

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.269 OF 2020

(Arising from the District Land and Housing Tribunal for Kibaha at Kibaha
in Land Application No.26 of 2016)

GLORIA PAUL KESSY APPELLANT

VERSUS

1. ANDREW OBUNDE

2. MAIMUNA S. MAGOTI

3. SARA ELIGHT ADEBE

}

..... RESPONDENTS

JUDGMENT

Date of Last order: 23.07.2021

Date of Judgment: 30.07.2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Land Application No.26 of 2016 of Kibaha at Kibaha. The District Land and Housing Tribunal for Kibaha decided the matter in favour of the respondents.

Aggrieved, the appellant lodged the instant appeal before this court through Land Appeal No. 269 of 2020 on five grounds of grievance, namely:-

- 1. That, the Trial Tribunal erred in law and facts in finding that the 2nd Respondent is the lawful owner of the suit property*
- 2. That, the Trial Tribunal erred in law and facts in not finding that the suit property was lawfully transferred to the Appellant by the PW2 ISSA MUHIBU;*
- 3. That, the Trial Tribunal erred in law and facts in not finding that the disputed piece of land measures three acres only and not five acres;*
- 4. That, the Trial Tribunal erred in law and facts in not finding the Respondents manufactured evidence and documents after the start of the hearing of the Application;*
- 5. That, the Trial Tribunal erred in law and facts in not weighing the evidence adduced by both parties to the Application and decide on the preponderance of probabilities.*

When the appeal was called for hearing on for hearing on 18th March 2021. This court issued an order to the parties to argue the appeal by way of written submissions. The appellant filed his submission in chief on 16th

April, 2021 and the respondent's Advocate filed a reply on 12th May, 2021 and the appellant's Advocate filed a rejoinder on 01st June, 2021.

In his submission, on the first ground, that the trial tribunal erred in law and in facts in finding that the second respondent is the lawful owner of the suit property. The appellant complained that he acquired ownership of the suit property on 16th February, 2012. She claimed that PW2, the Chairman of Kibosho Village testified that the disputed land was transferred to the appellant in 2012. To substantiate his testimony he tendered a sale agreement (Exh.P1).

The appellant continued to submit that PW2 was authorised to dispose of the suit property to the appellant and after the transfer of the suit land to the appellant, she paid Tshs.1, 500,000/= to the village council. She argued that if the suit property was granted to the second respondent in 2003, the Village council could not have witnessed the transfer of the same property. The appellant urged this court to find that the tribunal erred in law to declare the second respondent a lawful owner of the suit property.

Submitting on the second ground that the tribunal erred in law and facts in not findings that the suit property was lawfully transferred to the appellant. The appellant contended that the second respondent was not

a lawful owner of the suit property. Insisting, the appellant argued that her claims are valid and she is the lawful owner of the suit property.

On the third ground, the appellant complained that the tribunal erred in law and facts for failure to find that the disputed suit measured three acres. The appellant faulted the tribunal's findings that the disputed plot measured five acres. To bolster her argumentation she referred this court to the sale agreement (Exh. P1). Stressing, the appellant claimed that the respondent trespassed a land of three acres and the remaining two acres were not in dispute.

Arguing for the fourth ground, the appellant complained that the respondent has wrongly produced documentary evidence. The appellant lamented that the tribunal did not follow the procedure in receiving and admitting documents as stated under Regulation 10 (1) (2) and (3) of the Land Disputes Courts (the District Land and Housing Tribunal) of 2003. She went on to claim that the other party was required to be served with a copy of the intended document to be tendered and to scrutinize the authenticity of the document. She claimed that the manner in which the documents were admitted was not clear since it was not easy to establish whether the documents were genuine or forged.

On the last ground, the appellant complained that the tribunal failed to weigh the evidence adduced by both parties. The appellant complained that the law requires the tribunal to weigh the evidence adduced and decide the matter on the balance of preponderance. It was her argument that the appellant's evidence was heavier than the respondent's evidence.

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

In reply, the learned counsel for the respondents complained that the trial tribunal decided rightly that the second respondent is the lawful owner. The appellant argued that the second respondent produced documentary evidence and narrated how he acquired the disputed plot, in 2003 and the same was allocated to her by the village council. She further stated that her witnesses testified in her favour. The respondent's Advocate refuted that Mr. Kibosha is a chairperson of Mapinga village. He claimed that Mr. Kibosha is no longer the chairperson of the said village. Thus, it was her submission that the trial tribunal was correct to declare that the second respondent was a lawful owner of the suit land.

On the second ground, the respondents' Advocate stressed that the tribunal decision in favour of the second respondent was correct since she proved her ownership of the suit land. He claimed that the sale agreement

was null and void because Mr. Kibosha signed the agreement as a witness and at the same time as a seller. Insisting, he argued that the appellant failed to prove his ownership.

With respect to the third ground, the learned counsel for the respondents was brief and straight to the point. He submitted that the second respondent owned 6 acres and out of 6 acres the appellant invaded 5 acres. He added that the tribunal wanted the proof of ownership and the respondent was able to prove her ownership while the appellant failed to prove his ownership of the suit land.

With respect to the fourth ground, the learned counsel for respondents valiantly contended that the appellant's allegation that the respondents cooked the evidence on record. He claimed that at the trial tribunal the appellant had the representation of the same Advocate but they did not object to the tendering of the document. He added that the appellant's Advocate examined the documents, the Chairman admitted the documents after the clearance of admission.

In conclusion, the respondent stated that the appeal lacks merit, he urged this court to dismiss the entire appeal with costs.

In her brief rejoinder, the appellant's Advocate maintained his submission in chief. He insisted that Mr. Kibosha was the Chairperson at the time when he allocated the disputed land to the appellant. He added that the suit land was lawfully transferred from Said Abbas Faraji to the appellant. He strongly contended that the respondents' Advocate submission that the documents were admitted without any objection from the appellant's Advocate is not correct since the tribunal was required to accord weight to the documents tendered in court.

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

I have considered the rival arguments by the parties to this appeal. Before I start to determine the grounds of appeal, I called upon the parties to address the court on the point of law that the assessors' opinions were not recorded and the same were not read over to the parties. The learned counsel for the appellant submitted that the assessors' opinions are not reflected in the judgment. He contended that the assessors testified instead of stating their opinions. The learned counsel for the respondent simply submitted that the assessors' observations are reflected in the judgment.

In addressing the point of law, whether the assessors' opinions were reflected in the tribunal proceedings. I will be guided by the Court of Appeal of Tanzania authorities, the case of **Mohsin v Taningra Contractor** Land Appeal No. 133 of 2009, where the Chairman did not indicate the assessors' opinions, the judgment was null and void. 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 Mbaraka and Another 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." [Emphasis added].

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."

Applying the above authorities in the instant case, it is clear that the original record does not show the opinion of assessors in writing, which the Chairman of the District Land and Housing Tribunal purports to refer the assessors' opinion in his judgment. I fail to understand how and at what stage the assessors' opinion found their way into the Tribunal's judgment.

Moreover, assessors' opinions cited by the Chairman in his judgment were not read in the presence of the parties before the judgment was composed. Under the circumstances, the judgment of the Tribunal is found to be improper.

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. Thus, there is no proper judgment before this Court for it to entertain in appeal. I shall not consider the remaining grounds of appeal as the same shall be an academic exercise after the findings I have made herein.

Following 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 Kibaha in Land Application No.26 of 2016 in the following manner:-

- (i) The Judgment and Decree of the District Land and Housing Tribunal in Land Application No. 26 of 2016 are quashed.
- (ii) I remit the case file to the District Land and Housing Tribunal for Kibaha to proceed from the stage of assessors' opinion presided by another Chairman.

(iii) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 30th July, 2021.




A.Z.MGEYEKWA

JUDGE

30.07.2021

Judgment delivered on 30th July, 2021 in the presence of Mr. Levis Lyimo, learned counsel for the appellant and Ms. Lightness Minja, learned counsel assisted by Ms. Hilda Mavoa, learned counsel for the respondents.




A.Z.MGEYEKWA

JUDGE

30.07.2021

Right of Appeal fully explained.