

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC.LAND APPEAL No. 208 OF 2021

*(Appeal from the decision of Kinondoni District Land and Housing Tribunal in Land
Application No.342 of 2013)*

BEATUS MABERE

*(Suing as an Attorney of Salim
Hamid and Islam Agil)*

APPELLANT

VERSUS

GEOFREY NDOSSA**1st RESPONDENT**

SAMWEL KILUA.....**2nd RESPONDENT**

JUDGMENT

03.08.2022 & 19.10.2022

Masoud, J.

The origin of this appeal is the dispute over ownership of the suit plot located at Mbezi Kibanda cha Mkaa, registered as Farm No.3273 (the suit land), instituted by the appellant before the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the trial tribunal).

Before the trial tribunal the appellant claimed to be the owner of the suit land. The central dispute was over the boundary. The appellant claimed that the respondents being neighbors to the suit land trespassed/ encroached into it. Having heard both parties on merit, the trial tribunal

decided the matter in favor of the respondents. Being aggrieved by the said decision, the appellant decided to appeal before this court on the following 15 grounds;

1. *That the Honorable Chairman erred in law by conducting proceedings without having a proper quorum of 2 assessors.*
2. *That Honorable Chairman erred in law and fact by proceeding to determine the matter without assessor giving opinion in the presence of the parties.*
3. *That the Honorable Chairman Erred in law and fact by concurring and considering the opinion of assessor which was totally based on law.*
4. *That the Honorable Chairman erred in law by considering evidence which was not admitted in trial.*
5. *That the Honorable Chairman erred in law and fact by determining the Application based on the decision of the ward Tribunal in Application No. 5 of 2009 oblivious to the fact that the said Application had been set aside by the Land and Housing Tribunal at Mwananyamala in Land Appeal No. 99 of 2009.*
6. *That the Honorable Chairman erred in law and fact by determining the matter based on the decision of the Ward tribunal Kimara ward in Land Application No. 5 of 2009 without hearing the parties on the issue therefore violating the parties right to be heard.*
7. *That the Honorable Chairman erred in law and fact by failure to evaluate the evidence adduced by the Appellant and neglected or ignored to analyze the evidence that was tendered by the authority on determining issues number 1 and 2.*
8. *That the Honorable Chairman erred in law and fact by not considering evidence adduced in locus in quo and ignoring all the illegality therein.*

9. *That the Honorable Chairman Erred in law and fact by not analyzing the entire evidence and nick picking evidence to come to the determination of the Issues.*
10. *That the Honorable Chairman erred in law and fact by only considered oral evidence of the Respondent over the expert testimony tendered by the government officials and appellant witnesses.*
11. *That the Honorable Chairman erred in law and fact for not addressing himself properly to the issues framed and agreed by the parties, in result the controversy between the parties rightly or wrongly before the Tribunal was left unresolved.*
12. *That the Honorable Chairman erred in law and fact by determining the issue of validity of the survey of the land in question which was not the matter at issue between the parties.*
13. *That the Honorable Chairman erred in law and fact by determining the issues by directing and focus on the respondents without weighing in the evidence of the Appellant.*
14. *That the Honorable Chairman erred in law and fact by basing his entire decision solely on his own opinion, belief and perspective without applying the sound legal provisions.*
15. *That the Honorable Chairman erred in law and fact by determining the matter based on Judgment of the ward tribunal and ignoring the evidence and facts which were presented in the Tribunal causing the judgment to be problematic.*

Based on the above-mentioned grounds, the appellant asked the court to allow the appeal with costs, set aside the judgment and decree of the rial tribunal and order trial de novo.

Hearing of this appeal was by way of filing written submissions. The parties adhered to the submissions filing schedule. Both parties were represented. While the appellant enjoyed the service of Mr. Shalom Samwel Msaky, learned Advocate, the first respondent was represented by Mr. Emmanuel Safari, learned Advocate, and the second respondent was represented by Mr. Abel Ngallaba, learned Advocate.

Submitting in support of the appeal, Mr Msaky decided to abandon the 1st, 2nd, and the 4th ground of appeals. Submitting in support of the 3rd ground of appeal, Mr. Msaky contended that, the trial Chairman erred when he relied on the assessor's opinion which was based on a point of law. The assessors gave their opinion that the appellant had no locus standi to try the matter before the tribunal. The opinion contravened section 24 of the Land Dispute Courts Act Cap 216 R.E 2019 (**Cap 216**). In his argument, the assessors were meant to assist the Chairman on matters of facts and not laws, but in the case at hand the said assessors gave their opinion on matters of law.

Mr. Msaky decided to merge and argue together the 5th,6th and 14th grounds. He argued therefore that when giving his decision, the trial Chairman relied on the decision of the Kimara Ward Tribunal in Land Application No.05 of 2009, which had already set aside in Land Appeal No. 99 of 2009. He added that the trial Chairperson *suo mottu* raised and

reached a decision concerning the issue of the Land Application No. 05/2009. Mr. Msaky contended that failure to accord the parties right to be heard on the issue is fatal as it occasioned miscarriage of justice.

To support the above argument, he referred the court to the following cases; **Mussa Chande Jape vs. Moza Mohamed Salum**, Civ. Appeal No. 141 of 2018, and **Mbeya-Rukwa Auto-Part Transport Limited vs. Jesrina George Mwakyoma [2003] TLR 251**.

Mr. Msaky, likewise, merged and argued together the 7th, 9th and 10th grounds as one ground of complaint. He submitted that proceedings of the trial tribunal are tainted with illegalities on the reason that testimonies of PW1, PW2, PW3 and PW4, DW2 and DW3 were not recorded. There was, according to him, no record of what transpired during the visit of the locus in quo, despite the fact that it was conducted four times.

Such irregularities led to the failure of the trial Chairman to properly analyze evidence before him. He referred the court to the case of **National Micro Finance Bank vs Chama Cha Kutetea Maslahi Ya Walimu Tanzania, Civil App. No 17/2019 (unreported)** where Court of Appeal quoted the case of **Ahmed Said vs. R.** in which it was stated that:

"The court position of law is that the judgment must show how the evidence has been evaluated with reasons..."

On the 8th ground, Mr. Msaky submitted that the visit of the locus in quo was tainted with illegalities. That, after visiting the locus in quo, on the following date, when the case came for mention on 06/04/2021, the trial chairman was required to examine and read out notes and all evidence collected or gathered from locus in quo before proceeding with the trial but he did not.

As to the 11th, 12th and 13th grounds, Mr. Msaky merged and argued them together as one ground of complaint. He consequently submitted that the trial Chairman failed to address the framed issues. That, the judgment did neither exhaust, nor answer the issues raised, nor confine itself on the question lingering on the issues at hand. That, Order XX R.4 (sic) of Cap 33, R.E 2019 provides that:

"In suits in which issues has been framed, the court shall state its finding or decision, with the reason therefore, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

In reply, Mr. Safari, submitting on the 3rd ground, said that the appellant argument on this ground was misconceived and lacked merits. It was his view that it is not the requirements of the law for the assessors to limit

their opinion only to matters of facts. Accordingly, he cited **Section 24 of Cap 216** (supra) which states that:

"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion."

He added that the same position is maintained under Regulation 19 (2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations GN. No. 174 of 2003, which provides as follows:

"Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give in Kiswahili"

The assessors, in his view, did their job according to the law. Therefore, he invited the court to dismiss the appeal.

Submitting on the 5th, 6th and 14th grounds, Mr. Safari submitted that the decision of the Kimara Ward Tribunal never formed the basis of the trial Tribunal's decision, and therefore, its existence is of no legal significance. That the basis of the trial Tribunal's decision is the consequences of the appellant's failure to prove his case. He stated that at page 11 of the trial tribunal's judgment, the trial Chairman tried to show the similarities between its decision, and that of the Kimara Ward Tribunal, tendered as exhibit DE-4.

Submitting on the 7th, 9th, and 10th grounds, Mr. Safari said that the trial tribunal's decision is proper in every aspect. He added that the decision was based on the appellant's failure to prove that he complied with survey procedure. There was therefore nothing capable of being considered by the trial tribunal.

He further argued with reference to the above grounds that the alleged situation cannot be the basis of reversing the decision of the trial tribunal because section 45 of Cap 216 (supra) prohibits reversal of decisions on account of any error or improper rejection of evidence. Nonetheless, it was his view that the evidence of DW 4 was properly recorded. In the end, he invited the court to find that the above grounds have no merits.

When replying for the 2nd respondent, Mr. Ngallaba, on the 3rd ground submitted that, throughout the entire proceedings of the trial tribunal, there was no any indication that the trial Chairman denied the appellant the right to be heard on the reason that he lacked locus standi. He therefore, argued that the complaint lacks proof.

On the 5th, 6th and 14th grounds, Mr. Ngallaba submitted that, the decision of the ward tribunal was attached as annexure and before it was tendered during hearing the appellant had an ample time to agree or

object and cross-examine based on the said annexure. He further submitted that the Chairman was not after all bound by the decision of the lower tribunal. If the same was persuasive quoting it as a reference is not prohibited by any law, it is a mere matter of forming opinion argument with a view to arriving into a decision.

He submitted further that the decision was entered in favor of the respondents. It was so because they managed to produce heavier evidence than the appellant. On this, reference was made to the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113. The court was further told that the trial court had a chance to evaluate, analyze evidence and study demeanor of witnesses unlike the appellate court. He further referred the court to the case of **Bushingila Ng,Onga Vs Manyanda Maige** TLR 335 (2002) in which it was held thus:

"It is settled that in the absence of misdirection or misapprehension of evidence an appellate court should not interfere with concurrent findings of the two lower courts"

The court was furthermore referred to the case of **Kimonidimitri Mantheaks vs Ally Azim Dewji and 7 Others**, Civil Appeal No.4 Of 2018, Court of Appeal of Tanzania (Unreported) cited by the Appellant which was relevant as far as the learned counsel was concerned. The

court was further referred to page 9, 1st paragraph from the bottom, of the said judgment in which the Court of Appeal held that:

"The said omission occasioned a miscarriage of justice as the court sitting on the first appeal cannot make proper re-evaluation of the entire trial evidence including what had transpired at the visit in the locus in quo"

The main issue which was before the trial tribunal was whether the respondents trespassed onto the suit land. This issue was according to Mr Ngallaba, cleared by the evidence adduced before the trial tribunal and the physical observation during the site visit, that the boundary between the parties was defined by the presence of sisal plants and cashew nuts trees.

Replying on the 8th ground, Mr. Ngallaba submitted that there was no irregularity in the evidence recorded at the locus in quo. He added that it is not true that the trial tribunal when composing its judgment did not direct itself to the framed issues. He further said that had it been so, the tribunal could not have reached into the decision which mirrors the framed issues. For instance, page 15, first paragraph of the typed judgment from the bottom read as follows:

"Mdai ameshindwa kuthibitisha madai yake na yanatupiliwa mbali kwa gharama, Eneo la mgogoro ni mali yao wadaiwa kama walivyopakana wenyewe. Mpaka baina ya wadaawa umenyooka kutoka kaskazini kwenda kusini kupitia makatani, miti ya

*mwarobaini na michikichi hadi uzio fensi, wadaiwa hawana hatia
na hawajavamia eneo la mdai''*

Having gone through the records of appeal and the parties' submissions, the main issue for determination is whether the appeal at hand is meritorious.

As regard to the 3rd ground, I am in agreement with Mr. Safari that the appellant's argument is misconceived. Section 24 of Cap 216 and Regulation 19(2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations GN.No.174 of 2003 do not provide for the requirements of the assessors to limit their opinion to matters of facts. I am similarly in agreement with Mr. Ngallaba that throughout the impugned decision, particularly at page 6 of the typed judgment, there is no trait indicating that the trial Chairman indeed said that the appellant lacked locus standi. Rather, what was supported by the trial Chairman was the truth that the appellant's claim lacked merits. Hence forth this ground has no substance.

As regard to the 7th, 9th and 10th grounds, I am in agreement with both counsel for the respondents that, the trial tribunal's decision is proper in every aspect, as it was based on the appellant's failure to prove his case.

My scrutiny of the proceedings left me in no doubt that the trial tribunal properly recorded the testimonies of PW1, PW2, PW3, PW4, DW2, DW3 and DW4. The record of the proceedings tells it all loud and clear.

The issue which was before the trial Tribunal was whether the respondents trespassed into the suit land. Taking into account the evidence presented before the tribunal, and the evidence gathered at the locus in quo, the trial tribunal answered the said issue in negation.

When being cross examined by Mr. Ngallaba, the appellant testified at the trial tribunal that the suit land by the year 1996 was under the occupation of the first respondent. At the same time, the appellant failed to prove whether the survey which was conducted in 24/3/2000 followed the requisite procedures. To satisfy itself on what was testified before it, the trial Tribunal visited the locus in quo and verified what was testified by the respondents, as it found out that the parties were separated by the sisal plants and cashew nuts trees. Thus, this ground too lacks merits.

Regarding the 8th ground, I have gone through the records of appeal particularly the date of the last visit to the locus in quo which was on 26/02/2021 and found out that it was the appellant who failed to prove his allegation on the existence of beacons. The tribunal conducted several unfinished site visits, as in each visit, the alleged beacons were not seen.

The last visit was ordered after the appellant sought the leave of the tribunal to bring the profession witness to verify the boundaries. He nevertheless failed to honor to comply with the leave. Consequently, the trial tribunal marked the site visiting closed. Thus, this ground too has no substance in view of the overwhelming evidence against the appellant's case.

Furthermore, on 11th, 12th and 13th grounds, the records of this appeal revealed that the main issues before the trial Tribunal were who was the lawful owner of the disputed land and whether the respondents trespassed onto the suit land. The records revealed further that these issues were answered in favor of the respondents as their evidence were heavier than that of the appellant.

Now coming to the last ground of complaint which included the 5th, 6th, and the 14th grounds, I have had once again to make a thorough perusal of the record. When arriving at its decision, the trial tribunal relied on the decision of the Kimara Ward Tribunal in Land Application No.05 of 2009, according to Mr Msaky. The said decision was according to Mr Msaky previously quashed and set aside in Land Appeal No. 99 of 2009 for want of jurisdiction.

My scrutiny left me in no doubt that the trial Tribunals decision is not based on the Kimara Ward Tribunal's decision. Going through the impugned judgment, it is quite clear that before making his final decision, the Hon. Chairman properly scrutinized the evidence brought before him together with what he physically observed through various site visits. Actually, what the trial Chairman did was to compare his findings with that of the Kimara Ward Tribunal.

While it was not advisable for the Chairman to compare his findings with the decision of the ward tribunal, I am in view of the record of the opinion that such act would not vitiate the trial or change the merit of the matter in the favor of the appellant. Therefore, this ground too lacks substance.

In the upshot, the appeal is without merit and it is dismissed with costs. It is so ordered.

Dated at Dar es Salaam this 19th day of October 2022.


B.S. Masoud
Judge

