

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 275 OF 2021
(Arising from Kinondoni District Land and Housing Tribunal in
Land Application No.247 of 2012)

ALLY SWAPANGA.....APPELLANT

VERSUS

AMINA ABDALLAH SELEMANI.....1ST RESPONDENT

SOPHIA ALLY (As Administrator of the

Estate of the Late ASIATA NASSORO).....2ND RESPONDENT

Date of Last Order: 12.09.2022
Date of Ruling: 17.10.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by ALLY SWAPANGA. He was the 1st respondent in Application No.247 of 2012 at Kinondoni District Land and Housing Tribunal (the **Tribunal**). At the Tribunal, the 1st respondent herein successfully sued for the ownership of Plot No.312, Block C, Sinza, Kinondoni District within the City of Dar es Salaam (the **suit land**).

The appellant being dissatisfied with the decision of the Tribunal has preferred this appeal basing on five grounds of appeal hereunder reproduced:

- 1. That, the Honourable Chairperson erred both in law and facts by holding that the appellant signed the sale agreement and consented to the sale of the suit land contrary to the evidence on record.*
- 2. That the honourable Chairperson erred in law and facts by relying on extraneous matters and held that the appellants report to police of forgery of sale of the suit land was aimed at preventing respondent from completing the sale transaction contrary to the evidence on record.*
- 3. That the honourable chairperson erred in law and fact by finding that the appellant handed over to the respondent to a fake title deed (exhibit P6).*
- 4. That the honourable Chairperson erred in law and fact for not taking into consideration the appellant's defence.*
- 5. That the honourable court erred both in law and facts by finding that the 1st respondent proved his case on a balance of probabilities contrary to the evidence on record.*

The appellant prayed for the appeal to be allowed and the decision of the Tribunal be set aside, and costs of this appeal.

This appeal proceeded by way of written submissions. Mr. Wilson Edward Ogunde, Advocate drew and filed submissions on behalf of the appellant, Mrs. Mulebya, Advocate drew and filed submissions in

reply on behalf of the 1st respondent, while Armando Swenya, Advocate drew and filed submissions in reply on behalf of the 2nd respondent.

I will first deal with the issue of the additional ground of appeal which was raised by Mr. Ogunde raised in the course of the submissions.

It was Mr. Ogunde's submissions that he discovered new grounds based on a point of law. He thus sought for leave of the court to add it as a new ground of appeal. He said that section 23 (3) of the Land Dispute Courts Act, CAP 216 RE 2019 allows the Chairman to proceed with all members who were present at the commencement of the proceedings. He said if the proceedings are adjourned, members absent in the previous proceedings are not allowed to participate in the subsequent proceedings. He said if the Chairman proceeds with one member, the absent one shall not be allowed to proceed in the subsequent proceedings. He said that the matter at hand commenced at the Tribunal on 10/11/2016 with two assessors namely Mr. Kinyondo and Mrs. Mbakileki. That on 13/02/2017 only Mr. Kinyondo was present and the Chairman invoked section 23 (3) of the Land Dispute Courts Act, and proceeded with only one assessor, Mr.

Kinyondo. In that regard, Mr. Ogunde was of the view that, it was improper for the Chairman to later on allow Mrs. Mbakileki to participate in the proceedings as it was Mr. Kinyondo who was legally supposed to proceed. He said on 27/02/2017 when **PW2** testified none of the assessors participated, that meant, Mr. Kinyondo's participation also ended on the said date. He said the proceedings from 27/02/2017 were supposed to proceed by the Chairman alone without any assessors but on 17/05/2017 Mrs. Mbakileki who missed the previous hearings emerged and participated in the proceedings whereas Mr. Kinyondo was absent. He said on 31/01/2018 all assessors were absent, but on 23/07/2018 Mr. Kinyondo participated in the proceedings. Mr. Ogunde further said 14/02/2019 Mrs. Mbakileki participated but Mr. Kinyondo was absent. And again on 20/08/2019 both assessors were present. He said section 23 (3) of the Land Dispute Courts Act, does not allow assessors to choose which proceedings to participate. He said once the Chairman invokes section 23 (3) of the Land Dispute Courts Act, and continues with the hearing in absence of assessors then the absentees are not allowed to participate in the subsequent proceedings if adjourned to another date. He therefore said, the Tribunal's proceedings beyond 27/02/2017 were irregular. He thus argued this court to quash and

set aside the proceeding of the Tribunal and order fresh hearing before another Chairman.

In reply, Mrs. Mulebya for the 1st respondent said that parties in Application No.247 of 2012 were informed of the assessors who had completed their tenure and could not continue serving in the Tribunal without being re-appointed. That the parties and their advocates was asked by the Chairman if they could proceed under section 23 (3) of the Land Dispute Courts Act, and they resolved to proceed. That the record of the Tribunal is clear and reflects what transpired between parties and assessors. That the issue of handling assessors is reflected in the Tribunal's judgment at page 11. Counsel further said that it is improper for the appellants' advocate to add the ground of appeal at the submissions stage, rather he should have sought for leave to amend his petition of appeal.

Mr. Swenya for the 2nd respondent said that section 23 (3) of the Land Disputes Court Act is silent on the status of assessors who were absent on the commencement of the hearing and his position to continue with the hearing after that. He further said with regard to the issue of assessors that, the matter had taken long since 2012 and

they had retired. That the Chairman had to proceed under section 23 (3) of the Land Disputes Courts Act. He prayed for the appeal to be dismissed.

In rejoinder, Mr. Ogunde reiterated his main submissions.

In his submissions, Mr. Ogunde prayed to add what he called an additional whereas he challenged subsequent participation of members of the Tribunal who were previously absent on ground of retirement. On the other hand, Mrs. Mulebya and Mr. Swenya for the 1st and 2nd respondents respectively, challenged this point and further pointed out that if this was an additional ground of appeal then Mr. Ogunde was supposed to seek leave of the court so that he could file an amended petition of appeal.

Indeed, Mr. Ogunde raised this additional ground in the course of the submissions which is not the normal practice. However, since the said grant of leave to add a ground of appeal is discretionary, the court may on very exceptional circumstances decide to grant the said leave raised for the additional ground to be argued and determined. In the present instance the court has considered the circumstances that

have been aligned in respect of the assessors' attendance in the hearing, and this being the court of record, and taking into account that this matter deals with proceedings which are the basis of the judgment, and further that the respondents had an opportunity of responding thereto; for ends of justice, this court shall grant leave for this additional ground of appeal to be argued and determined.

Section 23 the Land Disputes Court Act governs the assessors in the Tribunal. The said section provides as follows:

23(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence.

Section 23 (3) of the Land Disputes Court Act entails that, for whatever reason, retirement inclusive, the Chairman may proceed with or without any assessor or continue with the remaining assessor if any. If the legislature had intended that an assessor could be

changed, or could resume after retiring, then the provision would have stated so. The rationale of the said position is that an assessor who commences trial has to actively participate to its conclusion as he is assumed to know the conduct of the proceedings.

Now, back to the District Tribunals proceedings, it reveals that at the commencement of the proceedings on 10/11/2016 there were two members, namely, Mr. Kinyondo and Mrs. Mbakileki. However, they kept on alternating. Sometimes both of them were present and at times neither of them appeared. For instance, on 06/12/2016 the record is silent about their presence, the assumption is that they were therefore absent. On 9/2/2017 and 13/2/2017 the records are also silent, meaning they were also absent, and it is when the Chairman recorded that the Tribunal shall proceed under section 23 (3) of the Land Disputes Court Act, but no reasons were assigned. Though Mrs. Mulebya in her submissions said the parties were informed that the assessors were retired, and the parties consented for the Chairman to proceed under section 23(3) of the Land Disputes Court Act but that is not on record, so we cannot state with certainty the reasons for their absence. It should also be noted that section 23 (3) the Land Disputes Court Act does not specifically cover absence of members

for reasons of retirement only, the section also covers instances of absence due death or long-time illness. In my view, the Chairman was supposed to specifically state the reasons for the absence that entailed him to proceed under section 23 (3) of the Land Disputes Court Act. Unfortunately, he did not do so. In any case, the assessors appeared later in the proceedings in an alternating manner which is contrary to section 23(3) of the Land Disputes Court Act. There was therefore no clear record who was retired and who remained. And reflecting it in the judgment while the proceedings are silent is irregular since the judgment is more or less the extract from the proceedings.

In the case of **Tubone Mwambeta vs. Mbeya City Council, Civil Appeal No.287 of 2017 (CAT-Mbeya)** (unreported) it was stated that where the trial has to be conducted with the aid of assessors they must actively and effectively participate in the proceedings and give their opinion before the judgment is composed (see also **Edina Adam Kibona vs. Abslom Swebe Shelly, Civil Appeal No. 286 of 2017 (CAT-Mbeya)** (unreported)). Since the assessors at the Tribunal were not present throughout the proceedings that means

they did not actively participate in the proceedings, and this is contrary to the law which results to nullity of the proceedings.

This ground alone is sufficient to dispose of the whole appeal, so I will not deal with the other grounds of appeal raised.

With the irregularity which have been established on the record, the appeal is allowed. The proceedings of the Tribunal are nullified, the judgment and decree of the Tribunal are quashed and set aside. I order the file to be remitted back to the Tribunal for re-trial before another Chairman. Considering that the irregularity is by the Tribunal, there shall be no order as to costs.

It is so ordered.



V.L. MAKANI
JUDGE
17/10/2022