

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

LAND APPEAL NO. 43 OF 2021

(Originating from Temeke District Land and Housing Tribunal in Land Application No. 198 of 2012)

MARIAM YUSUPH RAJABU.....APPELLANT

VERSUS

**RAJABU ABDALLAH KINEGE &
YUSUPH RAMADHANI SHAKINEGE** (Administrators of the estate of
RAMADHANI ABDALLAH SHAKINEGE).....**RESPONDENT**

Date of Last Order: 10.12.2021
Date of Judgement: 31.01.2022

JUDGMENT

V. L. MAKANI, J

This is an appeal by MARIAM YUSUPH RAJABU against the decision of Temeke District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 198 of 2012 (Hon. R.L. Chenya, Chairman).

At the Tribunal the applicant prayed for an order that he is the lawful owner of the property with Residential Licence No. TMK/MBGK/MKK.35/230 situated in Temeke Municipality (the **suit premises**). However, it was the Tribunal's finding in its judgment

dated 23/02/2021 that the appellant failed to prove her case and her application was dismissed with costs.

Being dissatisfied with the decision of the Tribunal the appellant has filed this appeal with eight grounds of appeal reproduced herein below:

- 1. That the honourable trial Tribunal erred in law and facts for dismissing the application on the ground that the evidence testified by PW1 under power of attorney was but hearsay while the Tribunal failed to exercise its duty by adjourn (sic) the case and direct the appellant to appear in personal (sic) to give her evidence.*
- 2. That the Hon. Trial Tribunal erred in law and facts for failure to consider sufficient reason hindered the appellant to bring other witnesses to testify on her side.*
- 3. That the Hon. trial Tribunal erred in law and fact for ignoring the Land Surveyors Officer Robert Masatu to take oath before testifying the Tribunal and recording his testimonies.*
- 4. That the Hon. trial Tribunal erred in law and fact to assert that during visitation of locus in quo it was discovered that the area falls under the letter of offer was included in the disputed property while o any single evidence adduced or tendered by either TW1, Land Surveyor Officer, parties or their witnesses to justify the finding of the tribunal.*
- 5. That the Hon. trial Tribunal erred in law and facts for failing to put into consideration the procedure and requirement to comply during of visitation of the locus in quo.*

6. *That the Hon. trial Tribunal erred in law and facts in holding that there is evidence prove that the late husband of the appellant is the one who purchased the suit property despite discrepancies and contradictories in the testimonies of the respondents and their witnesses.*
7. *That the Hon. trial Tribunal erred in law and fact for failure to keep proper records and proceedings of which was testified by the appellant.*
8. *That the Hon. trial Tribunal erred in law and fact to write the judgment in Kiswahili language despite of the proceedings were recorded in English language.*

With leave of the court the appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by Mr. Yuaja Balankiliza, Advocate while that of the respondent were drawn and filed by Ms. Neema Mwaipita, Advocate.

Mr. Balankiliza prayed for the grounds of appeal to be adopted and be part of the submissions. He consolidated the first and second grounds of appeal and the other grounds were argued separately.

Arguing the first and second grounds, Mr. Balankiliza submitted that Order III Rule 2 (a) of the Civil Procedure Code CAP 33 RE 2019 allows person holding power of attorney authorizing him to make and do such appearance, applications or acts on behalf of the party who has him the said given him a power of attorney. He cited the case of

Peter M. Msungu & 6 Others vs. Managing Director of Sengerema District & 3 Others, Civil Appeal No. 1 of 2008

(HC-Mwanza) (unreported). He said the application was instituted by the applicant but due to health problems Juma Pembe Mgwami was appointed to act as the lawful attorney. He said since the judgment was prepared by a Chairman who was not present from the commencement of the matter he was therefore not aware that the applicant had given a power of attorney to Juma Pembe Mgwami to represent her and he did so until the application was completed but before her death.

He said the Tribunal failed to act fairly and judicially because the same Tribunal permitted the power of attorney but at the same time the application failed because the applicant was represented by a person under power of attorney. He said the Tribunal failed to administer justice and decided the case technically. He said if there was justice the Tribunal was supposed to adjourn the case and call upon the appellant to appear in person to enable her to give evidence. He said this principle was in the case of **Gosibert Rwamulelwa vs. Prisca Rwamulelwa [2005] TLR 417** which was adopted in the case of **Olini Andenkisye & Another vs. Pride Tanzania Limited & 2**

Others, Land Appeal No. 22 of 2011 (HC-Mbeya)(unreported).

He pointed out that the Tribunal ought to have followed this principle.

On the third ground, Mr. Balankaliza submitted that the Tribunal erred when it faulted the appellant from bringing other witnesses without regarding the reason hindered the appellant to bring them. He said when the witness failed to appear and the applicants case was closed but was reopened however the Tribunal when the matter was fixed for hearing and parties appeared the Tribunal departed from its previous order and fixed the matter for defence hearing. He said the other witnesses had strong evidence and he prayed for this court to decide in favour of the appellant and declare her the lawful owner of the suit premises.

On the fourth ground the appellant said that the Land Surveyor Officer who was called as a witness did not take oath before giving evidence contrary to section 4(a)(b) of the Oaths and Judicial Proceedings Act, Act. CAP 34 RE 2019.

On the fifth ground, Balankaliza said that it is the legal principle that a case must be decided according to the facts and evidence presented

in court. He said in this case the Tribunal erred when it found that the land claimed that the suit premises fall under the land which was claimed to be under the Letter of Offer. He said the Surveyor Officer (**TW1**) advised the Tribunal to visit the locus in quo to verify the area in dispute but on the date fixed the respondents were not present. He said the suit premises were two different properties.

On the sixth ground Mr. Balankaliza pointed out that the Chairman did not follow the rules of procedure as regards the visit to *locus in quo* in terms of the case of **Sikuzani Saidi Magambo & Another vs. Mohamed Roble, Civil Appeal No. 197 of 2018 (CAT-Dodoma)** (unreported). He said in the case at hand, the records show that on 05/02/2021 it was set for visiting locus in quo but the guidelines in the **Sikuzani Saidi Magambo's** case were not followed. He said the Tribunal visited the site without the respondents and so it was not fair.

As for the seventh ground, Mr. Balankaliza said there was contradictory evidence by **DW2**. He said **DW2** testified that the deceased bought the suit premises from Mzee Mbonde, but he later tendered a loss report showing that the loss of Letter of Offer of the

deceased. He thus said there was doubt as to whether ownership of the suit premises were granted by the Ministry of Lands or bought from Mzee Mbonde. He said that there was also contradiction in the evidence that while **DW1** said the suit premises was sold by Omari Mohamed Fumo, **DW2** said it was sold by Mzee Mbonde. He said despite these contradictions the Chairman of the Tribunal went on to declare that the respondents were the lawful owners of the suit premises. He insisted that the suit premises under the Letter of Offer is different from the property of the appellant.

As for the eighth ground, the appellant claimed that the Tribunal failed to keep proper records, he said on 25/05/2015 the matter was adjourned for the appellant to comply with payment of the stamp duty in respect of the Sale Agreement that was tendered. It is claimed that the matter was adjourned to 29/07/2015 again on 26/10/2015, 23/02/2016 and 16/05/2016 and the Tribunal ordered the matter to proceed for hearing on 09/08/2016. He said there are no records showing that the Sale Agreement was tendered and admitted as exhibit. Mr. Balankiliza submitted that lack of keeping proper records was maliciously done and so the appellant was treated unfairly

As for the last ground Mr. Balankiliza submitted that the judgment is in Kiswahili language despite the records being in English. He said according to section 32 of the Land Disputes Act CAP 216 RE 2019 the language of the Tribunal should be English or Kiswahili except the record and judgment should be in English. He said this was contrary to the law and it should be declared that it is void ab initio. He concluded by praying that the judgment of the Tribunal be quashed and set aside and the appellant be declared the owner of the suit property. He also prayed for costs of the appeal.

In response Ms. Neema said as for the first and second grounds of appeal, she does not agree with the allegation that the illness of the appellant was the reason which led to the grant of the power of attorney to **PW1**. She said the records of the Tribunal do not reflect what is alleged by the appellant because the records are silent as to whether the power of attorney was issued because of illness. She thus said the Tribunal was correct in considering the evidence of **PW1** as hearsay. She further said the assertion that the Tribunal ought to have directed the appellant to appear and give evidence is without merit as such duty is on the parties who are to prove their cases

under section 110 and 111 of the Evidence Act CAP 6 RE 2019 and of the Tribunal.

As for the third ground Ms. Neema said the appellant was given a chance to bring witnesses on several occasions but she did not manage to procure them and so the Tribunal had a right to mark the appellant (then applicant's) case closed and proceed with defence hearing. She said in the circumstances the appellant was afforded considerable time but failed to present her case but failed for reasons known to her.

On the fourth ground Ms. Neema said the Land Surveyor Officer was not a witness but an officer who was called to identify boundaries of the suit premises as such there was no reason for him to take an oath. And if this were necessary the court should consider this as a minor anomaly and should not defeat the judgment delivered by the Tribunal.

As for the seventh ground Ms. Neema stated that it is not true that the 1st respondent said the Letter of Offer was granted in 1984 but it was in 1992. She further said the appellants husband purchased the

suit premises in 1984 and in the process managed to get a Letter of Offer. She said there was no residential licence that was presented by the appellant to that effect leaving the Tribunal without any option rather than deciding in favour of the respondent.

As for the eighth and ninth grounds, Ms. Neema said the Tribunal kept proper records. She admitted that the judgment is in Kiswahili but there was another judgment in English and this anomaly is minor and cannot change the content of the judgment delivered. She prayed for the appeal to be dismissed with costs.

In rejoinder Mr. Balankiliza reiterated the main submissions and further contented that the power of attorney was properly registered and it spelled out that the appellant had illness and poor hearing as such the initial Chairperson allowed the power of attorney. He reiterated his prayer that the appeal be allowed with costs and the appellant be declared the lawful owner of the suit premises.

I have gone through the submissions by learned Counsel and the record of the Tribunal. The main issue for consideration is whether the appeal before this court has merit.

As for the first, second and third grounds of appeal, it is true the Tribunal permitted **PW1** Juma Pembe Mgwami to act as an attorney under the Power of Attorney, but the records are silent as to why the appellant did not appear and give evidence. The records do not state the reasons for the grant of the Power of Attorney namely whether the appellant was sick or has any hearing ailment it merely states that the appellant issued a Special Power of Attorney. The said Special Power of Attorney which was registered on 08/11/2012 does not state that the appellant was sick or has limitations in hearing.

Indeed, the case of **Gosibert Rwamulelwa** (supra) requires the court to adjourn the matter and allow the donee to appear and give evidence but in the present case though the Tribunal did not state this expressly, but it is on record that on 18/10/2016 **PW1**, who by then was the attorney of the appellant, closed the case. But for interest of justice and after the prayer by Kokomanga, Advocate for the appellant, the Tribunal re-opened the appellant's case. It was expected that the appellant would present witnesses including the appellant in person, but when the matter was set for hearing the appellant still could not avail witnesses. As said herein above, and the

Chairman duly stated this in his judgment, **PW1** did not give reasons why the appellant could not come to court, that is, whether she was out of the jurisdiction, sick, incapacitated, disabled or she was abroad. In that regard the evidence on ownership of the suit premise given by **PW1**, as correctly stated by the Tribunal is hearsay in terms of the case of **Peter Msungu & Others** (supra).

As for the eighth ground the records are clear that on the dates alleged by the appellant that is on 29/07/2015, 26/10/2015, 23/02/2016 and 16/05/2016 the matter was adjourned, and the appellant was present in all of these dates. The only missing record is that of 09/08/2016 which in my view do not prejudice the parties herein in whatever manner.

The ninth ground should not detain us because section 32 of the Land Disputes Court Act CAP 216 RE 2019 was repealed by the Written Laws (Miscellaneous Amendments) Act, 2021 where the language of courts, tribunals and other bodies charged with duties to dispense justice was directed to be in Kiswahili.

Regarding for the fourth, fifth sixth and seventh grounds, it is on record that the Land Officer of Temeke Robert Masatu did not take oath because he was not a witness. One Eliakira Reuben Pallangyo, another Land Officer from Temeke (**TW1**) was called as the Tribunal witness and she was the one who took oath, and in the course of her testimony she suggested that the boundaries of the land in dispute should be assessed. That is why the appellant's advocate moved the Tribunal to visit the site and Robert Masalu was on the date set availed himself to the site. The allegations that the respondents were not present during the visit of the locus in quo have no merit as their advocate Mr. Lutufyo was present.

According to the evidence by the Tribunal witness (**TW1**) there were doubts as to whether the Letter of Offer and the Residential Licence (**Exhibit P1**) were properly issued. This was also raised by Robert Masatu the Land Surveyor who was at the site for purposes of assessing the boundaries. However, the Tribunal did not consider the evidence of **TW1** or the corresponding assessment by the other Land Officer on site. The main aim of calling **TW1** and visiting the site was to achieve the main issue as to who is the lawful owner of the suit premises. The silence by the Tribunal on this issue was not proper.

Indeed, the Tribunal had already established that the evidence of **PW1** was hearsay, but the record of the visit to the locus in quo as reflected in the proceedings is not detailed. I am quite sure that if the record of the visit was detailed and conducted in terms of the case of **Sikuzani Saidi Magambo's** case (supra) the Chairman would have cleared the doubts as observed by **TW1**. There is also a letter from Temeke Municipal Council which gave the details of the site visit by the said Land Officer Robert Masatu stating categorically that Plot No.320C Block G, Mbagala is different from the plot which has a Residential Licence No. TMK/MBGK/MKK35/320 which belongs to the appellant. This letter, which in my view, is very crucial in deciding the ownership of the suit premise, was not taken on board by the Chairman because of the poor nature of the record of the site visit hence not considered. To my understanding, the letter would have immensely assisted the Chairman in arriving at a just decision had he followed the guidelines of conducting the site visit. As it is, the Chairman ignored the Tribunal witness and details of the site visit which would have clearly assisted in deciding whether the suit premises and the alleged land claimed by the respondent were different. It is on this basis I find that there was no proper analysis of the evidence by the Chairman including absence of detailed proper

record of the site visit resulting to irregularity in the proceedings which omission is fatal and goes to the root of the matter.

Now, what is the remedy where there is an irregularity in the procedure? It is common knowledge that the remedy available is re-trial (see **Fatehali Manji vs. Republic [1966] EA 343**). Though re-trial is not automatic, but I am convinced that re-trial would be the best option because the circumstances entail unreliability of the proceedings and this will enable the parties to properly present their cases for substantive justice to be seen and done.

In that respect, the appeal is allowed with costs. The proceedings, judgment and decree of the Tribunal are hereby quashed and set aside. The file is to be returned to the Tribunal for re-trial before another Chairman and new set of assessors.

It is so ordered.


V.L. MAKANI
JUDGE
31/01/2022

