

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.199 OF 2020

(Originating from the District Land and Housing Tribunal for Temeke at
Temeke in Application No.119 of 2019 dated 3rd September, 2020)

AMINA OMARY MINGA APPELLANT

VERSUS

SALAMA ISSA RESPONDENT

JUDGMENT

Date of Last order: 26.07.2021

Date of Judgment: 28.07.2021

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal in Land Application No. 119 of 2019. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant and the respondent are disputing over

a piece of land located in Mtoni Relini, Temeke District. The respondent Salma Issa instituted a case before the District Land and Housing Tribunal for Temeke applying for a declaration that she is a lawful owner of a parcel of land located at Mtoni Relini, Temeke District. The respondent also claimed for land vacant possession, compensation of unstated sum. The appellant also prayed for the applicant to give vacant possession of the said plot. The respondent also urged the District Land and Housing Tribunal to order the appellant to stop trespassing his land. The respondent claimed that suit land was the property of his late father and the respondent invaded the suit land after his late father's death. The respondent claimed that she is the administratrix of the estate of her late father.

On his side, the appellant Amina Omary Nginga denied the allegations. She claimed that she has never trespassed Issa Mwichande's land rather she is the lawful owner of the disputed land which she purchased from the late Issa Mwichande. The District Land and a Housing Tribunal ruled that the appellant was an invitee and ordered him to vacate the land and the respondent was declared the lawful owner of the disputed land. The appellant was also ordered to pay the respondent general damages.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Temeke. She has raised six grounds of grievance, namely:-

- 1. That the honourable Tribunal erred in law and fact by entertaining and determining land dispute which was time barred since the trespass alleged to be effected by the appellant was discovered in 2005.*
- 2. That the honourable Tribunal in law and fact by deciding in favour of the respondent despite the fact that she did not tender any document to prove her administratrix ship of the estate of estate of the late Issa Mwichande.*
- 3. That the honourable Tribunal erred in law and fact by deciding in favour of the respondent on the land into which the appellant is purported to trespass despite the fact that dimensions of the said land do not know.*
- 4. That the honourable Tribunal erred in law and fact for deciding in favour of the respondent based on weak evidence adduced before the trial Tribunal.*

- 5. That the Honorable Tribunal erred in law and fact for failure to record evidence of the appellant regarding the dimension of the land she purchased from the late Issa Mwichande in 1993.*
- 6. That the Honorable Tribunal erred in law and fact for failure to analyze evidence adduced by the appellant.*

When the appeal was called for hearing on for hearing on 17th February, 2021, the appellant was represented by Ms. Josephine learned counsel holding brief for Mr. Gambo, learned advocate. The respondent, appeared in person, unrepresented. By the court order, the appeal was argued by way of written submissions whereas, the appellant's Advocate filed his submission in chief on 28th April, 2021 and the respondent Advocate filed his reply on 17th May, 2021 and the appellant's Advocate filed a rejoinder on 24th May, 2021.

In his submission, the appellant contended that the District Land and Housing Tribunal determined the land dispute which was time barred. The appellant went on to argue that the alleged trespass was discovered in 2015. To bolster his submission he referred this court to Item 22 of the 1st Schedule of the Law of Limitation Act, Cap. 89 [R. E 2019]. Also, she referred this court to pages 3 and 5 of the District Land and Housing

Tribunal Judgment which shows that the appellant purchased the suit land on 13th April, 1993 from the late Issa Mwichande. She went on to argue that the respondent who is the administrator of the estate of the late Issa Mwichande discovered the purported trespass in 2005 and she filed the suit on 13th November, 2019, 14 days lapsed. The appellant continued to argue that the appellant raised a preliminary objection that the matter is time barred but the objection was overruled. She cited the case of **Ismail Halid Mmingwa v Mohamed Saleh Amour**, Land Case No.83 of 2014 (unreported), the court dismissed the suit for being time barred. The appellant urged this court to dismiss the suit since the issue of time limit goes to the root of the case

Submitting on the second ground, that the tribunal erred in law and fact by deciding in favour of the respondent despite the fact that she did not tender any document to prove her administratrix of the estate of the late Issa Mwichande. The appellant briefly contended the respondent has no capacity to sue in the name of the late Issa Mwichande. She claimed that to prove her case, the respondent was required to tender a letter of administration. Otherwise, the decision of the tribunal is nullity and void since the respondent had no locus stand to institute the said case.

As to the third ground, that the tribunal erred in law and fact by deciding in favour of the respondent on the land which the appellant is purported to trespass despite the fact that the dimensions of the said land are not known. The appellant was brief and straight to the point. She contended that the land the suit land which the appellant is alleged to trespass is not defined in terms of dimensions. It was her view that the same makes the purported trespass to be an afterthought and the same is unjustifiable in the eyes of the law.

On the fourth ground, that the tribunal erred in law and fact for deciding in favour of the respondent based on weak evidence. He argued that the respondent in his pleadings and evidence adduced before the tribunal. She valiantly argued that the respondent had not tendered a sale of agreement between the appellant and her late father one Issa Mwichande. Repeatedly, she argued that she failed to tender letters of administration to justify her administration of the said estate of the late Issa Mwichande. She forcefully argued that the burden of proving the case was upon the respondent. To fortify her position she referred this court to section 115 of the Evidence Act, Cap.6 [R.E 2019].

With respect to ground 5, the appellant complained that the tribunal erred in law and fact for failure to record evidence of the appellant in regard to dimension of the land which she purchased from the late Issa Mwichande in 1993. She contended that she testified to the effect that the boundary of the suit land which she bought was marked by cashew nut trees and the pit latrine was in the land sold to the appellant by the late respondent's father. She claimed that the tribunal did not record properly the land dimension.

On the sixth ground, the appellant was straight to the point. She complained that the tribunal erred in law and fact for failure to analyse evidence adduced by the appellant. The appellant went on to argue that tribunal failed to analyse evidence on record which was supported by an exhibit AONI which proved the boundaries and the appellant's ownership over the suit land. She lamented that in case of the Chairman could have considered the said evidence it could have decided in favour of the appellant.

On the strength of the above, the appellant beckoned upon this court to allow the appeal and quash and set aside the judgment and decree of the tribunal with costs.

Opposing the appeal, Ms. Glory Sandewa, learned counsel for the respondent combined the fifth and sixth grounds and opted to argue the remaining grounds separately. On the first ground that relates to time barred, Ms. Glory argued that the respondent testified to the effect that after the alleged trespass and before filing the land application before the tribunal the matter was reported at Mtoni Ward Tribunal, however, the Ward Tribunal could not resolve the matter. To support her submission, she referred this court to a copy of the letter from Mtoni Ward Tribunal dated 19th April, 2019 (Annexure 2) which was admitted during the hearing of the application. Ms. Glory also referred this court to pages 2 and 3 of the trial tribunal Judgment that the Chairman acknowledged that the respondent reported the incidence and the matter was before the Ward Tribunal.

In rebuttal, Ms. Glory argued that the application was not time barred since the respondent made a follow-up and in 2005 when the respondent was in Oljoro JKT on her return she realized that the appellant has trespassed his land.

Submitting on the second ground which states that the respondent did not tender any documentary evidence to prove her administratrix of the estate of her late father. Ms. Glory briefly and straight to the point submitted that the respondent was appointed as an administratrix of the estate of the late Issa Mwichande and she tendered a letter administration of the estate.

As to the third ground which relates to the dimension of the disputed land. The learned counsel for the appellant argued that the respondent was firm that at the trial the respondent explained that boundaries were set surrounding the piece of land which was owned by her late father. She added that during the trial the Chairman visited locus in quo and the boundaries of the disputed area were shown. Stressing, she submitted that the dimensions of the suit land were known.

With respect to the fourth ground, that the decision of the tribunal based on weak evidence adduced by the respondent. Ms. Glory simply submitted that the respondent submitted necessary evidence to support her claim.

On the fifth and sixth grounds, the learned counsel for the respondent argued that the evidence adduced by the appellant that she bought the land suit from the deceased was forged. She added that the deceased was a civil servant, he could read and write thus the appended thumb signature was not genuine. She went on to testify that the respondent witness one Amiri Omary testified to the effect that the appellant's sale agreement was witnessed by a student who was 13 years old thus he was not eligible to witness a contract.

In her conclusion, the learned counsel for the respondent urged this court to dismiss the appeal and uphold the decision of the District Land and Housing Tribunal dated 3rd September, 2019.

In her rejoinder, the appellant maintained her submission in chief. She lamented that the respondent's reply is devoid of merit. Insisting, she claimed that the appeal is out of time and the respondent did not tender ant letter of administration of the estate of her late father. She went on to submit that both parties admitted that the suit land belongs to their late fathers therefore they had no *locus standi* to sue and be sued. The appellant valiantly contended that the Chairman was required to nullify the Ward Tribunal proceedings and advise the parties to sue in the

capacity of the administrator. To bolster his submission she referred this court to the case of **Mohamed Kijojo v Athumani Abdallah Makungwa**, Misc. Land Appeal No.95 of 2018, High Court, Land Division at Dar es Salaam.

The appellant went on to claim that the assessors were not ordered to write their opinion, thus, no any opinion of assessors was read over. To substantiate her position she urged this court to go through the typed proceedings of the appellate tribunal.

In conclusion, for the interest of justice, the appellant beckoned upon this court to allow the appeal entirely with costs.

I have given careful consideration of the record of the case and the arguments for and against the appeal filed by the appellant and before I embark on the grounds of appeal, I have noted a point of law that was also raised by the appellant in her rejoinder that the assessors' opinion was not recorded. I have called the parties to address the court on this matter whereas the learned counsel for the appellant state that failure to record the assessors' opinion is a serious irregularity the same renders the tribunal's decision fatal. The respondent had nothing to add rather he left

the matter in the hands of the court to decide. I have given careful consideration of the record of the case and the arguments for and against the appeal advanced by the parties and I feel that the same should not detain this Court. It is on record and as per the submission by the appellant, the Chairman did not record the opinion of the assessor.

I have gone through the handwritten proceeding of the District Land and Housing Tribunal for Temeke specifically on the last pages of the original proceedings and noted that the assessors' opinion were not recorded. However, the Chairman in his judgment acknowledged that the assessors Fatuma Chikwindo and Rutami Masunu opined that the application be dismissed. 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 was pinioned, 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." [Emphasis added].

Similarly, in the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No 287 of 2017, 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 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 has not 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, 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, therefore, the same has no useful purpose. 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 which i have made.

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 Temeke in Land Application No.199 2019 in the following manner:-

- (i) I remit the case file to the District Land and Housing Tribunal for Temeke, the records remain intact, the Chairman to record the assessors' opinion and compose a new judgment.
- (ii) The matter to proceed at the District Land and Housing Tribunal for Temeke before another Chairman with the same set of assessors.
- (iii) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 28th July, 2021.




A.Z.MGEYEKWA
JUDGE
28.07.2021

Judgment delivered on 27th July, 2021 in the presence of Mr. Yeremiah,
learned counsel for the appellant and the respondent.




A.Z.MGEYEKWA

JUDGE

28.07.2021