

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 41 OF 2021

*(Arising from the Decision of Kibaha District Land and Housing Tribunal
in Land Application No. 103 of 2015 made on 16th August, 2017 by Hon.
Jerome Njiwa Chairperson)*

ASHA HUSSEIN (As Administratrix of the

Estate of Hussein Maghobo) APPELLANT

VERSUS

FINTAH EDWARD CHINGWILE 1st RESPONDENT

WAZIRI HAKIM TAMBALA 2nd RESPONDENT

JUDGMENT

Date of Last order: 30.08.2022

Date of Judgment: 31.08.2022

A.Z. MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land located at Misugusugu at Kibaha within Pwani Region. The decision from which this appeal stems is the Judgment

of the District Land and Housing Tribunal in Application No. 103 of 2017. The material background facts of the dispute are not difficult to comprehend. They go thus: on 21st September, 2015, Asha Hussein (as administratrix of the estate of Hussein Maghobo) instituted an application against the respondents claiming ownership of the suit property. The respondent claimed that she is the lawful owner of the land in dispute. The appellant prayed to be declared the lawful owner of the suit land, and that the respondent be declared trespassers to the appellant's suit land.

The District Land and Housing Tribunal for Kibaha determined the matter and found that the matter was time-barred, however, the Chairman went further to determine the matter on merit and the respondent was declared a lawful owner of the suit land.

Believing the decision of the District Land and Housing Tribunal for Kibaha was not correct, the appellant lodged a Petition of Appeal containing two grounds of appeal as follows: -

1. *That the trial Tribunal erred in law and in fact by failing to scrutiny, analyse, and evaluate evidence on record and thereby reached an erroneous decision.*
2. *The trial Tribunal failed to invoke the principle of adverse possession and hence reached an erroneous decision.*

When the matter was called for hearing before this court on 30th August, 2022, the hearing was conducted through video conferencing whereas the appellant was represented by Mr. Denis Julius, learned advocate while the respondent was represented by Mr. Francis Mwita, learned counsel.

The appellant's counsel started to submit on the second ground that the trial tribunal failed to invoke the principle of adverse possession, whereas according to him the respondents were invaders. He contended that the 2nd respondent testified to the effect that he bought the suit land, thus in his view as long as the 2nd respondent bought the suit land then the principle of adverse possession cannot stand. Mr. Denis went on to argue that in adverse possession the suit land must be abandoned, and the 2nd respondent his testimony did not state whether the suit land was abandoned. Thus, in his view, the principle of adverse possession is inapplicable in the situation at hand. He further claimed that the genesis of the appeal shows that the suit was prosecuted by the same parties on the same issue and the Chairman acknowledged that there was an order of retrial. Fortifying his submission he referred this court to page 2 of the Judgment.

The learned counsel for the appellant continued to argue that the Chairman raised an issue of time-barred while the law clearly specifies

the limitation of time for parties to litigate on the same suit. Supporting his submission he cited section 21 of the Law of Limitation Act, Cap. 89 [R.E 2019] and the case of **Salim Lakani & 2 Others v Ishfakushabi Yusuf Ally (as an administrator of the Estate of the late Shabir Yusuf Ally)**, Civil Appeal No.237 of 2019 CAT at Dar es Salaam. The counsel for the appellant blamed the Chairman for failure to exclude the time of litigation.

On the first ground, the learned counsel for the appellant contended that the trial tribunal Chairman failed to analyse, scrutinize and evaluate the evidence on record. Mr. Denis contended that the 2nd respondent was required to prove his case, however, the 2nd respondent did not tender the sale agreement to prove her ownership over the suit property. He claimed that the 2nd respondent's evidence is doubtful since he did not mention the vendor. Supporting his submission, he referred this court to page 6 of the trial tribunal Judgment. He went on to submit that there was no any administration on the estates of the deceased. He valiantly argued that the suit land could not be sold in the absence of the administrator of the estate.

In conclusion, the learned counsel for the appellant urged this court to quash and set aside the decision and proceedings of the District Land and Housing Tribunal with costs.

In reply, Counsel for the respondents submitted that the application was dismissed for being time-barred. He contended that the issue of adverse possession was raised by the trial Chairperson as an *obiter dictum* when stated his assumption on page 10 of the typed Judgment. He went on to submit that the issue of time-barred was referred from the Application specifically paragraph 6 (a), whereas the cause of action arose in 1996 and that the application was lodged to the District Land and Housing Tribunal in 2015.

It was his submission that the trial Chairman's decision was sound and reasoned thus, the Chairman was correct in dismissing the suit based on the issue of time-barred. He added that the application at the Ward Tribunal in 2010 was also time-barred because it was lodged after a lapse of 14 years from 1996 when the cause of action arose. He added that the issue of limitation of time was not raised but the Chairman stated that the issue of time-barred can be raised at anytime. He added that since the Chairman found that the application time barred then the same sufficed thus other issues were obiter. The learned counsel for the respondents claimed that the appellant in her testimony did not state when exactly the cause of action arose thus the Chairman after examining the pleadings found a point of law that the matter was time-barred.

The learned counsel for the respondents went on to submit that there is

no any proof whether the appellant obtained the suit land belongs to her while the 2nd respondent claimed that the suit land belongs to him and not to the deceased.

In rejoinder, the appellant's counsel reiterated his submission in chief and further added that the Chairman wrongly moved himself to discuss the issue of adverse possession as a result he declared the 2nd respondent's lawful owner of the suit land.

On the strength of the above submission, the appellant beckoned upon this court to quash the decision of the tribunal and allow the appeal.

Having summarized the submissions and arguments by both learned counsels, I am now in the position to determine the grounds of appeal before me.

Before proceeding with composing the judgment I called upon the parties to address the court whether the parties were given an opportunity to address the Chairman on the issue of time-barred. Both learned counsels stated the Chairman raised the issue of time-barred *suo motu* without affording the parties the right to submit.

It would appear from the court records that the trial Chairman raised the

issue of time-barred *suo motu* and as rightly stated by both counsels parties were not heard on the issue which was raised *suo motu* by the Chairman in his Judgment.

The trial Tribunal Chairman, having found the suit time-barred when the suit was instituted in the District Land and Housing Tribunal for Kibaha, he was required to call parties to address him on the issue of time-barred before composing a Judgment, failure of which the parties would have been denied their right to be heard. Since the parties were not granted an opportunity to address the tribunal on the issue of the time limit raised by the trial Chairman '*suo motu*', such an act amount to procedural irregularity as parties were condemned unheard.

The right to be heard is a Constitutional right in accordance with Article 13 (6), (b) of the Constitution of the United Republic of Tanzania of 1977. This position is supported by a number of decisions made by this Court and the Court of Appeal of Tanzania, notably the Court of Appeal's decision in the cases of **Tang Gas Distributors Limited Mohamed Salim Said**, Civil Application for Revision No. 68 of 2011, and **The Registered Trustee of Shadhilly vs MahfudhSalim Omary Bin Zagar (Administrator of the estate of the Late Salim Omary)**, Civil Application No. 512/01 of 2018, (Unreported). The Court of Appeal in the decision of

Tanga Gas Distributors (supra) observed that; -

“Fortunately, it is common ground here that it is settled law that: *“no decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice”*: **I.P. T.L. v. STANDARD CHARTERED BANK** (supra). [Emphasis is ours].

It further stated that@ -

*‘What then are the consequences of a breach of this principle? Settled law is to the effect that, its breach or violation, unless expressly or impliedly authorized by law, **renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard**: see, for instance, **ABBAS SHERALLY & ANOTHER v. RABDUL SULTAN H.M. FAZALBOY**, Civil Application No. 33 of 2002 (unreported) and **I.P.T.L. v. STANDARD CHARTERED** (supra). Emphasis added.*

Resultantly, I find no reason to determine the grounds of appeal anymore upon the entire procedure of the District Land and Housing Tribunal for Kibaha being irregular.

Following the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 [R.E 2019] 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.103 of 2015 in the following manner: -

- (i) The Judgment, Decree, and Proceedings of the District Land and Housing Tribunal in Land Application No. 103 of 2015 are quashed and set aside.
- (ii) I remit the case file to the District Land and Housing Tribunal for Kibaha for retrial before another Chairman in accordance with the law.
- (iii) I direct that the case scheduling be given priority, hearing to end within six months from the date of Judgment.
- (iv) No order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 31st August, 2022.




A.Z.MGEYEKWA
JUDGE
31.08.2022

Judgment delivered on 31st August, 2022 via video conferencing whereas both learned counsels were remotely present.




A.Z.MGEYEKWA
JUDGE
31.08.2022