

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 228 OF 2022

(Originating from the Judgment and Decree in Land Application No. 139 of 2013 at District Land Housing Tribunal for Ilala delivered on 29 August 2022, Hon. A.R Kirumbi, Chairman)

**KABOYA PASTORY HENRY (administrator of the
estate of the late HADIJA KONDO)APPELLANT**

VERSUS

THARCIS ALOIS SAMBUA RESPONDENT

JUDGMENT

Date of last Order: 10/08/2023

Date of Ruling: 09/11/2023

K. D. MHINA, J.

This is the first appeal. It stems from the District Land and Housing Tribunal ("the DLHT") for Ilala in Land Application No. 139 of 2013, whereby, Kaboya Pastory Henry (administrator of the estate of the late Hadija Kondo) the applicant who is now the appellant, claimed, inter alia for the declaration that as the personal representative of the late Hadija Kondo he was a rightful owner the house No. 23/15 located at Ilala Mchikichini area adjacent to Tanzania Breweries Company Ltd.

The brief facts which led to the institution of Land Application 139 of 2013 before the DLHT are that, the appellant alleged that he had a

possession of the suit premises as a lawful owner since 1950 without any disturbance until August 2011 when the respondent started to take rent from the tenants and remove Hamisi Msikano, the brother of the late Hadija Kondo who was allowed to live in the house since 1970. The respondent claimed that he was given the house by one Mwajuma Mussa Msemba.

He further alleged that the respondent pulled down the house and constructed two business stalls for business purposes.

Therefore, this background prompted the appellant to rush and seek redress at the DLHT for Ilala.

On the respondent's side, he alleged that the house in dispute was given to him by the original owner Mwajuma Musa Msemba on 12 November 1997. He further alleged that Hadija Kondo had no time been the owner of the disputed house.

After the full trial, the DLHT decided the matter in favour of the respondent for the reasons that the evidence indicated that the house in dispute was given to the respondent by Mwajuma Mussa. In that decision the DLHT held that, I quote;

"Nimepima Ushahidi wa pande zote, na kubaini kwamba Ushahidi wa mdaiwa una nguvu zaidi kuliko ushahidi wa mdai. Kielelezo D1 kinaonyesha mdaiwa alipewa nyumba inayobishaniwa

na marehemu MWAJUMA MUSSA, na jitihada za mdai kuipinga nyaraka hiyo kupitia vyombo vya (dola) Serikali ziligonga mwamba kama inavyothibitishwa na vielelezo D5 and D9”.

Undaunted, the appellant appealed to this court and preferred the following grounds to fault the decision of the DLHT;

- i. That the decision of the DLHT was reached against the weak evidence of the respondent compared to the evidence of the appellant*
- ii. That the Chairman of the DLHT erred in law and fact by leaving the issue for determination and raised new issue.*
- iii. That the Chairman of the DLHT erred in law and fact by failed to properly evaluate the evidence before it hence reached in wrong conclusion.*
- iv. The Tribunal erred in law and in facts for ignoring the fact that Hadija Kondo died in 1996 and her probate and certificate of death was proved before the Court of Law in Probate No. 111/2013 at Ukonga Primary Court.*
- v. The Tribunal erred in law and in facts for failure to conduct properly the locus in quo hence reached a bad conclusion.*
- vi. That the Chairman of the DLHT erred in law and fact by ignoring the two assessors’ opinion who confirmed that the appellant has proved the ownership of the disputed house No. 25/15 now is ILA/MCK/ILK/23/15.*

- vii. That the Chairman of the DLHT erred in law and fact by declaring that the two witnesses DW3 and DW4 killed (sic) the appellant case while appellant claim ownership house no. 25/15 which is different from house no. 265 and 385 and DW3 prove that the disputed house belonged to the late Hadija Kondo.*
- viii. That the Chairman of the DLHT failed to discover that exhibits D2, D3 and D4 has no connection with the disputed house No. 25/15 now is 23/15 in Probate No. 65/2004 the document produced by respondent was the will of the late Mwajuma Mussa and not the affidavit which was produced by the respondent in Application No. 139 /2013.*
- ix. That the Chairman of the DLHT erred in law and fact by considering exhibit D1 of the respondent which was signed by incompetent people and contrary to Order XIX Rule 3 (1) of the Civil Procedure Code Cap 33 R:E 2019.*

The appeal was argued by way of written submissions. The appellant appeared in person, unrepresented. On the other hand, the respondent was represented by Mr. Sisty Massawe, learned advocate.

Faulting the DLHT in the 1st, 3rd, 4th, 6th, 7th, 8th and 9th grounds of appeal which the appellant combined and argued together, he submitted that DLTH was wrong by holding that the testimonies of DW3 and DW4 proved that the late Hadija Kondo died in 1994, therefore she could not write

a will in 1994. Also it was wrong for the DLHT to hold that the suit property was included in the probate filed by the late Mwajuma Mussa in Probate Cause No. 65 of 2004. His reasons were;

One, at the DLHT DW3 during examination in chief testified that the late Hadija Kondo died in 1997 but on cross-examination he changed and stated that she died in 1993. On the other hand, DW4 did not know when Hadija Kondo died. That DW3 and DW4 were not even the relatives of the late Hadija Kondo to prove that she died in 1993.

On the other hand, the judgment of Ukonga Primary Court in Probate 111 of 2013 proved that Hadija Kondo died in 1996.

Further, PW3 who testified that the late Hadija Kondo was her sister testified that she died in 1996. While PW4 testified that before she died, the late Hadija Kondo wrote a will whereby she bequeaths her properties to her children and grandchildren.

He further submitted that PW2 the husband of the late Mwajuma Mussa testified that Hadija Kondo died in 1996. The same as the testimony of PW4 who gave the plot to the late Hadija Kondo in 1950 testified that Hadija Kondo died in 1996.

Two, the DLHT failed to analyze exhibit D2, D3 and D4 hence wrongly hold that the suit property was included in in the estate of the late Mwajuma Mussa in Probate Cause No. 65 of 2004. He stated that the house in that probate was no 265 and not 23/15 belonged to the late Hadija Kondo.

Third, he submitted that there was no evidence to prove that the respondent demolished the former wooden house and constructed a modern house.

Fourth, the DLHT was wrong to consider exhibit D1 the affidavit of the late Mwajuma Mussa Msembe which was signed by incompetent people contrary to Order XIX Rule 3 (1) of the CPC.

Fifth, the testimonies of PW1, PW2, PW3, PW4, DW3 and exhibits P1, P2, P3 and P4 proved that the appellant was a lawful owner of suit property.

Faulting the DLHT decision in the second ground, the appellant submitted that the DLHT raised and decided a new issue on whether Hadija Kondo died in 1993 or 1996 and failed to understand that the same had been determined by Ukonga Primary Court in Probate No. 111/2013. To substantiate his submission, he cited **Antony Ngoo and another vs. Kitinda Kimaro**, Civil Appeal No 25 of 2014 (unreported) where it was held that cases must be decided based on issues on record.

Regarding the fifth ground of appeal, he submitted that the DLHT failed to conduct properly the locus in quo, thus reached a wrong decision. His reason was at the trial the respondent testified that the house in dispute was No. 265. Further, he tendered exhibit D7 which indicated that the house was no. 385. But when the DLHT visited the locus in quo it was discovered that the suit house was no ILA/MCK/KK/23/15 formerly registered as house no ILA/MCK/KK/25/15. But the chairman in did not allow the respondent to show house no 265 and 385 instead in his judgment wrote that parties agreed that the disputed house was no 23/15.

In response to the 1st, 3rd, 4th, 6th, 7th, 8th and 9th grounds of appeal, Mr. Massawe submitted that the DLHT properly analyzed and evaluated the evidence on record.

He narrated that Hadija Kondo who died in 1990's and Mwajuma Mussa who died in 2003 were a mother and her daughter. The letters of administration of the late Mwajuma Mussa were granted to Kulwa Halfani in 2004 where the respondent successfully objected the inclusion of the suit property in the estate Mwajuma Mussa. On the other hand, the estate of the late Hadija Kondo was granted to the appellant in the year 2013.

He further submitted that Kulwa Halfani appealed against the exclusion of the suit property in the estate of the late Mwajuma Mussa but her efforts proved futile following the decisions of the District Court and High Court (Exhibit D3 and D4).

Mr. Massawe further submitted that the DLHT was proper to held that the purported las will of Hadija Kondo (Exhibit P3) had no evidential value because through DW3 it was established that Hadija Kondo died in 1993.

In addition to that DW4 proved that exhibit P4 (the death certificate) was not issued by the Registration Insolvency and Trustees Agency (RITA), therefore the document was not authentic.

He further stated that the ownership over the disputed house was already determined by Kariakoo Primary Court in Probate No. 65 of 2004 and since the said decision was never varied or set aside, then the respondent was a lawful owner of the property.

Responding to the 2nd ground, Mr. Massawe submitted that there was no any new issue raised. The Chairman of the Tribunal was evaluating both testimonial and documentary evidence which was placed before him.

Regarding the 5th ground, he submitted that the appellant was trying to impeach the trial record. He argued that since the Chairman held that

both parties agreed that the disputed property was house no. 23/15, therefore under sanctity of court record that was what really transpired.

The appellant filed his rejoinder which I don't see the reason to analyze it here, since it is a reiteration of what had been submitted earlier, in the submission in chief.

Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I wish to start with the fifth ground of appeal regarding the visit in locus in quo which resulted in the findings as to the description of the suit property.

Initially, after the dissatisfaction of the DLHT decision, the appellant appealed to this Court vide Land Appeal No. 262 Of 2020 with the same grounds of appeal. This Court on 12 October 2021(Msafiri.J) disposed the ground relating to assessors by dismissing it. Further, this Court combined the remaining grounds of appeal and held that both depended and relied on the description of land as far as the location of the suit property was concerned. On that this Court held that the description of the suit property was not properly adduced, therefore it ordered the case file be remitted to the DLHT to take additional evidence and visiting locus in quo.

In compliance with the order of this Court, the DLTH visited the locus

in quo as per the proceedings (untyped) dated 18 March 2022. It is indicated that both parties were present and they adduced evidence in respect of the proper description of the land and the DLHT made its findings on that evidence. Therefore, in my opinion, for the purpose of filling gaps in evidence by visiting the locus in quo, the DLHT fulfilled the conditions set out in **Kimondimitri Mantheakis vs. Ally Azim Dewji and seven others**, Civil Appeal No. 4 of 2018 (Tanzlii) because as I alluded to earlier, both parties adduced evidence and the DLHT made its observation.

Therefore, the procedure of visiting locus in quo was properly conducted, hence the fifth ground of appeal is devoid of merits.

Reverting to the 1st, 3rd, 4th, 6th, 7th, 8th and 9th grounds of appeal which were argued jointly and together by the parties, they both revolve around the issue of analysis and evaluation of evidence.

On this the principle of law is that Courts and Tribunals must evaluate evidence and give reasons for the decision. See the decision of this Court in **Ramadhani Mtulia Mwega vs. Shaweji Salum Mndote**, Land Appeal No. 50 of 2019, where it was held that;

"There must be evaluation of evidence."

In the instant appeal, the major complaint by the appellant was predicated on the issue that evidence of the respondent was weak compared to his strong evidence and thus the DLHT failed to properly evaluate his evidence which resulted in a wrong decision.

From the discussion above, the law is clear that under Section 110 of the Evidence Act, Cap. 6 [R.E. 2019], which reads

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The position was cemented in the cited case of **Hemedi Said (Supra)**, where it was held that;

"He who alleges must prove the allegation."

For proper determination of the grounds of appeal, it is important first to look at the description of the suit property. The controversy between the parties was with regard to the proper description of the suit land. On his side, the appellant testified that the house in dispute previously was known as No. 25/15, and when he testified it was known as No. 23/15. The respondent testified that in 1980, the house was known as No. 385 as per the City Council receipts, and when he was handed over the suit premises it

was known as No. 265 later No. 25/15. For the last time the street authorities gave it no. ILA/MCH/23/25.

In its decision, the DLHT after visiting locus in quo, held that despite the above different description but the parties agree that the same house is in dispute and it is House No. 23/15 located at Ilala Mchikichini adjacent to Tanzania Breweries Company Ltd wall.

Therefore, from the available record, the DLHT was right to declare that the description of the house in dispute between the parties was the same and it was number No. 23/15 located at Ilala Mchikichini adjacent to Tanzania Breweries Company Ltd wall.

Further, regarding the evidence of ownership of the suit premises it was on record that while the appellant stated that he acquired ownership as the administrator of the late Hadija Kondo while the respondent stated that he was given by the late Mwajuma Musa.

At the trial the appellant tendered the will dated 6 June 1994 and the death certificate dated 2 April 1996. On the other hand, the respondent disputed by testified that the late Hadija Kondo died in 1993 and that the documents were forged.

According to DW3, the leader of the Muslim Community at Vikumburu Village where the late Hadija Kondo died and buried testified that the deceased died in 1993 and he was the one who led the funeral services. This was corroborated by the photo of the tombstone of the late Hadija Kondo (Exhibit D8 collectively) which indicated that she died on 24 November 1993 and buried on 25 November 1993.

Further, according to DW4, the Assistant Registrar from RITA testified that the death certificate (Exhibit P4) was not a genuine document issued by their office.

From the above evidence, the DLHT properly evaluated it and rightly hold that the will was not genuine because it was written in 1994 while the deceased died in 1993. The record does not indicate any other strong evidence to counter the evidence of DW3 and DW4 on that issue.

In addition to that the evidence of DW3 and DW4 raised a "great" doubt against the appellant's story over the actual date of death of the late Hadija Kondo. In fact, it demolished appellant side evidence because the death certificate was not genuine.

Another aspect on the ownership of the dispute is based on Exhibits D1, D2, D3 and D4. Exhibit D1 an affidavit of the late Mwajuma Musa

Msemba hand over the house in dispute (mentioned house no.265) to the respondent. That affidavit was the exhibit at the Primary Court at Kariakoo in Mirathi No. 65 of 2004 whereby the applicant was Kulwa Halfan who requested to administer the estate of the late Mwajuma Mussa. In its decision (Exhibit D2) the Primary Court held that the house belonged to the respondent after he successfully filed an objection for the house to be included in the administration of Kulwa Halfan. The decision of the Primary Court was unsuccessful challenged at the District Court (Exhibit D3) and at the High Court (Exhibit D4).

From the above discussion, I hold that the DLHT properly evaluated the evidence, thus makes the 1st, 3rd, 4th, 5th and 7th grounds of appeal to be devoid of merits.

Regarding the 2nd ground of appeal, also flatly I hold that it lacks merits because, the issue for determination was the ownership of the house in dispute, the duty which the DLHT performed. But in order to reach to the stage of determination of the issue, it discussed, analyzed and determined on the controversy regarding the date of death of the late Hadija Kombo. That was crucial for the determination and weight of the deceased purported will (Exhibit P3). Therefore, the DLHT decided the issue before it.

Therefore, as I alluded to earlier, the 2nd ground of appeal lacks merit.

Regarding the 6th ground the law is clear and this should not detain me long.

On this section 24 of the **Land Disputes Court Act, Cap 216**, the Chairman of the DLHT is not bound to follow assessors' opinions while giving a decision.

Therefore, the appellant's complaint in the 6th ground that the Chairman ignored the assessors' opinions does not have any weight. Thus, this ground also lack merits.

Regarding the 8th ground of appeal, the evidence was clear that the house in dispute was allocated different identification number from time to time. As I indicated before after the visiting the locus in quo the DLHT resorted that the house in dispute though each party mentioned different description number but it was the same. Therefore, the house referred in Exhibit D1, House No 265 and was the same house referred in Exhibits D2, D3 and D4. There is no other house in dispute other than the house mentioned in the affidavit of the late Mwajuma Mussa and the purported will of the late Hadija Kondo.

Therefore, the ground lacks merits because after visiting the locus in quo the issue of the description of the house was resolved.

Regarding the last ground, I have the following;

One, the exhibit D 1 was admitted at the Primary Court as evidence and efforts to challenge its validity proved futile at the District Court and High Court (Exhibit D3 and D4). Therefore, in this instant appeal, this Court cannot hold that Exhibit D 1 is defective while the decisions from the Primary Court to the High Court in respect of that issue uphold Exhibit D1.

Two, the appellant did not substantiate this ground in his submission as how the Exhibit D1 was signed by incompetent people.

Three, at the trial the appellant did not raise that issue of incompetence of the persons who signed it. He raised this issue for the first time in this appeal and that is not proper.

Flowing from above, in totality both grounds of appeal lack merits. Consequently, I dismiss the appeal with costs.

It is so ordered.




K. D. MHINA
JUDGE
09/11/2023