

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO.283 OF 2022**

*(Arising from Land Application No. 102 of 2019 of District Land and  
Housing Tribunal for Kibaha District at Kibaha)*

**MWANAHAMISI SALEHE ..... APPELLANT**

**VERSUS**

**SAIDI HAMISI ..... 1<sup>ST</sup> RESPONDENT**

**TEDDY MSHUMBA ..... 2<sup>ND</sup> RESPONDENT**

**GOOD MONETARY FUND ..... 3<sup>RD</sup> RESPONDENT**

**COAST AUCTION MART & COURT BROKER ..... 4<sup>TH</sup> RESPONDENT**

*Date of Last Order: 18/04/2023*

*Date of Judgment: 01/06/2023*

**JUDGMENT**

**I. ARUFANI, J**

This appeal originated from the decision of the District Land and Housing Tribunal for Kibaha at Kibaha (hereinafter referred as the tribunal) in Land Application No. 102 of 2019 which was determined in disfavour of the appellant. The appellant was dissatisfied by the decision of the tribunal and appeal to this court basing on the grounds quoted hereunder: -

1. *That, the chairperson erred in law and facts by holding that there was no testimony to justify the appellant's claims.*
2. *That, honourable chairperson erred in law and facts by denying the appellant her basic right to be heard as a fundamental right.*
3. *That, the trial court erred in law and fact by not holding that the 3<sup>d</sup> respondent's evidence was bad in law for being illegally obtained.*
4. *That, the honourable chairperson's proceedings were tainted by a number of irregularities capable of vitiating the whole proceedings.*
5. *That, the exhibit tendered and admitted in court's could not be used to base the trial court's decision for being liable to be expunged from records.*

The appellant prays for the judgement and orders of the tribunal be quashed and set aside, a declaration that the appellant is the lawful owner of the land in dispute and any other relief this court deems just and fit to grant. While the appellant was represented in the appeal by Mr. Tumaini Mgonja, learned advocate, the first respondent appeared in person, the third and fourth respondents were represented by Mr. Mbwana Ally Chipaso, learned advocate and hearing of the appeal proceeded ex parte against the second respondent as she was dully served but failed to appear in the court. The counsel for the parties prayed and allowed to argue the appeal by way of written submissions.

As the appeal was argued by way of written submissions the court has found there is no need of reproducing in this judgment all what is submitted in the submissions filed in this court by the parties in supporting and in rebutting the grounds of appeal presented to the court by the appellant. The court has also found that, the counsel for the appellant abandoned the fourth ground of appeal and if need will arise argued the rest of the grounds of appeal separately. That being the position of the matter I will start with the second ground of appeal and thereafter I will deal with the rest of the grounds of appeal together as they are challenging the decision of the tribunal basing on evaluation and propriety of the evidence relied upon by the tribunal to determine the application.

The counsel for the appellant argued in relation to the second ground of appeal that, the appellant was denied right of being heard which is a fundamental right. He referred the court to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended which states when a right and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing. He argued that, during hearing of the matter the appellant was not afforded chance to hear the testimony of the third

respondent's witness and she was not accorded chance of cross examining the said witness as the case was heard in her absence.

He referred the court to the proceedings of the tribunal which shows the testimony of the witness of the third respondent was heard in the absence of the appellant. He argued that, the witness of the third respondent was allowed to give evidence and tendered exhibits which the appellant was not given chance of challenging it. In his reply the first respondent joined hand all what was submitted by the counsel for the appellant in his submission in support of the appeal and stated the appeal has merit.

On his side the counsel for the third and fourth respondents stated in relation to the second ground of appeal that, the appellant attended all sessions of hearing her case until when she closed her case. He argued that, the record of the tribunal shows hearing of the respondents' cases proceeded in the presence of the appellant and the parties who were absent were the first and second respondents. He added the record of the tribunal shows the appellant was even given chance to cross examine the witnesses testified at the tribunal.

He argued that, the argument by the counsel for the appellant that the appellant was not present when the witness of the third respondent adduced his testimony is baseless and the proceedings relied upon by

the counsel for the appellant are unfounded. He went on submitting that the counsel for the appellant was required to show which proceeding of the tribunal shows the hearing of the matter proceeded in the absence of the appellant. His prayer at the end of his submission is for the appeal to be dismissed in its entirety with costs.

The court has given the deserving consideration the arguments and the submissions filed in the court by both sides in relation to the allegation raised in the second ground of appeal that the appellant was denied right of hearing the evidence of the third respondent's witness and find it is proper to have a look on what is recorder in the proceedings of the tribunal.

The court has found it is true as argued by the counsel for the appellant that, when the matter came for hearing the evidence of the respondents on 8<sup>th</sup> February, 2022 the appellant was not present before the tribunal. The tribunal continued with hearing of the evidence of the witness of the third respondent in the absence of the appellant. For clarity purposes the proceedings of the tribunal read as follows: -

*8/2/2022*

*Mwenyekiti (sic) – S. L. Mbuga*

*Mleta Maombi – Hayupo*

*Wajibu Maombi – 1. Hayupo*

2. Hayupo

3. Yupo

4. Hayupo

*Karani – Asha Mshana*

*Mdaiwa: Mimi nipo tayari kuanza kutoa utetezi wangu.*

*Baraza: Shauri ni kwa ajili ya usikilizwaji, kesi inaendelea na usikilizwaji.*

*Sgn: S.L Mbuga 8/2/2022.”*

The proceedings of the tribunal show after recording what is stated hereinabove the tribunal continued to hear the evidence of the witness of the third respondent which was adduced by Joshua Daudi Jey who testified as DW1. That shows the appellant was not present before the tribunal on the mentioned date when the evidence of DW1 was heard. The court has found the submission by the counsel for the third and fourth respondents that the appellant was present when the evidence of the respondents' witness was heard is not supported by the record of the tribunal as the appellant was not present at the tribunal on the date mentioned hereinabove.

The court has found even the argument by the counsel for the third and fourth respondents that the appellant was given chance of cross examine the respondents' witnesses is not supported by the record of the tribunal as there is nowhere in the proceedings of the tribunal

indicated the appellant was given chance to cross examine DW1. To the contrary the court has found the record of the tribunal shows the evidence of DW1 was heard in the absence of the appellant. That being the position of the matter the question to determine here is whether the chairman of the tribunal was right to order the hearing of the evidence of DW1 to continue in the absence of the appellant.

The court has found the law governing hearing in the tribunal is the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, GN No. 174 of 2002 which its Regulation 11 states as follows: -

*11 (1) On the day the application is fixed for hearing, the tribunal shall –*

*a) where the parties to the application are present proceed to hear the evidence on both sides and determine the application;*

***b) where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant.***

*c) where the respondent is absent and was duly served with notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and*

*determine the matter ex-parte by oral evidence."*

[Emphasis is added].

The wording of the above quoted regulation 11 (1) (b) states categorically when the applicant is absent on a date fixed for hearing of his application and he was present when the date for hearing of the matter was fixed or he had a notice of the date of hearing of the matter and he was not prevented by good cause, the tribunal is required to dismiss the application. Therefore, although the appellant had already adduced her evidence and the matter was coming for hearing the evidence from the respondents, the tribunal was not required to continue with hearing of the evidence of the respondents' witness in the absence of the appellant.

The appropriate procedure which the chairman of the tribunal chairman would have followed as provided under Regulation 11 (1) (b) of the Regulation was either to adjourn the hearing of the respondents' evidence to another date and if the chairman was of the view that the absence of the appellant was without good cause he was required to dismiss the application and not to continue with hearing of the application in the absence of the appellant. In the light of the stated violation of the law regulating the procedure of conducting hearing of disputes in the tribunal the court has found the proceedings conducted by the tribunal on 8<sup>th</sup> February, 2022 is irregular as the appellant was



not accorded right of hearing the evidence of the third respondent's witness, hence the stated proceeding cannot be left to stand in the record of the tribunal.

Having arrived to the above stated finding the court has found the appropriate order to make in the circumstances of the matter is to invoke its revisionary powers provided under section 43 (1) (b) of the Land Disputes Courts Act, Cap 216 R.E 2019 to quash the proceedings of the tribunal from 8<sup>th</sup> February, 2022 to the end of the proceedings of the tribunal and set aside the judgment together with its decree which was made basing on the evidence received by the tribunal contrary to requirement of the law. To the view of this court the above finding is enough to dispose of the appeal at hand and there is no need of going to the rest of the grounds of appeal.

In the premises the appeal of the appellant is hereby allowed. The proceedings of the tribunal conducted from 8<sup>th</sup> February, 2022 to the end is quashed, the judgment of the tribunal and its decree are set aside. The file of the tribunal be remitted to the tribunal for hearing of the application from where it had reached before 8<sup>th</sup> February, 2022. As the reason caused the court to arrive to the stated finding was not caused by fault of the parties in the matter there will be no order as to costs. It is so ordered.

Dated at Dar es Salaam this 1<sup>st</sup> day of June, 2023.



  
I. Arufani

**JUDGE**

01/06/2023

**Court:**

Judgment delivered today 1<sup>st</sup> day of June, 2023 in the presence of Mr. Simon Barlow, learned advocate holding brief for Mr. Tumaini Mgonja, learned advocate for the appellant, in the presence of the first and second respondents in persons, in the presence of Mr. Joshua Daudi Jay, Director for the third respondent and in the absence of the fourth respondent. Right of appeal to the Court of Appeal is fully explained.



  
I. Arufani

**JUDGE**

01/06/2023