

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO.129 OF 2021**

(Arising from the District Land and Housing Tribunal for Temeke at Temeke
in Land Appeal No. 10 of 2020 arising from Buza Ward Tribunal in Land
unnumbered Land Dispute)

NICOLAUS SWAI APPELLANT

VERSUS

REDEMPTA NASSORO RESPONDENT

JUDGMENT

Date of last Order: 04.03.2022

Date of Judgment: 08.03.2022

A.Z.MGEYEKWA, J

The matter of controversy between the parties to this appeal is on the landed property. Brief facts related to the instant appeal is that, the appellant filed a case at the Ward Tribunal of Buza in Case No. 39 of 2017 and Case No.55 of 2019. Redempta Nassoro lodged a case against Nicolaus Swai in Case No. 39 of 2017, the Ward Tribunal of Buza recorded the agreement between Redempta Nassoro and Nicolaus Swai

that the two have agreed that Redempta to proceed with the construction process and in case Swai wanted to build a house then he is allowed to use the appellant's gate. Both parties were ordered to live peacefully as neighbours. The said agreement was signed on 17th August, 2017.

In 2019, Nicolaus Sway lodged a case against Redempta Nassoro in Case No. 55 of 2019 at Ward Tribunal of Buza. Claiming that after failing to resolve the dispute he decided to lodge a complaint at Ward Tribunal of Buza. The Ward Tribunal of Buza went determined the matter and ordered for division of the suit land which measured 37 cm whereas each party was required to own 18.5 cm. Redempta Nassoro was ordered to adjust her gate pillar.

Dissatisfied, Redempta Nassoro challenged the trial tribunal decision at the District Land and Housing Tribunal for Temeke alleging among other things, that the trial tribunal determined two cases and that the trial tribunal erred in dividing the suit land. The respondent's averment in his defence was that he is the lawful owner of the suit land. The District Land and Housing Tribunal decided in favour of the respondent and quashed and set aside the Ward Tribunal of Buza in Case dated 30th January, 2020. The appellate tribunal upheld the decision of the trial tribunal with costs.

In this appeal, the appellant has accessed the Court seeking to impugn the appellate tribunal decision through an appeal premised on six grounds of grievance, namely:-

1. *That, the Honourable District Land and Housing Tribunal erred in law and fact by defaulting the prior decisions of the Ward Tribunal between the appellant and respondent without taking into account that the appellant is the owner of the disputed land;*
2. *That, the Honourable District Land and Housing Tribunal erred in law and fact by allowing the appeal without considering that the basis of its decision does not come from the judgment rather a piece of paper stamped with the Ward Tribunal rubber stamp.*
3. *That, the Honourable District Land and Housing Tribunal erred in law and fact by not taking into account that the respondent had exceeded her boundaries and instead went on interfering with the appellant's land.*
4. *That, the Honourable District Land and Housing Tribunal erred in law and fact by relying on the former Ward Tribunal's decision without stating the contents and what was its decision or directives to both appellants.*

5. *That, the Honourable District Land and Housing Tribunal erred in law and fact by failure to state in the judgment the opinion of the assessors when reaching in its decision.*
6. *That, the Honourable District Land and Housing Tribunal erred in law and fact for quashing and nullifying the decision of the ward conciliation council without taking into account its role as conciliators.*

When the appeal was called on for hearing on 4th February, 2022, the appellant had the legal service of Mr. Derick Kahidi, learned counsel and the respondent appeared in person, unrepresented.

In his submission, Mr. Derick decided to abandon the third and sixth grounds of appeal. On the first ground, the appellant's counsel contended that the District Land and Housing Tribunal erred in law by quashing the decision of the Ward Tribunal without taking into account that the appellant is the lawful owner of the suit land. Mr. Derick contended that the respondent build a fence on the appellant's piece of land. He submitted that the respondent did not produce any evidence to prove that she is the lawful owner of the suit land. Mr. Derick went on to submit that the Ward Tribunal directed the respondent to demolish the fence which was constructed in the exceeded 18 cm area. He added that the appellate tribunal acknowledged that the respondent to leave aside 18 cm, thus, it was not correct to quash the decision of the trial tribunal since the

encroachment was proved. To buttress his contention, he referred this court to section 34 (1) of the Land Disputes Courts Act Cap.216 that the appellate tribunal in determining the appeal was required to consider relevant records. Stressing on the point, he argued that the records clearly shows that the respondent encroached the appellant's land.

Arguing for the second ground, Mr, Derick valiantly contended that the appellate tribunal erred in law for not considering that the basis of its decision did not arise from the Ward Tribunal judgment rather a piece of paper bearing trial tribunal rubber stamp. He contended that the appellate tribunal held that there was claim No.39 of 2017 which was delivered on 17th August, 2017; the appellant allowed the respondent to continue with construction process.

He continued to submit that the appellate tribunal made a turnaround decision by deciding that the said case does not exist and the records in respect to Case No. 39 of 2017 are not in place. Fortifying his submission he referred this court to pages 3 and 4 of the appellate tribunal judgment. Insisting, he claimed that the appellate tribunal contradicted itself as to whether the records were available or not. He went on arguing that the appellate tribunal on page 6 referred to case No. 39 of 2019 and quashed

the trial tribunal decision based on Case No.39 of 2017 while again it did acknowledge that the said case did not exist.

As to the fourth ground, Mr. Derick was very brief and focused. He contended that the appellate tribunal erred in law to rely on the former Ward Tribunal decision while the records in regard to both cases Case No.39 of 2019 and Case No. 39 of 2017 do not exist and neither of the parties lodged those cases.

Concerning the fifth ground, the learned counsel for the appellant asserted that the appellate tribunal did not consider the opinion of assessors. Supporting his submission he referred this court to section 23 (1) of the Land Disputes Courts Act, Cap.216, and argued that the appellate tribunal was required to sit with assessors and record the assessors' opinions. He claimed that the appellate tribunal in its decision acknowledged the assessors' opinion while the same were not recorded. He added that the Chairman was required to state reasons for why he did not consider the assessors' opinions which is contrary to section 24 of the Land Disputes Courts Act, Cap.216.

On the strength of the above submissions, Mr. Derick beckoned upon this court to quash the appellate decision, order the respondent to

demolish here gate which is in the appellant's land, declare the appellant, a lawful owner of the suit land and allow the appeal with costs.

Responding, the respondent began by tracing the genesis of the matter which I am not going to reproduce in this appeal. She opted to argue all grounds of appeal together. She was brief and straight to the point. The respondent submitted that the appellate tribunal was correct to uphold the decision of the Ward Tribunal of Buza in Case No. 39 of 2017. She claimed that the respondent in 2020 lodged a case before the Ward Tribunal which had no any number. She claimed that she is the lawful owner of the suit land and she occupied the suit land before the respondent. She added that her gate pillar is built near the respondent's house and that is the main reason for their dispute. Concerning the assessors' opinion, she had nothing to say because she could not remember.

Rejoining, Mr, Derick reiterated his submission in chief. Stressing that the respondent did not prove whether Case No. 39 of 2017 existed. He also insisted that the appellate tribunal did not comply with the requirement stated under section 34 of the Land Disputes Courts Act, Cap. 216. He insisted that it was an irregularity for the failure of the trial tribunal to number its case.

On the strength of the above submission, the respondent beckoned upon this court to allow the appeal.

After a careful perusal of the submission made for the appeal by the appellant's counsel and the respondent and after having gone through the court records, I have come to the following firm conclusions. In determining this appeal the main issue calling for determination is *whether the appeal is meritorious*.

With respect to the first and fourth grounds of appeal, the appellate tribunal erred in law to rely on the former Ward Tribunal decision and did not take into account the fact that the appellant is the lawful owner. I have gone through the trial tribunal record and scrutinized the proceedings of the trial and appellate tribunals and noted that contrary to the submission of Mr. Derick, both cases; Case No.39 of 2017 and Case No. 39 of 2019 are in the records. The said cases do exist and the Ward Tribunal of Buza made two decisions; in Case No. 39 of 2017, the complainant was the Redempta Nassoro and in the Case No. 39 of 2019, the complainant was Nicolaus Swai whose Advocate claims that the cases do not exist and none of the parties lodged the said cases at the Ward Tribunal of Buza.

Without, wasting the precious time of this court, I find this ground devoid of merit since the records clearly show that the appellant's complaint

before the Ward Tribunal of Buza and the trial tribunal in Case No.39 of 2017 recorded the parties' consent that, the respondent should not proceed with construction activity, however, later in 2019, the respondent changed his mind. Hence he lodged a dispute at the same trial tribunal and the trial tribunal decided to divide the suit land.

I am in accord with the trial tribunal Chairman that it was not correct for the trial tribunal to determine the matter twice. The appellant was not required to file a case on the same subject matter. In case he was dissatisfied, then he had an opportunity to challenge the consent judgment by way of revision. Therefore the first ground cannot hold water since Case No. 39 of 2019 before the trial tribunal was wrongly instituted. Therefore these grounds are demerit.

As to the second ground, Mr. Derick faulted the appellate tribunal that it did not consider the basis of the decision that it does not arise from a judgment rather a piece of paper. In my view, the said piece of paper is a proper document that was prepared by the Ward Tribunal of Buza and the same is a consent judgment whereas parties agreed to let the respondent continue with the construction of her gate. The same is recorded in a Court file; File No. 39 of 2017, Station: Buza, the parties are Redempta Nassoro against Nicolaus Swai. The consent judgment bears the signature of the

Chairman, dated 23rd April, 2020, and a tribunal rubber stamp is affixed, indicating that it is a legal consent judgment. It is worth noting that in mediation, there is no proper or strict procedure what matters is to record the parties' agreement which was done.

The issue of irregularity; that the trial tribunal did not number its case contrary to section 34 of the Land Disputes Courts Act, Cap. 216. In my view, the omission does not vitiate the fact that from the beginning the Ward Tribunal of Buza misdirected itself to determine the Case No. 39 of 2019. Therefore, this ground is answered in negative.

With respect to the fifth ground, the appellate tribunal did not record the assessors' opinion, however, the same was reflected in its judgment. I have scrutinized the appellate tribunal proceedings and noted that on 15th July, 2021, the Chairman invited the assessors to file their opinion and the same was filed at the tribunal whereas assessors; Rutami Masunu and Chikwindo wrote their opinions on 5th July, 2021. The Court of Appeal of Tanzania in the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, held that:-

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

Therefore, contrary to Mr. Derick's submission, the assessors gave their opinion for consideration in the preparation of the Tribunal's judgment, and the same is reflected in the appellate tribunal file. The record reveals that the Chairman acknowledged the assessors' opinion in his judgment. Therefore this ground is demerit.

In the premises and for the fore stated reasons, I am inclined to hold the appeal was lodged without a scintilla of merit and the same is hereby dismissed in its entirety.

Order accordingly.

Dated at Dar es Salaam this 8th March, 2022.




A.Z.MGEYEKWA
JUDGE
08.03.2022

Judgment delivered on 8th March, 2022 in the presence of both parties.




A.Z.MGEYEKWA
JUDGE
08.03.2022

Right to appeal fully explained.