint in this appeal is

the manner in Which the said first appellate tribunal conducted the proceedings of the appeal. Obviously, this issue could not be raised at the first appellate court because it happened at the conclusion of the said appeal. Therefore the grounds are distinguishable and since he had the opportunity of addressing the ground and the ground, if sustained affects the legality of the decision of the first appellate tribunal, I shall proceed to determine it.

Having cleared the concern, let me now address the irregularity which was raised by Mr. Luhego that the assessors never gave their opinion. He argued further that the Chairman never considered the opinion of the assessors when composing his judgment. I need not be detained much by this issue, I have gone through the judgment of the tribunal and find that in his brief judgment, the Chairperson did not give reason for his decision and more importantly, as pointed out by Mr Luhengo, there is no place in that brief judgment which shows that the assessors opinion was considered in reaching the verdict. The omission contravenes with Section 23 (2) of the Land Disputes Court Act, Cap 216, R.E 2019 ("The Act") which provides as follows:

*"The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors **who shall be required to give out their opinion before the Chairman reaches the judgment.**" (Emphasis is mine).*

Furthermore, the procedures for compliance with the Section 23(20 of the Act is elaborated under Regulation 19(2) of the Land Disputes Courts (the

District Land and Housing Tribunal) Regulations, G.N. No.174 of 2003 ("The Regulations") which provides:

"Notwithstanding sub regulation (1) the chairman shall, before making judgment, require every assessor present at the conclusion of the hearing to give their opinion in writing and the assessors may give his opinion in Kiswahili."

The above cited provisions make it a mandatory requirement for the chairman to consult the assessors before pronouncing judgment, in compliance with Section 23(2) of the Cap. 216. Therefore in order to ascertain whether or not the law was complied with, the records of the tribunal should reflect that the assessors were so involved. However, the record does not show whether the assessors were given a chance to give their opinion as required by the law. The records of the tribunal show that the appeal came for hearing on 24/04/2019 and upon conclusion of the hearing, the Chairman went straight to schedule the appeal for judgment without according the assessors' time to file and give their opinions in writing.

Furthermore, even in his judgment, the Chairman did not reflect what the opinion of those assessors was. As it was held in the cited case of **Dotto Shija** (Supra), the omission is fatal and vitiates the proceedings of the first appellate tribunal including the judgment and decree therein. Consequently, this appeal is allowed. The proceedings of the tribunal are quashed and the judgment and decree are hereby set aside. The Land Appeal No. 330/2017 is hereby remitted back to the first appellate tribunal

with an order of expedient re-hearing of the appeal before another Chairman and a new set of assessors. I make no order as to costs.

Appeal Allowed.



A handwritten signature in blue ink, consisting of a series of loops and a final flourish, is written over a horizontal dotted line.

S.M. MAGHIMBI

JUDGE

04/12/2020