

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.77 OF 2022

(Arising from the District Land and Housing Tribunal for Kinondoni in Misc.
Land Appeal No.104 of 2020)

JOSEPHINE AUGUSTINO (Sued under Power of Attorney of

ALLAN BRITON AUGUSTINO) APPELLANT

VERSUS

ASHA HUSSEIN RESPONDENT

JUDGMENT

Date of Last order: 23.02.2023

Date of Judgment: 28.02.2023

A.Z.MGEYEKWA, J

This appeal stems from the decision of the Wazo Ward Tribunal in Land Cause No. 113 of 2019 arising from the District Land and Housing Tribunal for Kinondoni in Land Appeal No.104 of 2020. The material background facts to the dispute are briefly as follows; the appellant instituted a suit at the trial

tribunal in Land Cause No. 113 of 2019, claiming that the respondent and 2 others trespassed onto his land and they constructed a wall. The trial tribunal decided the matter in favour of the appellant and he was declared the owner of the suit land. Dissatisfied, the respondent lodged an appeal before the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Application 779 of 2021 against the respondent. The appellate tribunal's efforts to receive the records from the trial tribunal were infertile. Hence the appellate tribunal decided to nullify, quash and set aside the proceedings of Wazo Ward Tribunal and parties were at liberty to lodge a fresh case.

The tribunal's decision did not amuse the appellant, hence, he decided to challenge it by way of appeal before this court, he filed an Amended Petition of Appeal on two grounds as follows:-

- 1. That Honourable Chairman of the appellate Tribunal erred in law and fact by nullifying the proceeding which was not before the Tribunal.*
- 2. That Honourable Chairman of the trial Tribunal erred in law and fact by ordering the parties to go for retrial in absence of assessors whiles the matter was been determined.*

When the appeal was called for mention on 23rd February, 2023 before me, the appellant enjoyed the legal service of Mr. Paul Mkenda, learned counsel,

and the respondent enlisted the legal service of Mr. Ambrose and Innocent, learned counsels. The appeal was argued orally.

The learned counsel for the appellant started to kick the ball rolling, he abandoned the second ground. We pray to argue on the first ground. Mr. Mkenda contended that the appellate tribunal erred in law and fact by nullifying the proceeding which was not before the tribunal. He argued that the Chairman did not go through the trial tribunal proceedings. Mr. Mkenda argued that the appellate tribunal did not issue an order to call for records. The learned counsel submitted that the Chairman heard both parties in Land Appeal No. 104 of 2020 and recorded the opinions of assessors while knowing that the trial tribunal file or proceedings were not called. He spiritedly argued that the act of the Chairman was contrary to the procedure. In his view, the appellate Tribunal was required to issue a call for records or to dismiss the appeal instead of striking out and ordering a retrial.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this Court to dismiss the appellate tribunal Ruling and any other orders as this Court thinks fit.

Responding, the learned counsel conceded that there was a Land Appeal No. 104 of 2020, and Asha Hussein, the respondent on 30th November, 2020

attached the proceedings of the Land Cause No.113 of 2019 delivered by Wazo Ward Tribunal. Mr. Ambrose stated that the Chairperson gave his reasons for quashing the proceedings of the trial tribunal. To buttress his contention he referred this Court to the Ruling of the DLHT specifically on pages 1 & 2. He went on to submit that the Chairperson stated that when he wanted to compose the judgment, she noted that the trial tribunal file was not present.

The learned counsel went on to submit that in such a situation, the law gives him the power to quash any proceedings. Fortifying his submission he cited section 35 1 (c) of the Land Disputes Courts Act, Cap.216 [R.E 2019] and stated that the appellate tribunal Chairman after noting that the proceedings of the trial tribunal were not brought before her, hence, she decided to quash the trial tribunal proceedings. The learned counsel continued to argue that even if she heard the assessors' opinion, still the Chairman had a duty to decide in accordance with the law.

In conclusion, Mr. Ambros urged this Court to find that the appeal is misconceived hence the same be dismissed.

In his rejoinder, Mr. Mkenda maintained his submission in chief that the appellate tribunal was not required to quash the trial tribunal proceedings.

He added that the Chairman had seen the copies of the trial tribunal proceedings attached to the appellant's Application but she did not take any trouble to call for records. He forcefully argued that allowing such a habit of litigation will not come to an end. He was convinced that there were other means for the appellate tribunal to solve the matter instead of quashing. Ending, he urged this Court to allow our appeal.

I have carefully gone through the respective submissions of both learned counsels at length and given them the due respect as deserved. I should state at the outset that the main issue for determination is *whether the appeal is meritorious*.

I have perused the District Land and Housing Tribunal for Kinondoni at Mwananyamala and noted that the appellant lodged an appeal before the DLHT on 30th November, 2020 and the Chairman issued several calls for records without success. Hence the Chairman decided to nullify the proceedings of Wazo Ward Tribunal and the parties were at liberty to lodge a fresh case. In a situation where the trial court or tribunal records are nowhere to be found, the appellate Court can nullify the proceedings, quash and set aside the award arising thereto. However, there is a process that needs to have adhered to by the Court of Appeal of Tanzania in the case of **Robert S/O Madololyo v the Republic**, Criminal Appeal No. 486 of 2015,

the Court of Appeal of Tanzania faced the problem missing of records of the lower courts as the one under scrutiny. The Court of Appeal of Tanzania was in view that one of the viable means of remedying the situation is involving other stakeholders in the administration of justice to reconstruct the records.

The same procedure is applicable in the situation at hand, the Chairman had to call the parties and notify them of the efforts taken to trace the lower tribunal records and that the efforts proved a failure. The tribunal could have asked the parties whether they are in a position to reconstruct a duplicate file. In case parties will fail to reconstruct the records then the trial Chairman is required to file an affidavit to confirm that the records are nowhere to be found. Thereafter, the appellate tribunal could have opted for the last resort to nullify the trial tribunal proceedings, quash and set aside the award arising thereto.

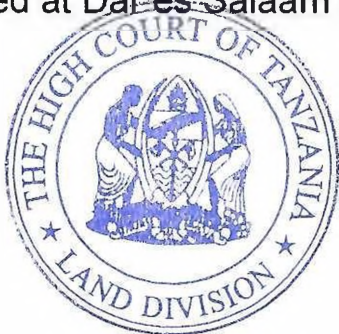
Going through the appellate tribunal, I noted that the Chairman did not call the parties to inform them, allow the parties to reconstruct the proceedings, and order the trial tribunal Chairman to swear an affidavit. Had it been that parties were addressed and the Chairperson filed an affidavit then the Chairman would have been in a better position to nullify the trial tribunal proceedings.

In sum, I find that the appeal is meritorious to the extent explained above. Therefore, I proceed to quash the order of the appellate tribunal and part of the trial tribunal proceedings starting from 12th November, 2021. I remit the file to the District Land and Housing Tribunal for Kinondoni at Mwananyamala to order the Chairperson to proceed with hearing the matter in accordance to the law.

The appeal is allowed without costs.

Order accordingly.

Dated at Dar es Salaam this date 28th February, 2023.




A.Z. MGEYEKWA

JUDGE

28.02.2023

Judgment delivered on 28th February, 2023 in the presence of the appellant and Ms. Mariam Mabina, counsel for the respondent.




A.Z. MGEYEKWA

JUDGE

28.02.2023

Right to appeal fully explained.