

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT SUMBAWANGA**

LAND APPEAL NO. 19 OF 2019

(Originating from the District Land and Housing Tribunal for Katavi
at Mpanda in Land Application No. 22 of 2017)

BETWEEN

ANNA CHAPAULINGE APPELLANT

AND

RAYMOND CHARLES TOSHA RESPONDENT

Date of Last Oder: 17/05/2021

Date of Judgment:10/08/2021

JUDGMENT

C.P. MKEHA, J.

Before the District Land and Housing Tribunal for Katavi at Mpanda, the appellant filed land application against the respondent herein for a number of reliefs including recovery of un-surveyed piece of land located at Ilembo street within Mpanda Municipality. Having heard the land application on merits, the same was dismissed by the tribunal with costs.

Aggrieved with the Judgment entered by the Tribunal, the appellant has preferred the present appeal with the following four (4) grounds that:

1. The chairperson of the tribunal erred both in law and in fact in relying and believing the evidence by DW2 one Gasper Sabuni Mshama who is a kitongoji chairperson who testified as the one who allocated the land to the respondent while he is neither a land allocation authority nor does he possess such powers, hence; reaching at a wrong decision.
2. The chairperson of the Tribunal erred both in law and in fact by failure to consider completely the evidence adduced by the appellant, hence, reaching at a wrong decision.
3. The chairperson of the Tribunal erred both in law and in fact in holding that the land in question is surveyed without having any evidence to that effect. Also, the trial chairperson put words in his mouth which do not originate from the witness, hence, reaching at wrong decision.
4. The chairperson of the tribunal erred both in law and in fact in giving right over the disputed land to the respondent herein while the whole evidence shows that the land in dispute is that of the appellant hence reaching at a wrong decision.

Essentially, the respondent refuted the grounds of appeal paraded in discontent of the findings of the decision of the trial District Land and Housing Tribunal. Hearing of the appeal was conducted orally. Both parties appeared in person, that is, unrepresented. For obvious reasons due to non-representation, the appellant and the respondent urged their

respective grounds and reply respectively to form integral part of their submissions with the appellant insisting to be the rightful owner.

Having considered the trial court record and the appellant`s grounds of appeal as well as the respondent`s reply to the said grounds, I proceed to observe as follows. To start with, the evidence on record per the testimony by PW1 shows that the disputed piece of land belonged to the deceased Alisen Chapaulinge who passed away in 1990.

The record indicates that, PW1 tendered form number IV regarding her appointment to administer estate of the late Alisen Chapaulinge. Yet; the filed land application did not capture the capacity under which the appellant sued the respondent.

In other words, the appellant sued the respondent in her own capacity instead of suing as the administratrix of the deceased`s estate. In the case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuph Osman & Fatna Mohamed**, Civil Rev. No. 6/2017, (Dar es Salaam), (Unreported), the Court of Appeal underscored at page 28 paragraph 1 to the effect that:

“... The life of her legal representation with respect to the estate was still subsisting at the time of her transaction with the 1st

respondent just as the suit land was vested in her in her capacity as the legal administratrix. But, as we have hinted upon, the 2nd respondent was not sued in that capacity. Instead, the 1st respondent sued her in her personal capacity and, for that matter, no executable relief could be granted as against her personally with respect to the suit land which, as it turns out, was vested into her other capacity as the legal representative ..”.

The respondent in this case did not object the fact that the appellant was suing in her capacity of the administratrix of the estate of the deceased. The interests of justice dictates invocation of the overriding objective principle by disregarding unnecessary irregularities and or technicalities, see; **Alliance One Tobacco and Tanzania Limited & Hamisi Shoni v. Mwajuma Hamisi (as administratrix of the estate of Philemoni R. Kilenyi) & Heritage Insurance Company (T) Limited**, Misc. Civil Application No. 803 of 2018, (Dar es Salaam Registry), (Unreported) where the Court underscored to that effect.

Being the case, this court found the anomaly not injurious to the ends of justice against the parties, knowing that, consequential orders at the end of the appeal, would be issued to save interests of the heirs, if the

appellant was to emerge victorious, not to convert the disputed land into her personal property.

Now, resorting into the condensed grounds of appeal and for the sake of disposing the appeal, the gist and context of the 1st, 2nd and 3rd grounds are essentially on proof regarding ownership; hence, all the three grounds will be determined by this Court altogether.

According to PW1, the suit land is said to have been bought by the deceased one Alisen Chapaulinge in 1978 from one Wantindi. Per PW1, the disputed piece of land measures ½ an acre adding that, following death of their father in 1990; they continued using the land until in 2003 when they went to Rukwa for completion of some rituals on the death of their father.

When the family came back from Rukwa in 2005, they found the suit land to have been invaded. According to DW1, that is, the respondent, he was allocated a piece of land measuring 22x22 paces in 1998 by Ilembu village chairperson one Gasper Sabuni with the allocation witnessed by Mashaka Bruno (now deceased) and Edward Mapigo (also deceased). According to DW1, he did not cultivate the land but that the same was

neglected. DW1 added that, the applicant sold their piece of land to one Simon whereas from 2016, the said Simon has been neighbour to DW1.

The testimony by DW1 differed from that by DW2 who testified to had allocated the disputed land to the respondent adding that by then it was a forest. DW1 added, the appellant's land is as such far from the respondent's land. DW2 further testified that, in the said allocation, he was with Augustine Mfumba (deceased), that is, in absence of another member.

To this court, the above depicts a clear serious confusion making it unlikely, for one to comprehend whether both parties were referring to same subject matter. Besides and in the circumstances, there was thus need for the trial court to visit the *locus in quo*, the same that does not feature on record to have been done.

Moreover, the trial court ought to have summoned both the referred to Wantindi and Simon as witnesses of the tribunal if at all the two were not summoned by the parties in the interests of substantial justice.

Justification for retrial is grounded from what was observed by the Court of Appeal in the case of **Gift Mariki, Frank John Mariki and Peter Joseph Mariki vs. the Republic** (supra) that:

“ In the circumstances and for the reasons stated earlier, we are of the settled view that there is no escape for that conclusion. The serious irregularity vitiated the trial. Taking into account the principles and factors to be considered, in our respectful view, this case invites a retrial (Merali & Others v R, [1971] E.A. 221; Fatehali Manji v. R [1966] E.A. 343 and Ahmed Ali Dharamsi Sumar v. R [1964] E.A. 481)”.

From the above, this court finds this appeal meritorious calling for retrial. Hence, this court orders the matter to be tried *de novo* before another chairperson and new set of assessors with competent jurisdiction. It is directed that, before resumption of trial, pleadings be accordingly amended to reflect real capacities of the parties. Considering the above, parties are ordered to shoulder for their own costs as to this appeal.

Dated at SUMBAWANGA this 10th day of August, 2021 .




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C.P. MKEHA
JUDGE
10/08/2021


**CERTIFIED
TRUE COPY
OF THE ORIGINAL**

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(LAND DIVISION)
AT SUMBAWANGA**

LAND APPEAL NO. 19 OF 2019

*(Originating from the District Land and Housing Tribunal of Katavi District
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ANNA CHAPAULINGE.....APPELLANT

VERSUS

RAYMOND CHARLES TOSHA.....RESPONDENT

Date - 10/08/2021
Coram - Hon. W.M. Mutaki – DR.
Appellant - Present in person
Respondent - Absence
B/C - Mr. A. Chitimbwa

COURT: Judgment delivered in presence of Appellant in person in the
absence of Respondent.




W.M. MUTAKI
DEPUTY REGISTRAR
10/08/2021

