

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

MISC. LAND APPEAL NO.27 OF 2022

(Arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No.110 of 2020 originating from Ward Tribunal of Mandera at Chalinze in Land Application No. 02 of 2020)

LEONARD A. LYATUU APPELLANT

VERSUS

IRENÆUS R. CHILUNGA RESPONDENT

JUDGMENT

Date of last Order: 11.07.2022

Date of Judgment: 15.07.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Mandera at Chalinze in Land Application No.02 of 2020 and arising from the District Land and Housing Tribunal for Kibaha in Land Appeal No. 110 of 2020. The material background facts to the dispute are not difficult to comprehend. They go thus; the respondent filed a case at the trial tribunal claiming that he is the lawful owner of the suit land measuring

10 acre located ta Kibaoni Village, Maloweza street Mandera Ward within Bagamoyo District. The respondent claimed that he bought the suit land in 2011 from Selemani Mwelungulu and the appellant trespassed into his land. To substantiate his testimony he tendered a sale agreement. On his side, the appellant testified to the effect that he is the lawful owner of the suit land he also tendered a sale agreement. The trial tribunal decided the matter in favour of the respondent.

Aggrieved, the appellant lodged an appeal at the District Land and Housing Tribunal, he complained that the trial tribunal had no pecuniary jurisdiction to determine the dispute, the trial tribunal did evaluate and analyse the parties' evidence the evidence on record and the appellant was not afforded right to be heard and the trial tribunal was not properly constituted. The District Land and Housing Tribunal's decision irritated the appellant. Believing that both tribunals took a wrong path, the appellant has moved to this Court, through five grounds of appeal contents of which are reproduced as hereunder:-

- 1. That the trial Tribunal erred in law by holding that the Ward Tribunal had jurisdiction to entertain the matter regardless of the evidence adduced before the tribunal.*
- 2. That the trial Tribunal grossly erred in law and fact by holding that parties were availed an opportunity to cross-examine each other and also to call witnesses and they did not utilize the opportunity.*

3. *That the trial Tribunal failed to evaluate and analyzed oral and documentary evidence tendered by the parties hence reaching into an erroneous decision that it was unnecessary to consider documentary evidence tendered by the Appellant.*
4. *That the trial Tribunal also erred in law by holding that failure of the trial tribunal to show or considering the opinion of the assessors was not fatal in administering justice.*
5. *That the trial Tribunal being the first appeal court erred in law for failing to reconsider and re-valuated the entire evidence on record by reading it together and subjecting it to critical scrutiny.*

When the matter came up for hearing on 26th June, 2022, the appellant enjoyed the legal service of Mr. Ndanu Emmanuel, learned counsel, and the respondent enlisted the legal service of Mr. Shogolo Charo, learned counsel.

In his submission, the appellant' Advocate opted to combine the second ground of appeal. With respect to the first ground, Mr. Ndanu contended that the pecuniary jurisdiction of the Ward Tribunal as the value of subject matter is above Tshs. 3,000,000/= as per section 15 of the Courts (Land Disputes Settlements) Act, 2019. Mr. Ndanu went on to submit that at the trial tribunal the appellant testified that he purchased the suit land at a consideration of Tshs. 1,200,000/= in the year 2012 and the dispute arose 8

years later, the appellant testified that he has built a big house and people are living in the said house and the said facts were not disputed. He blamed the appellate tribunal for holding that the suit land valued Tshs. 1,900,000/= hence the trial tribunal had jurisdiction. To buttress his contention he cited the case of **Shyam Thanki & Others v New Palace Hotel** (1971) 1 EA 199 at 202.

Submit on the second ground, Mr. Ndanu contended that the appellant at the appellate tribunal challenged the judgment of the trial tribunal that parties were denied an opportunity to cross-examine each other and call material witnesses. Supporting his submission he referred this court to page 6 of the appellate tribunal judgment. He went on to argue that the Ward Tribunal had the mandate to control its proceedings and not the parties. Referring to the facts of the case, Mr. Ndanu contended that the dispute between the parties was about a piece of land and both claimed to have bought it from the same person and their sale agreements were witnessed by local authority leaders. It was his view that the vendor and local authorities' leaders were material witnesses' but the Chairman did not see the need of calling them to clarify the dispute regarding the ownership of the land. It was his submission that the holding of the appellate tribunal was unfounded since the law requires to afford parties the right to call their witnesses hence the trial tribunal decision was a nullity. He urged this court to set aside the decision of the trial tribunal.

With respect to the third ground, Mr. Ndanu contended that the trial tribunal failed to evaluate and analyses oral and documentary evidence tendered by the parties hence it entered into an error. He also blamed the appellate tribunal for failing to reconsider and re-evaluate the entire evidence. He continued to submit that the appellant challenged the decision of the trial tribunal that it did not consider the appellant's documentary evidence which proved that he was the lawful owner of the suit landed property. He added that the trial tribunal did not state the reasons for its decision. He also blamed the appellate Chairman for upholding the decision of the trial tribunal fortifying his position he referred this court to page 6 of the typed judgment.

He continued to argue that the appellate tribunal based its decision on the year when the parties purchased the suit land without analysing the extent of seeing the trial tribunal ought to have decided which of the two documents are genuine. He claimed that the respondent's document is fake and considering the fact that none of the witnesses were called to testify at the trial tribunal.

On the third ground, the learned counsel for the appellant was brief and straight to the point. He contended that the appellate tribunal failed to note that the assessors' opinions were not considered by the trial Chairman. Supporting his submission he referred this court to page 9 of the typed judgment. He claimed that the appellate tribunal did not consider the

requirement of the law. Supporting his submission he cited the case of **Edina Adam Kibona v Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017, CAT at Mbeya (unreported). He claimed that both tribunals' decisions are irregular hence the same be quashed and set aside.

On the strength of the above submission, he beckoned upon this court to find that there are serious issues of irregularities and illegalities in the proceedings and judgments of both tribunals, thus, he urged this court to quash and set aside the tribunals' decisions with costs.

In reply, the respondent began by tracing the genesis of the matter which I am not going to reproduce in this appeal. On the first ground, the respondent argued that the appellant wants this court to reverse the decision of the trial tribunal based on the ground of pecuniary jurisdiction. He submitted that section 15 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] provides for pecuniary jurisdiction of the Ward Tribunal to be three million. He submitted that the matter before the tribunal was a piece of land valued at Tshs. 1,900,000/= as per the sale agreement. He claimed that the appellant's allegation that the property in dispute is more than what is stated in the sale agreement are mere words that lack proof since there is no any valuation report to support his contention.

As to the second ground, the respondent simply submitted that the appellate tribunal decision was sound and reasoned since both parties

were given the right to be heard and the decision was the result of evidence adduced at the tribunal.

With respect to the third ground, the respondent complained that the record shows that parties tendered their documentary evidence and upon consideration, the appellant's evidence carried lesser weight than the respondent's evidence. Supporting his submission he referred this court to page 6 of the appellate judgment. He added that the trial tribunal decided in favour of the first buyer and the appellant's documentary evidence was found to carry lesser weight compared to the respondent's evidence. In his view, the trial tribunal was right to decide in the favour of the respondent.

Arguing for the fourth ground, the respondent contended that the appellate tribunal's decision was correct. He submitted that there is no requirement for assessors in the Ward Tribunal. He stated that section 4 of the Ward Tribunal Act is about the composition of the Ward Tribunal. Thus, it was his view that the trial tribunal decision was reached after voting and not by considering the assessors' opinions.

In conclusion, the appellant beckoned upon this court to dismiss the appeal with costs.

In his brief rejoinder, the learned counsel for the appellant reiterated his submission in chief. He added that the respondent has referred this court to an irrelevant paragraph of the appellate tribunal concerning affording the parties' right to be heard. Stressing on the point of assessors, Mr. Ndanu argued that the trial tribunal proceedings lack assessors' opinions. Ending, he urged this court to quash and set aside both tribunals' decisions.

I have revisited the evidence and submissions of both sides now, I am in a position to determine the appeal. I will address the first ground as it appears. The appellant's Advocate contended that the Ward Tribunal quorum was improper. In his submission the issue of jurisdiction is vital and the same must be determined before hearing the case on merit. In the case at hand, the respondent who lodged the suit claimed that he bought the suit land on 2nd March, 2011 for Tshs 1,900,000/=. The respondent's sale agreement is dated 4th August, 2012 and he bought 10 acres for Tshs. 1,200,000 each acre.

The pecuniary jurisdiction is determined by looking at the sale agreement and both sale agreements show that the value of the suit land was below 1,200,000/= and 1.900,000/=, the Ward Tribunal pecuniary jurisdiction is articulated in Section 15 of the Land Disputes Courts Act, Cap. 216. Section 15 of the Act provides that:-

“15. Notwithstanding the provisions of section 10 of the Ward Tribunals Act, the jurisdiction of the Tribunal shall in all proceedings of a civil nature relating to land be limited to the disputed land or property valued at three million shillings.”

Applying the above provision of the law in the matter at hand, it is clear that the suit was proper before the Ward Tribunal. Therefore this ground is demerit.

On the second ground of appeal, the sale agreement reveals that it was the vendor who sold the same piece of land to two different buyers. The trial tribunal's proceedings show that the parties testified without calling their witnesses and especially the vendor was not called to testify while he was and in the circumstances of the matter at hand he was an important witness to clear the confusion. I have perused the Land Housing Tribunal records and in my view, I find that it was not proper to blame the parties for failure to call their witnesses while the trial had a duty to ask the parties if they had any witnesses to testify in court and the same was required to be recorded. Reading the trial tribunal record, the records are silent on whether parties were given an opportunity to call witnesses.

The vendor was a necessary party and calling him was unavoidable because of the nature of the case and the relief claimed. In my considered view, the vendor was a necessary witness to be called to testify and clear

the confusion. Therefore, I fully subscribe to the written submission of Mr. Ndanu that the vendor and local authorities' leaders were material witnesses to testify and clear the confusion.

Additionally, it is worth noting that a fair trial includes the right to cross-examine the witnesses called and the right to call witnesses. In the instant case, the Chairman offered the parties' right to testify then the assessors were given an opportunity to ask questions. However, the parties were not informed about their rights to call witnesses to support their claims and they were not given the right to cross-examine each other.

It is trite law that unless the right to cross-examine is waived, the testimony of such a witness cannot be considered as legal evidence if it is not subjected to cross-examination. The same was held in the case of **EX-D.8656 CPL Senga S/O Idd Nyembo and 7 Others v R**, Criminal Appeal No. 16 of 2018 (unreported) where the Court of Appeal of Tanzania held:-

"Unless, a party has waived his right to cross-examine the witness, the testimony of the witness cannot be taken as legal evidence unless it is subject to cross-examination. Consequently, the testimony affecting a party cannot be the basis of the decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of cross-examination." [Emphasis added].

The law is also settled that, any decision premised on the proceedings conducted in violation of the right to be heard is a nullity due to infringement of the principle of natural justice. It does not matter whether a similar position would have been reached had the parties been heard on the matter.

For the aforesaid findings, it is clear that the Chairman entered into an error hence the decision of the District Land and Housing Tribunal is devoid of merit.

Consequently, the above finding sufficiently disposes of the appeal. Consideration of other complaints raised will not affect the above finding. I accordingly refrain from delving into them. Therefore, without hesitation, I nullify the proceedings and quash and set aside the judgment, decree, and subsequent orders of both tribunals. Eventually, I order that the case file be remitted to the District Land and Housing Tribunal for re-hearing of the land application before another Chairman. The appeal is allowed without costs.

Order accordingly.

Dated at Dar es Salaam on 15th July, 2022.

A circular blue ink stamp of the High Court of Tanzania, Land Division. The outer ring contains the text 'THE HIGH COURT' at the top and 'LAND DIVISION' at the bottom, separated by two stars. The center features a coat of arms with a shield, a book, and a scale. Overlaid on the stamp is the signature of A.Z. MGEYEKWA, followed by the text 'JUDGE' and the date '15.07.2022'.

A.Z.MGEYEKWA
JUDGE
15.07.2022

Judgment delivered on 15th July, 2022 via audio teleconference whereas Mr. Ndanu Emmanuel, learned counsel for the appellant, and Mr. Charo, learned counsel for the respondent were remotely present.



A.Z. MGEYEKWA

JUDGE

15.07.2022

Right to appeal fully explained.