

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI**

LAND CASE APPEAL NO. 38 OF 2023

*(Appeal from the Decision of the District Land and Housing Tribunal of Moshi at Moshi dated 6th
February, 2023 in Application No. 156 of 2018)*

AUGUSTINO NGOWI.....APPELLANT

Versus

FESTO MBWAMBO.....RESPONDENT

JUDGMENT

20th March & 24th April, 2024

A.P.KILIMI, J.:

Before the District Land and Housing Tribunal of Moshi the appellant Augustino Ngowi sued the respondent Festo Mbwambo for trespassing on his land by building a wall. The respondent on the other hand refuted the allegation and stated that the said land belongs to him. Upon considering the whole of the evidence presented thereat, the trial tribunal was satisfied that the respondent is not trespasser as the wall was built on his plot. Consequently, the tribunal dismissed the application with cost for being unfounded. Aggrieved by the decision, the appellant has now appealed to this Court raising the following grounds of appeal:

1. That the trial tribunal erred in law in entertaining a defense filed out of time without leave and against protestation of the applicant.
2. That the trial tribunal failed to properly evaluate the evidence and reached a wrong conclusion.
3. That the decision of the trial tribunal is bad in law as the deciding chairman took over without giving reasons.
4. That the decision of the trial tribunal is bad in law as the assessors were not properly involved.

On 14th February, 2024 when the matter came for hearing, it was agreed that the appeal be disposed of by way of written submissions and this court issued a filing schedule which was complied effectively.

Mr. Elikunda Kipoko learned advocate prepared the submission on behalf of the appellant and on the first ground of appeal which faulted the tribunal for entertaining a defence which was filed out of time; it was his submission that the records show that the tribunal did entertain the defence which was filed out of time. He argued that it is trite law that the defence filed out of time is as good as no defence at all. He submitted therefore that since the defence was filed out of time the tribunal ought to have struck it out and proceed to determine the dispute based on the evidence of the applicant alone. The learned counsel further submitted that in absence of defence evidence the applicant had proved his claim to the balance of probability.

On the second ground of appeal which challenged the tribunal for failure to evaluate the evidence, it was Mr. Kipoko's submission that the records are clear that the tribunal concocted the evidence on the first paragraph of page four of the typed judgment. Mr. Kipoko referred to the clause which stated, "...kwamba hakuna ubishi kwamba alinunua eneo lake anakoishi kutoka kwa mtu anayeitwa Shaftael Lema ..." and argued that this was said while the seller was not brought to court and no reasons were given to that effect. He further argued that based on the evidence, exhibit D was not supposed to be acted upon since it lacked stamp duty and that the position of the law is that such sale agreement which do not bare any stamp duty is inadmissible in evidence. He supported his argument with the case of **Zakaria Barie Bura vs Theresia Maria John Mubiru** 1995 TLR 211 (CA).

On the 3rd ground of appeal that the decision of the tribunal was bad in law because the deciding chairman took over without giving reasons. It was Mr. Kipoko's submission that the change of chairman without giving reasons was fatal irregularity as was held in the case of **Leticia Mwombeki vs Faraja Safarali and Others**, Civil Appeal No. 133 of 2019, Court of Appeal, Dar es Salaam (TANZLII).

In respect to the 4th ground which challenged the decision of the tribunal on the basis that the assessors were not properly involved, Mr. Kipoko submitted that it was an apparent fact that assessors did not deliver their opinions prior to the chairman composing his judgment. He referred to the law as provided for under sections 23(1) and (2) of the Land Disputes Courts Act, and stated that from the provision, the composition of the Tribunal has been listed to be mandatory, a chairman sitting with not less than two (2) assessors. Further that under section 23 (2), which has to be read together with Regulation 19 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations GN No. 174 of 2003 (the Regulations), the requirement is that after taking part in the conduct of the matter, the assessors are required to give their opinions in writing and the same be read out to the parties before the Chairman pronounce a decision which has incorporated those opinions. It was his further submission that in the judgment it was not shown whether the opinion of assessors were read out to the parties prior to the pronouncement of judgment. Mr. Kipoko argued that this was a fatal irregularity and prayed that the proceedings of the trial tribunal be nullified and the case to be heard afresh.

Reacting to the above submissions, the respondent maintained that the entire submission by the appellant was unfounded and that the trial tribunal had correctly decided the matter in his favour. Responding to the 1st ground of appeal it was his submission that the said written statement of defence was filed within time. Referring to the proceedings the respondent submitted that on 17/06/2019 when the matter was set for mention, his Counsel prayed for leave to file the Written Statement of Defence out of time and the said prayer was granted whereby the Respondent was given 21 days to file his defence. He submitted further that his defence was filed on 26th of June, 2019, which is only 10 days after the grant of the said order.

Addressing the 2nd ground regarding evaluation of evidence particularly on the admission of the sale agreement, it was his submission that the tribunal correctly admitted and acted upon the said sale agreement after having found it to be valid and lawful. He further submitted that it was undisputable fact that the Suitland was lawfully sold to the Respondent and that when the said sale Agreement was tendered by the Respondent; the Appellant objected the same only for the reason that it lacked the Respondent's photo, an objection which was rejected by the Tribunal for being baseless. It was the respondent's further submission that, it is not a

must that, in any case that the vendor must be made a part to the suit unless he has an interest over the Suitland. He thus contended that since there was no any adduced evidence or articulated fact that the said Vendor had any interest over the Suitland then he said it was not necessary to join the same.

It was the respondent's further submission that the appellant never raised the objection of the agreement not bearing stamp duty during trial therefore this court's hands are tied to determine the matter at this stage. He further argued that the appellant did not prove how the omission has occasioned any failure of justice on his part as required by the law under section 45 of the Land Disputes Courts Act.

Contending in respect to the 3rd ground of appeal, the respondent vehemently disputed it and submitted that it is true that the matter was firstly presided by Honorable Chairman T. Wagine who was later transferred to another station and that consequently the matter was handled over by Honorable Chairman P.J. Makwandi. It was his further submission that, by the time the first chairman was transferred the matter was still on mention stage and that the requirement of the law in so far as assigning reasons is concerned it is only necessary if it happens before concluding the evidence and that evidence is given during hearing as provided by the law under Order

XVIII Rule 10 (1) of the **Civil Procedure Code** together with Section 51 of **Act No.2, CAP 216**. To support his assertion, he a cited the case of **Deusedith Sylivery Vs Jovenary Katembo {administrator of the estate of the late Sylivery Kayungi) & Asteria Sylivery,** Land Case Appeal No.07/2022- High Court of Tanzania at Bukoba. He concluded that be the appellant never stated or proved as to how the purported omission had occasioned any failure of justice on his part as required by the law under section 45 of the Land Dispute Courts Act (supra). He thus prayed that this ground be disregarded for lack of merit.

Responding to the 4th ground of appeal regarding the allegation that assessors were not properly involved in the decision making, it was the respondent's submission that the tribunal was properly constituted. He further submitted that throughout the proceedings the presiding chairman sat with a set of two assessors and before composing the judgment they gave their opinion in writing whereby on 20/12/2022 the same was read over to the parties. He thus concluded that the appellant's averment that the assessors were not properly involved was baseless and a misconception of the law so he prayed for the entire appeal be dismissed with costs.

I have thoroughly gone through the trial tribunal's record, grounds of appeal and submission from both parties. In determining this appeal, I will endeavour to respond to the issues as raised in the grounds of appeal sequentially.

On the first ground where the appellant faulted the tribunal for entertaining a defence filed out of time and without leave to do so, with respect I have noted that this allegation by the appellant counsel is absolutely not true. As evidenced on record of proceedings of the tribunal, it clearly shows under page 5 that on 17/6/2019 the respondent's advocate one Ms. Esther requested for 21 days to file reply and the tribunal granted the prayer as shown on page 6 of typed proceeding. The record further shows that when the matter was set for mention on 09/7/2019 the learned advocate confirmed to have filed the written statement of defense as ordered and the tribunal fixed a date for hearing. At this juncture, on the aforesaid reasons, I find this ground of appeal meritless and it is therefore dismissed.

In respect to the second ground Mr. Kipoko challenged the evaluation and analysis of the evidence, as not to have been properly done. Elaborating on the ground the learned counsel pointed on two points. First, he faulted the tribunal for relying on the evidence of the respondent that he had bought

his plot from a person known as Shaftael Lema while the said person was not brought to court. In my review of the tribunal proceedings, I noted that this was never an issue during trial and the appellant did not even cross examine the respondent on such issue therefore by raising the matter at this point on appeal it can be termed as an afterthought on the part of the appellant which if entertained will prejudice the respondent. (See **Shadrack Balinago vs. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General**, Civil Appeal No. 223 of 2017 and **Richard s/o Mgaya @ Sikubali Mgaya v R.**, Criminal Appeal No. 335 of 2008 (both unreported))

On the second point, Mr. Kipoko challenged the tribunal that it failed to evaluate evidence and erred by relying on evidence of exhibit D1 because it lacked stamp duty. As I have already observed above the learned counsel is raising this objection for the first time on appeal. This objection however correct it may be, it has no effect on the decision of the tribunal because as rightly argued by the respondent the appellant has not stated how the omission has occasioned failure of justice on his part. I concede with the respondent that the cited provision of **section 45 of the Land Dispute Courts Act Cap. 216** by the respondent is very relevant on this point. The

law under this provision requires a party claiming that there was an error, omission or irregularity in the proceedings to establish how such error has occasioned failure of justice in order to be redressed on that account. In the present matter the learned advocate has only alleged an error in the proceedings but has not explained how such error affected the appellant's case. In the circumstance, I find that this ground also lack merit and it is dismissed forthwith.

On the third ground, the appellant challenged the tribunal decision on the ground that the deciding chairman took over without giving reasons. The law governing this subject is provided for under **Order XVIII Rule 10 (1)** of the **Civil Procedure Code**, Cap 33 R.E. 2019 which states;

10.-(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(Emphasis added).

In the case cited by Mr. Kipoko of **Leticia Mwombeki vs Faraja Safarali and Others** (supra) the court observed that,

"The essence of the cited order is to ensure that trial commenced by the trial Judge or Magistrate is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for the continuation of the trial of a partly heard case. The rationale behind is that, the one who sees and hears the witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be compromised".

(Emphasis added).

Having examined this ground of appeal in light of the above legal provision and the above cited case, the issue I am called upon to determine is whether the omission on succession of presiding chairman did vitiate the trial and the resulting judgment.

According to the record it is apparent that in 29/06/2022 that Hon. Chairman Makwandi who heard the entire evidence at the trial ordered to visit locus in quo on 08/07/2022. But on this day of visiting the locus in quo, the record shows Hon. Chairman with assessors and in absence of parties addressed the court that he has been transferred to Bukoba Land and Housing tribunal and said the case will proceed with another Chairman.

It was on 15/07/2022 when a new chairman appeared as presiding officer at the tribunal. To dispel any possibility of alteration, I find it apposite to reproduce the statement of the chairman and Corum showing who were present at the tribunal on that day at page 38;

"Tarehe 15/07/2022

Akidi: Hon. R. Mtei – Mwenyekiti

Wajumbe: (1) Sarah Mchau

(2) Sara Lukindo

Mwombaji: Hayupo

Mjibu maombi: Hayupo

K/B: Yustina Mganga

***Baraza:** - Shauri hili lilikuwa mbele ya Mhe. P. Makwandi Mwenyekiti, ambaye kwa sasa amehamia katika Baraza la Ardhi na Nyumba la Wilaya ya Bukoba. Kwa sababu hizo nitaendelea na usikilizaji wa shauri hili baada ya mimi kuhamia katika Baraza hili la Ardhi na Nyumba la Wilaya ya Moshi.*

*Sgd: R. MTEI
MWENYEKITI
15/07/2022*

The excerpt above shows that all parties were absent and only assessors were present, the record further shows that the chairman on the date for visiting locus in quo on 02/12/2022. However, on that very day scheduled for visiting parties were present but the chairman did not re address what he said earlier in their absence. And for purpose of clarity, I reproduce what transpired at page 41 as follows;

"02/12/2022

Akidi: Mhe. R. Mtei – Mwenyekiti

Wajumbe: (1) S. Mchau

(2) S. Lukindo

Mdai: Yupu

Mdaiwa: Yupu

Karani: Yustina

***Baraza:** - Shauri linakuja kwa ajili ya kwenda kutembelea eneo la mgogoro.*

***Wadaawa:** - Tupo tayari kwenda kwenye eneo la mgogoro.*

*Sgd: R. MTEI
MWENYEKITI
02/12/2022*

The above is in accordance to court record, it is a trite law that, there is always a presumption that a court record accurately represents what happened, thus should not be easily impeached. (See **Paulo Osinya v. R** [1959] EA 353 **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 and **Shabir F. A. Jessa v. Rajkumar Deogra**, Civil Reference No. 12 of 1994 (unreported)).

The answer to this issue is definitely yes because the record shows that there was indeed change of presiding chairman at different times in the proceedings. In the first instance the presiding chairman was Hon. T. Wagine who is seen from the beginning of the proceedings until 03/04/2019 when Hon. P. J. Makwandi took over. At this stage the hearing had not yet commenced it was still on the mention stage. From that point the trial proceeded with Hon. P. Makwandi until 15/07/2022 when Hon. R. Mtei took over. As shown above Hon. R. Mtei took over almost all witnesses were heard and it remain to visit the locus in quo. However as shown above with respect the learned chairman did not address the parties themselves since on that date the records show all parties were absent, and on the next day for visiting locus in quo the same was not addressed.

In the case of **Kajoka Masanga vs The Attorney General & Another** [2016] TZCA 270 (TANZLII) the court quoted with approval its earlier decision in **Ms. Georges Centre Limited V. The Honourable Attorney General and Ms. Tanzania National Road Agency**, Civil Appeal No. 29 of 2016 (unreported) and considered the scope of the rule above and said:

"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that the provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial

*proceedings hinges on transparency.
Where there is no transparency justice
may be compromised."*

[Emphasis is mine]

The act of the last successor Chairman who took over and visited the locus in quo and further wrote the judgment without telling parties why he came in, I am of considered view vitiated the directives envisaged in the above authorities, thus, the same was fatal since he has no jurisdiction and the trial becomes nullity.

In the circumstances, I find this ground of appeal has merit. Furthermore, I find that the determination of this of appeal is sufficient to dispose of the appeal and subsequently I find no need to consider and determine the remaining ground of appeal.

In the final analysis, I, in the exercise of revisional powers vested in this Court by section 43(l)(b) and (2) of the Land Disputes Courts Act (Cap. 216, R.E. 2019), the proceedings of the District Tribunal from 15th day of July, 2022 when Hon. R. Mtei as chairman took over of this matter are hereby

nullified and consequently its Judgment and decree thereon is hereby quashed and set aside.

I further order an expedited retrial from that date stated above before the Tribunal by another Chairman, but by a set of the same assessors who heard the case from the beginning if are still in service. After considering the circumstances of the case, I order each party to bear its own costs.

It is so ordered.

DATED at **MOSHI** this 24th day of April, 2024.



X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered virtually this 24th day of April, 2024 in the presence of Ms. Lilian F. Mushi, counsel for appellant and Ms. Esther Kibanga, counsel for Respondent. Appellant and Respondent absent.

Sgd; **A. P. KILIMI**
JUDGE
24/04/2024

Court: Right of appeal duly explained

Sgd; **A. P. KILIMI**
JUDGE
24/04/2024