

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.105 OF 2020

(Arising from the District Land and Housing Tribunal for Kibaha at Kibaha in
Land Appeal No.16 of 2020 dated 24th September, 2020 Originating from
Fukayosi Ward Tribunal in Land Case No.26 of 2019)

LILIANI MALAKASUKA APPELLANT

VERSUS

BEATRICE SELEMANI MHINA RESPONDENT

JUDGMENT

Date of Last order: 02.07.2021

Date of Judgment: 13.08.2021

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Fukayosi in Land Case No.26 of 2019 and arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No. 20 of 2020. The material background facts to the dispute are briefly as follows; Beatrice Selemani Mhina, the appellant successfully filed a Land Case No. 26 of

2019 at Fukayosi Ward Tribunal for trespass. The respondent wanted to recover her land which she bought in 2016 and the transfer was witnessed by the village council. The respondent claimed that Liliani Malakasuka has trespassed her land and developed the suit land. On the other hand, the appellant claimed that she is the lawful owner of the suit land. She stated that she bought the suit land in 2011, the plot belongs to K.K.K.T of Kijitonyama Parish. After the determination of the matter, the Ward Tribunal of Fukayosi decided the matter in favour of the respondent.

Aggrieved, the appellant appealed to the District Land and Housing Tribunal for Kibaha, at Kibaha vide Land Appeal No. 24th September, 2010, she complained that the trial tribunal did not consider her testimony. The District Land and Housing Tribunal sustained the decision of the trial Tribunal. The appellate Chairman stated that the trial tribunal was justified in coming to the finding that the respondent is the lawful owner of the suit land, thus, it decided the appeal in favour of the respondent. The first appeal irritated the appellant, hence this appeal which contains eight grounds of grievance, namely:-

1. That the trial tribunal erred in law to hear, determine and deliver its Judgment without proper quorum hence lacked requisite jurisdiction.

2. That the learned Chairperson erred in law and in fact in failing to distinguish the discrepancies in of the land sale process to the Respondent as clearly shown by the Appellant.
3. That the learned Chairperson erred in law and fact by concluding that Miraji Rajabu Mwasa and Shabani Iddi Mwasa were from the same family.
4. That the learned Chairman erred in law and in fact by not considering the arguments by the Appellant and especially to the fact that the land in dispute belonged to the Miraji Rajab Mwasa and not Shabani Iddi Mwasa.
5. That the learned Chairman erred in law and in fact by creating her own version of the transaction thus misrepresenting and misconceiving the whole dispute to the detriment of the Appellant.
6. That the learned Chairman erred in law and in fact by being biased and procuring an inconsistency Judgment.
7. That the learned Chairperson erred in law and in fact for ignoring the fact that, during the trial at the Ward Tribunal, the only person appeared to testify was the one who sold to the Appellant and the one who sold to the Respondent never appeared before the Ward Tribunal.

8. That the learned Chairperson erred in law and in fact by failing to establish the historical ownership of the disputed land.

When the appeal was called for hearing on 16th March, 2021, by the Court order the appeal was argued by way of written submissions whereas, the appellant filed his submission in chief on 30th March, 2021 and the respondent filed his reply on 17th April, 2021 and the appellant filed a rejoinder on 24th April, 2021. The appellant was represented by Mr. Vedastus Majura, learned counsel, and the respondent appeared in person.

The appellants were the first ones to kick the ball rolling. The learned counsel for the appellant combined the second and seventh ground and argued the remaining grounds separately. On the first ground that the Chairperson erred in law to determine and deliver the judgment without proper quorum hence lacked requisite jurisdiction.

The appellants contended that the proceedings of the trial tribunal do not have the names of the members who formed its quorum during the trial. Vedastus contended that the appellate tribunal also overlooked the said irregularity. To bolster his argumentation he cited the **case of Esther Fredrick Sumaye v Jimmy Peter Mushi**, Land Appeal No. 43 of 2017

(unreported). Insisting he claimed that there was no name of the members recorded in the quorum when the evidence was recorded during the trial. The learned counsel referred this court to a trial proceeding dated 30th December, 2019 and 3rd January, 2020.

The second and seventh grounds relate to discrepancies in the sale process and the Chairman ignored the facts of the case. Mr. Vedastus complained that the appellant produced the sale agreement while the respondent did not produce any document. He added that the appellant stated that she bought a piece of land from Miraji Rajabu Mwasa who testified at the trial tribunal, while the respondent testified to the effect that she acquired the suit land legally from K.K.K.T Usharika wa Kijitonyama and tendered a receipt. He lamented that the appellate tribunal ought to determine the evidence adduced by the appellant's witnesses.

With respect to the third ground, that the Chairperson erred in law by concluding that Miraj Rajabu Mwasa and Shaban Iddi Mwassa were from the same family. He complained that Miraji sold the suit land to the appellant claiming that the suit land belonged to his father one Ramadhani Mwasa. He went on to submit that Iddi Ramadhan Mwasa sold the suit land to the respondent who is the young brother of Ramadhan Mwasa. It

was his view that it was not proper for the tribunal to conclude that Miraj Rajabu Mwasa and Shaban Iddi Mwasa were from the same family.

Arguing for the fifth and sixth grounds, the appellant complained that the Chairman produced her own evidence. He claimed that the respondent stated that he acquired the disputed land legally from K.K.K.T Usharika wa Kijitonyama and he tendered a receipt. He referred this court to page 10 of the tribunal judgment. He does not concur with the tribunal's findings for the reason that the appellant's evidence was not analysed well.

On the eighth ground, he complained that the Chairman failed to establish historical ownership of the disputed land. He claimed that the ownership of the disputed land had its roots in their grandfathers thus the one to dispose of the suit land was required to be an administrator of the estate of the deceased. He added that this issue was not addressed by Fukayosi Ward Tribunal and the appellate tribunal disregarded this ground. To buttress his position he cited the case of **Mfaume Ramadhani v Elias Jimola Mashaka**, Land Appeal No.24 of 2016, HC Land Division (unreported).

On the strength of the above argumentation, the appellant beckoned upon this court to quash and set aside the decisions of both tribunals and allow the appeal with costs.

Resisting the appeal, on the first ground, he argued that the proceedings of both tribunals are well provided under the Land Disputes Courts Act, Cap. 216 [R.E 2019]. He went on to state that the jurisdiction and composition of the trial and appellate tribunals was proper as per the law. To support his position he referred this court to sections 11 and 23 (1) & (2) of the Land Disputes Courts Act, Cap.216 [R.E 2019]. He went on to state that the Fukoyasi Ward Tribunal proceedings had five members, three of whom were females and the appellate tribunal had two assessors. To buttress his submission he referred this court to pages 14 and 15 of the appellate tribunal proceedings. He urged this court to disregard this ground.

Submitting on the 2nd and 7th grounds of appeal, Mr. Vedastus contended that the records and proceedings in both tribunals show that the appellant testified to the effect that the respondent did not have a sale agreement during the trial then later she admitted that the respondent tendered a sale agreement dated 14th September, 2011. He forcefully

argued that the appellant's argument is untrue since the sale agreement was tendered in court. He continued to argue that the appellant only tendered a sale agreement, the same was wrongly executed and the village government denied having witnessed such sale agreement.

Arguing for 3rd and 8th grounds, the matter is related to historical background on ownership of the disputed land. The respondent argued that the suit land formed part of the land that was communally owned by the clan as opposed to the individual families' lands. He added that the tribunal found that each family of the clan owns its land separately from the other family. He valiantly stated that the respondent bought the suit land in 2011 and obtained a customary right of occupancy in 2017. He added that since 2011 no one raised complained or objected to the sale of the suit land. He stated that the contentious issue as to who was a legal owner of the suit land was resolved by the trial tribunal and the tribunal decided in favour of the respondent.

As to the 5th and 6th grounds, the respondent forcefully argued that it is the appellant's own version that he bought the suit land from K.K.KT – Kijitonyama. He stated that the Church played the role of informing his/her worshippers of the availability of pieces of land for sale at Fukayosi village.

He went on to state that the Church did not purchase the said land for any person.

On the strength of the above, the respondent beckoned upon this court to uphold the decision of Fukayosi Ward Tribunal and Kibaha District Land and Housing Tribunal and dismiss the appeal with costs.

In a short rejoinder, the appellants reiterated their submission in chief. She insisted that the composition of the trial tribunal was not proper since the proceedings of the trial tribunal do not show the names of members of the tribunal. Fortifying her submission she cited the case of *Easter Fredrick Sumaye v Jimmy Peter Mushi*, Land Appeal No. 43 of 2017 HC Land Division (unreported).

In conclusion, the appellants urged this court to allow the appeal with costs.

After a careful perusal of the record of the case and the submissions submitted by both parties. In determining the appeal, the central issue is *whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of both tribunals.*

In my determination, I have opted to start with the first ground of appeal that the trial tribunal erred in law to hear, determine and deliver its judgment without proper quorum hence lacked requisite jurisdiction. This ground can dispose of the appeal.

I have perused the trial tribunal records; and found that the trial Chairman hearing commenced on 24th December, 2019 without recording the Coram, on 30th December, 2019 the Chairman recorded the Coram whereas four members were recorded to attend the hearing. Therefore, I fully subscribe to the appellant's contention that the trial tribunal is mute on who constituted the tribunal during trial. The law requires under section 11 of the Land Disputes Court Act, Cap. 216 [R.E 2019] stated that the Ward tribunal is composed of not less than four and more than eight members as reflected on Coram dated 30th December, 2020. However, on 24th December, 2020 there is no evidence that the trial tribunal was composed, this court cannot assume that the Coram was duly constituted.

Another defect is when the Chairman in his judgment recorded that the matter proceeded in the presence of six members while in the tribunal proceeding only five members were recorded. The member who appeared to be added to the hearing is Zainab R. Saidi. The same is fatal and as

long as this court is not sure how many assessors were selected to seat with the Chairman during the hearing that means this court cannot assume that Zainab R. Said was among the assessors who were present during the hearing of the case. That means she gave her opinion while she was not among the members who constituted the trial tribunal hearing.

Nevertheless, I have called upon the parties to address me on the issue of point of law that the assessors at the appellate tribunal that the assessors' opinions are placed in the file but the records are silent whether the same were read over. On 02nd September, 2020 the Chairman recorded that the assessors have finalized their opinion whereby Happines Kihampa and H.D. Millinza gave their opinion in writing. However, the records are silent whether the said opinions were not read over. The same was required to be availed in the presence of the parties so as to enable them to know the nature of the opinion.

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 and provision of the law, in the instant case, it is clear that the trial tribunal original proceeding dated 24th December, 2020 trial tribunal Coram was not recorded and the appellate tribunal original records do not reveal whether the assessors' opinion was read over.

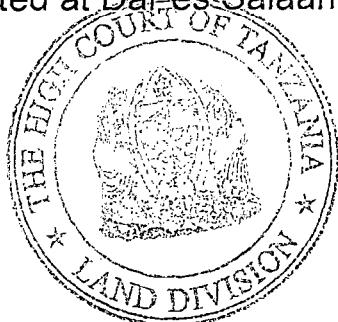
Under the circumstances, the judgment of both tribunals is found to be improper. Inspired by the incisive decisions quoted above, applying the same in the instant appeal, it is evident that a fundamental irregularity was committed by the tribunal Chairman. Thus, there is no proper judgment before this Court for it to entertain in appeal. I shall not consider the remaining grounds of appeal as the same shall academic exercise. I shall

not consider the remaining two 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 will invoke my revisional powers under section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 [R.E 2019] and nullify the judgments and proceedings of both trial tribunals. I will further direct that the file be remitted to the Ward Tribunal for retrial. No order as to costs.

Order accordingly.

Dated at Dar-es-Salaam this date 13th August, 2021.

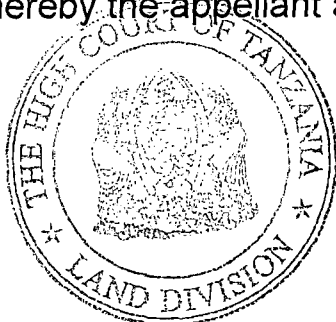



A.Z.MGEYEKWA

JUDGE

13.08.2021

Judgment delivered on 13th August, 2021 via audio teleconference whereby the appellant and respondent were remotely present.




A.Z.MGEYEKWA

JUDGE

13.08.2021

Right of Appeal fully explained.