

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.136 OF 2016

*(Originating from the District Land and Housing Tribunal for Mkuranga in Land
Appeal No. 30 of 2016)*

HERBERT ROGERS MWAIMU APPELLANT

VERSUS

ABDALLAH CHUMU YUSUFU RESPONDENT

JUDGMENT

Date of Last Order: 28.06.2021

Date of Ruling: 20.07.2021

A.Z.MGEYEKWA, J

This is a second appeal. The matter originates from Vikindu Ward Tribunal in Civil Case No. 02 of 2016. At the centre of controversy between the parties to this appeal is a parcel of land. The appellate tribunal determined the matter and

The material background facts to the dispute are as follows: The respondent was the complainant at the Ward Tribunal, he successfully claimed ownership of a piece of land located at Ngunguti hamlet in Vikindu village within Mkuranga District. Dissatisfied, the appellant filed an appeal before the District Land and Housing Tribunal. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal for Mkuranga in Land Application No. 30 of 2016.

Undeterred, the appellant has come to this Court seeking to assail the decision of the District Land and Housing Tribunal for Mkuranga on four grounds of grievance; namely:-

- 1. That the trial tribunal erred in law by failing to determine a fundamental issue of Jurisdiction which was one of the grounds of Appeal before it.*
- 2. That the trial tribunal without any reason grossly erred in law by failing to consider and determine each and even ground of appeal raised.*
- 3. That the trial tribunal further erred in law by failing to account any weight to the evidence tendered before it.*
- 4. That the trial tribunal further erred in law by failing to provide the opinion of the assessors.*

When the matter was called for hearing before this court on 20th April, 2021, the court ordered the parties to argue the appeal by way of written submissions whereas, the appellant's Advocate filed his submission in chief on 26th May, 2021 and the respondent Advocate filed his reply on 21st April, 2021. The appellant's Advocate waived his right to file a rejoinder.

The appellant was the first one to kick the ball rolling. He opted to submit on one ground and dropped the remaining grounds. The appellant argued that the tribunal erred to rule that there was adverse possession, while the records show that the dispute between the parties started before 2016. He also blamed the District Land and Housing Tribunal for failure to consider and determine each ground of appeal.

The appellant continued to submit that the respondent admitted that the dispute existed since 2014. To support his submission he referred this court to page 2 paragraph 1 of the tribunal proceedings. It was his view that the issue of adverse possession was sustained without any justification. To bolster his submission he cited the case of **Moses v Lovegrove** (1952) QB, and **Hughes v Griffin** (1969) 1All ER 460 where it was held that:-

“a person seeking to acquire title to land by adverse possession had to cumulatively prove the followings;-

f) That the statutory period, in this case, twelve years has lapsed

g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period.

The appellant continued to argue that the Chairman wrongly observed that from 2004 to 2016 is twelve years, which under the doctrine of adverse possession the respondent became the owner of the suit land as lightly found by the trial tribunal.

On the strength of the above submission, the appellant beckoned upon this court to allow the appeal with costs.

The respondents' confutation was strenuous. The learned counsel for the respondent came out forcefully and defended the trial court's decision as sound and reasoned. The respondents came out forcefully and defended the trial tribunal's decision as sound and reasoned.

The respondent argued that the Ward Tribunal determined the fact in issue that the appellant wrongly sold the land which belonged to the respondent. He went on to state that the appellant trespassed into the respondent's land and sold it to Henrick Elimelick Mgaya. He further contended that since the respondent occupied the suit land since 2004 without being interrupted then by the time the appellant sold the suit land in 2016 he was barred by the law of limitation because the 12 years had lapsed.

The respondent valiantly argued that the appellant did not institute any dispute until 2016 when the respondent filed a suit at the Ward Tribunal.

On the strength of the above submission, the learned counsel for the respondent contended that the appellant failed to exercise his right (if any) rightly invoked by the tribunal and the appeal was rightly dismissed by the tribunal.

Having heard the submissions of both parties simultaneous with carrying a thorough review of the original record, I wish to state from the outset that I wish to begin with the third and fourth grounds which in my view if decided in the positive, are sufficient to dispose of the entire appeal for reasons which will unfold in the course. I have gone through the original proceedings and I fully subscribe to the appellant's submission that the assessors' opinions were not recorded

I have gone through the handwritten proceeding of District Land and Housing Tribunal for Mkuranga specifically on the last pages the records do not show that the assessors stated their opinion instead the Chairman proceeded to set a date for delivering a judgment on 10th August, 2016 and on 20th August, 2016 the Chairman delivered the judgment and acknowledged on page 4 of his judgment that they concur with the

unanimous opinions of both assessors. It is not seen anywhere the assessors being invited to issue their written opinion as required under the law, or the said opinion being read before the parties and recorded in the proceedings as required under the law. The act of the trial Chairman to record the assessors' opinion without record the same was contrary to Regulation 19 (1) of the Land Dispute Courts (The District and Housing Tribunal) Regulations, 2003 GN.174 of 2003. The Chairman has to require every assessor present at the conclusion of the hearing to give his opinion in writing before making his judgment and the opinion be recorded in the proceedings. The Court of Appeal of Tanzania in numerous cases stated that the assessors' opinion must be expressly indicated in the record. In the case of **Hamisa S. Mohsin v Taningra Contractor** Land Appeal No. 133 of 2009 where the Chairman did not indicate what opinioned, the judgment was null and void and in the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 it was held that:-

“... the opinion of assessors must be given in writing and be reflected in the proceedings before a final verdict is issued”.

Equally, the Court of Appeal of Tanzania in the case of **Ameir Mbarak and Azania Bank Corp Ltd v Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported) held that:-

"Therefore in our considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgment of the Chairman in the judgment. In the circumstances, we are of a considered view that assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity."

Similarly, in the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported), the Court of Appeal of Tanzania stated that:-

"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their opinion before the judgment 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 Page 4 of 6 or not such opinion has been considered by the Chairman in the final verdict."

The Court further held that:

"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in the view of the fact that the records do not show that the assessors were required to give them, we fail to understand how and at what stage they found their way into the Court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same has no useful purpose."

Inspired by the incisive decisions quoted above, applying the same in the instant appeal, it is evident that a fundamental irregularity was committed by the tribunal Chairman. I shall not consider the remaining grounds of appeal as the same shall academic exercise.


From the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional powers to this court and proceed to revise the proceedings of the District Land and Housing Tribunal for Mkuranga in Appeal No. 30 Of 2016 in the following manner:-

- (i) The proceedings in Appeal No. 30 Of 2016 and the orders made thereof are hereby quashed.

- (ii) I remit the case file to the District Land and Housing Tribunal for Mkuranga, before a different Chairperson and the same set of assessors.
- (iii) The matter to proceed at the District Land and Housing Tribunal for Mkuranga before another Chairman within 8 months.No order as to costs.

Order accordingly.

Dated at Mwanza this date 20th July, 2021.


A.Z.MGEYEKWA
JUDGE
20.07.2021

Judgment delivered on 20th July, 2021 in the presence of both parties.




A.Z.MGEYEKWA
JUDGE
20.07.2021

Right of Appeal fully explained.