

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

(Kigoma District Registry)

LAND APPEAL NO. 17 OF 2019

*(Arising from Land Application No. 49/2018 of the District Land
and Housing Tribunal for Kigoma)*

SHABANI IDDRISSA KALEMELA

(The Administrator of the estate of the late

IDDRISSA SHABANI KALEMELA) APPELLANT

VERSUS

HUSSEIN ISSA KALUKULA *(The Administrator*

of the estate of the late **ISSA SHABANI**

KALUKULA).....RESPONDENT

JUDGMENT

Dated: 22/06/2020 & 21/7/2020

Before: Hon. A. Matuma, J

This is a sorrowful appeal, I say so because it results from the land suit between two blood brothers **Iddrissa Shabani Kalemela** and **Issa Shabani Kalukula** who are both deceased persons.

The current parties **Shabani Iddrisa Kalemela** and **Hussein Issa Kalukula** are also blood brothers standing as administrators of their respectful fathers herein above named.

Their fathers died under enmity over the dispute, their sons took over the suit and continued the enmity. And God forbid, their siblings to inherit the grudges of their father herein and their late grandfathers supra. I have tried to my level best to call upon the parties herein to amicably settle the

dispute as they are blood relatives but each was bitter, no one salutes the other. That is why I have called this appeal as the sorrowful one.

Now back to the matter, the late two brothers Issa Shabani Kalemela and Iddrissa Shabani Kalukula during their life hood in 1989 stood in the Regional Housing Tribunal vide Rent Restriction Application No. 2/1989 over the dispute property **plot No. 92 Block "O" Mwanga Majengo** within Kigoma Municipality.

Each of the two brothers claimed ownership of the property in dispute and each pressed the rent tribunal to order the tenants theirin to pay rents to him.

S.B Lukelelwa, chairman the Tribunal as he then was, and who had an opportunity to see the two brothers alive commented in his judgment;

"At one stage, we called them, the two warring brothers, and advised them to file a Civil suit so that ownership of the said house could be declared.

The applicant refused saying that he has papers from the Land department which shows that he is the proprietor of the house, on the other hand his young brother resorted that he has similar papers from the same source, and actually he is in physical possession of the house. In any way we saw them clearly shows that the relations between the two brothers are in every respect very bitter. The applicant being very bitter and with visible elements of violence".

The applicant in that Rent restriction suit was Issa Shabani Kalukula the father of the current respondent Hussein Issa and the respondents were

his young brother Iddrisa Shabani Kalemela the father of the current appellant Shabani Iddrisa and some other tenants.

The tribunal then dismissed the application directing the parties to file a Civil suit for determination of ownership first. The tenants were directed to pay rent to the one they used to pay until ownership is determined in a competent court.

Before the Civil suit was filed, the elder brother Issa Shabani Kalukula passed away. His son Hussein Issa kalukula now respondent as administrators of the estate of his late father filed the dispute in the District Land and Housing Tribunal against his young farther Iddrisa Shabani Kalemela vide Land Application No. 49 of 2011. In the due course of the matter, the said young father also passed away. His son, the current appellant Shabani Iddrisa Kalemela took over as administrator of the estate in question. Now it is a battle between the two brothers in continuation of battle left behind by their respectful father. Very sad.

At the trial tribunal, the respondent Hussein Issa who was by then the applicant testified that after the death of his father, he identified his properties through documents in which he realized that the property in dispute herein **plot No. 92 Block "O" Majengo** was among the properties of his late father. He tendered various documents including the certificate of occupancy thereof as exhibit P2 collectively. He also tendered various rent receipts as from 1987 to 2011 when he instituted the suit as exhibit P3 collectively. He therefore called the trial tribunal to declare him the lawful owner of the property and order vacant possession against the appellant by then the respondent.

The appellant on his party testified in the trial tribunal that his late father was the lawful owner of the dispute plot, he is the one who built the house on the plot, lived therein up to his death and had title documents as well. He tendered a title document as exhibit D2, sketch map thereof as exhibit D3 and various letters from the land Authorities as exhibit D4 and D5 respectively.

The learned chairman relying in one of the respondent/applicant's exhibits (Exhibit P4) which was a letter from the Land Authority explaining how the land in dispute changed title from the appellant to the respondent, declared the applicant now respondent as the winner thereof and ordered vacant possession against the appellant.

Such decision aggrieved the appellant hence this appeal with five grounds.

At the hearing of this appeal Mr. Method Kabuguzi learned senior advocate who represented the appellant obtained leave to file a supplementary Memorandum of appeal. The respondent appeared in person unrepresented.

I will start with the supplementary grounds of appeal. The learned advocate herein submitted that the proceedings and judgment of the District Land and Housing Tribunal are tainted with material illegality as the evidence of the appellant was neither scrutinized nor considered at all. He submitted that the appellant's evidence at the trial was completely ignored hence a breach of the right to be heard.

The respondent admitted that indeed the evidence of the appellant was not scrutinized at all but he stood firm that such evidence was valueless compared to his evidence and as such it was properly ignored.



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Without wasting time on this, it is true that with all evidence on record from both parties, the learned chairman picked only exhibit P4, scrutinized it and rested his judgment in the said sole exhibit. As such it is true that he did not talk to the evidence of the appellant in any manner. That was wrong as rightly submitted by the learned advocate. Courts of law are always bound to scrutinize all the evidence on record and state which one is acceptable and which one is not, and give reasons for accepting some evidence and rejecting the other. Since I am the first appellate Court, I will step into the shoes of the trial tribunal and re-assess the evidence on record to reach my own decision.

The second complained illegality is that; documentary exhibits of both parties were not read to the parties, they were merely dumped on record.

The respondent disputed this alleged complaint stating that documentary exhibits were exchanged between the parties and tribunal assessors and read out during trial.

It is my firm view that on this the respondent is right and I reject this complaint. I find that it was a mere omission of the trial chairman to record that the documents were read out, but as rightly submitted by the respondent the parties had opportunity to see and read the exhibits by themselves during trial. The appellant was represented by the learned Counsel but the respondent stood alone. The respondent despite of being unrepresented and a layman maintained before me that he was accorded opportunity to read the documents during trial. To quote him he stated before me;

"During their tendering in evidence passed through my hands and I had time to read them as most of them were in Kiswahili".

In the circumstances, the learned chairman ensured that each party becomes aware of the contents of the documentary exhibits. He merely omitted to put on record that the exhibits were actually read out. The omission is thus curable in terms of section 45 of the Land Disputes Courts Act (Act No. 2 of 2002).

The third complained illegality was that on record two tribunal chairmen presided over the matter. No reason on record was stated for change of hands of the tribunal chairmen.

The respondent replied that the change of chairmen was for obvious reason that the first chairman one Ling'wetw got ill (alipata ugonjwa wa macho). It is when his successor chairman took over.

I have no reason to disbelieve the respondent on this. He seems to state what exactly happened during trial.

It is him who was unrepresented but it seems he was following thorough the proceedings at the trial tribunal. The appellant had the service of an advocate, it cannot be accepted that a lay unrepresented party was very keen to understand the stages of the proceedings and the appellant's advocate a learned brother was not. Had they not been aware of the reasons for the change of trial chairmen, the appellant's advocate as an officer of the Court ought to have asked the Court/successor chairman to put on record why the succession. I find this complaint as an afterthoughts.

Their silence mean that the respondent is talking the truth that the predecessor chairman got ill and that fact was disclosed to all parties. As such I find that it was a mere omission of the trial successor chairman to

put on record the stated reason. Such omission is as well cured under section 45 supra.

The last complained illegality is that assessors cross examined witnesses.

The respondent disputed this complaint and stated that no one was cross examined by any assessor.

I think the respondent is right, there is no evidence on recorded suggesting that assessors cross examined witnesses. This complaint is unfounded and I consequently dismiss it. The Supplementary Memorandum of Appeal is over.

Back to the main five grounds of appeal Mr. Kabuguzi learned senior advocate argued them together.

He argued that the appellant had heavier evidence than that of the respondent as it is on record that the dispute house was the property of the later Iddrissa Shabani Kalemela the father of the appellant. That, when the late Issa Shabani Kalukula (respondent's father) wanted to take a loan from the Bank, he asked the appellant's father to give him his tittle just for a loan taking but later that process was cancelled.

He further submitted that such fact is corroborated by documentary evidence that the fathers of the parties herein had some arrangements for the transfer of the dispute plot just for the purposes of enabling the respondent's father to take the loan but the arrangement was illegal.

The learned advocate further submitted that there was no any evidence on consideration for the alleged transfer to be justified. He was of the view that the respondent's father tricked his young brother (appellant's father) just to con him. He argued further that the appellant's father built

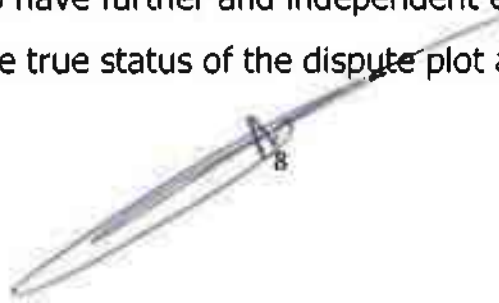
the house, lived in it to the time of his death, his family is still living in it including his widow and that even the respondent's father did not claim it up to when he died. But the respondent is the one who came to start claiming over their property.

The learned advocate then faulted the trial tribunal's reliance to exhibit P4 without calling its author to justify his opinion in it. He therefore, called this Court to allow the appeal with costs.

The respondent on his party also replied to the grounds of appeal generally.

He submitted that at first the dispute property was registered in the name of Iddrissa Shabani his young father and the father of the appellant for a short-term ownership (**Hati ya umiliki wa muda mfupi**). He argued that it was his father Issa Shabani Kalukula who had purchased the land and registered it in the name of his young brother the deceased appellant's father. Then his father Issa Shabani Kalukula asked for **hati ya muda mrefu** over the plot and was so granted a 33 years offer which is still existing and he is paying land rent over it. He disputed issues of loan taking and argued that all the documentary exhibits of the appellant are forged documents. He stated that the land in dispute has two different files in the land Authority each states ownership in respect of the two deceased fathers. He therefore, prayed that this appeal be dismissed with costs.

In the circumstances of the matter at hand, the enmity existing between the two blood relatives, the long time the dispute has existed between them, I decided to have further and independent evidence from the land authority to get the true status of the dispute plot and its original history.



As such I issued an order to the land officer to enter appearance with all the necessary documents relating to the property in question.

I then adjourned the matter to await the compliance of the order. On 22/6/2020, one Paulo Misuzi, Land Officer entered appearance.

I took his evidence under oath as a Court witness. Although he was not subject to cross examination, for obvious reason that the dispute revolves around relatives who were not the original litigants but merely inherited the dispute, I gave the parties opportunity to put questions to him whenever they needed clarification in his evidence both oral and documentary so that they can be enlighten of the true historical background on the property in dispute between them.

Mr. Paulo Misuzi had the following evidence which seems neutral and unchallenged by the parties.

He testified that originally the dispute plot was owned by Iddrissa Shabani, the appellant's father. He was registered the owner of the property on **2/12/1975**.

He was allowed to develop the property and paid all dues for preparation of the certificate of the Right of Occupancy.

He was then on **23/10/1986** issued with the tittle document with **Letter of Offer No. 296146** as the Lawful owner of the plot in dispute.

The witness further testified that Iddrissa Shabani developed the plot by building at first the mud house (nyumba ya matope) and later on the block house (nyumba ya tofali).

He went on stating that on 4/1/1987, Iddrissa Shabani wrote to the **Afisa Maendeleo ya Ardhi Mkoa - Kigoma** requesting that his brother Issa

Shabani Kalukula be granted a long term right of occupancy over the property.

Following such request on **27/2/1987** the Land Authority prepared a title deed of 33 years to Issa Shabani Kalukula. The property was then registered in the name of the respondent's father.

Just on **3/3/1988** Iddrisa Shabani wrote another letter revoking his previous letter requesting the land officer to stop the process of registering the property in his brother's name but by then a certificate of occupancy was already prepared and issued to the respondent's father.

According to him, it is when now the two brothers started endless cases over the property to date. They each complained to various Land Authorities whereas the appellant's father got replied that his purported transfer of the property to his brother was illegal because he who endorsed the transfer was "**Afisa mipango Miji**" instead of "**Afisa Ardhi**" and also that the transaction between the two brothers was illegal because it was executed in manner that the Government was not made to get its due payments for the transfer.

On the other hand, the respondent's father was also replied that the transfer was complete and conclusive. He was thus recognized owner of the dispute plot.

From the herein above evidence, both that which was taken at the trial and which I personally took at the hearing of this appeal, it is obvious that Iddrisa Shabani the appellant's father was the original owner of the dispute plot. His written request to the land authority led to the property being registered in his brother's name.

For the just determination of this dispute, I am of the view that I should determine whether the transfer of the property from the appellant's father to the respondent's father was complete and conclusive. This is because the alleged transfer was the source of all the subsequent problems.

According to the exhibits which were tendered by both parties during trial and those which were tendered before me by the Land Officer, the transfer was questionable and as such the land authorities had different views over it. Those different views as to who is the Lawful owner are reflected on different correspondences as herein above exhibited.

According to exhibit D5 **Afisa Maendeleo ya Ardhi** listed four reasons to the effect that the lawful owner of the property was still its original owner Iddrisa Shabani because the purported transfer was illegal. He stated that:

*"Nakuarifu kuwa hatua zote zilizofanywa ni **batili** na hati ya umilikaji ya muda mrefu aliyopewa ndugu yako Issa Shabani Kalukula kwa barua KUTC/04010/3365 ya tarehe 28/2/1987 **siyo halali** kwa sababu zifuatazo.*

- 1. Anayehusika kutoa barua ya toleo ni ofisa ardhi wa mji au mkoa na siyo ofisa mipango miji kama ilivyofanyika.*
- 2. Jina la mmilikaji wa long term lazima liwe ni la yule yule aliyekuwa na short term, vinginevyo kuwe kwanza na kibali cha uhamisho wa milki hiyo ya muda mfupi, ndipo atakayekuwa amehamishiwa kuomba hati ya muda mrefu. Ni Dhahiri kuwa hapa mlikuwa mna nia ya kukwepa kodi na ushuru wa Serikali hasa kwa sababu kuna jengo.*

3. Mwenye Ardhi ni serikali wewe ni mpangaji tu na haki yako ni ya upangaji tu. Ardhi haiazimwi kama tunavyoazimana nguo.

4. Ni agizo la serikali kuwa mijini tusitengeneze offer of Right of occupancy tangu December, 1987 na hivyo hiyo iliyotengenezwa haitambuliwi na wala haitasajiliwa.

Kwa maelezo hayo na bila kujali barua uliyoniandikia, ofisi yangu inaendelea kumtambua Iddrisa Shabani kuwa mmilikaji halali wa kiwanja Na. 92 Block "O" Mwanga na natoa onyo kwake kuwa afuate taratibu na sheria ikiwa anataka kumpa haki ya milki ndugu yake Issa Kalukula".

That decision by the land officer aggrieved the respondent's father and he thus complained to the commissioner for Lands. The commissioner vide exhibit P4 wrote to the land officer that;

"Ndugu Issa Shabani Kalukula aliniletea malalamiko yake kuhusu kutenguliwa kwa haki yake juu ya kiwanja tajwa hapo juu kama ulivyomfahamisha katika barua yako niliyoitaja hapo juu.

Nimechunguza kwa makini suala hili na kuona haya yafuatayo:-

a. Inaelekea ni utaratibu katika mji wa Kigoma kwa barua ya toleo kusainiwa na afisa mipango miji kwani barua za toleo za viwanja vingi ambavyo wewe umetayarisha hati na hatimaye kusajiliwa zimesainiwa na afisa huyo.

b. Palikuwepo na makubaliano kati ya Iddrisa Shabani na Issa Shabani Kalukula kwanba Iddrisa arejeshe kiwanja serikalini ili hatimaye kiweze kutolewa kwa Issa Shabani Kalukula kwa barua ya tarehe 4/1/1987 nawe ulipokea

ukakubali na kutoa barua ya toleo kwa Issa S. Kalukula na hatimaye kumtayarishia offer of Right of occupancy ambayo sasa imesajiliwa.

c. Ni Dhahiri vile vile umesaidia kukwepesha serikali isipate mapato katika ushuru kwa uzembe uliotokea ofisini kwako.

d. Kuna hati kubwa iliyosajiliwa vile vile offer of right of occupancy ilikwishapata saini ya Mkurugenzi wa ardhi hivyo huwezi kutotambua toleo la kiwanja kwa Issa Shabani Kalukula.

Kutokana na hayo yaliyotangulia ndugu, Issa Shabani Kalukula ndiye mmiliki halali wa kiwanja kilihchotajwa hapo juu".

The learned trial chairman relied on paragraph (b) and (c) of the herein above exhibit P4 to reach to its judgment.

In fact, the two paragraphs were transformed into being the judgment of the trial tribunal because immediately after it were quoted, the chairman made just a conclusion;

"With the above clarification I have no word to say more therefore the applicant's application has merits and it is hereby granted as per the extent explained".

To me, I have no doubt that the purported transfer was illegal and therefore, could not have been conclusive to confer ownership to the respondent's father.

This is due to the fact that both the Land officer and the commissioner for lands despite of their different views as to who between the two was

the lawful owner of the dispute plot, had observed illegalities in the purported transfer among them that;

- i. There was no formal transfer from which the government could have obtained some dues for the transfer.*
- ii. The officer who endorsed the purported transfer and issued the Letter of Offer to the respondent's father was not legally capable so to do.*

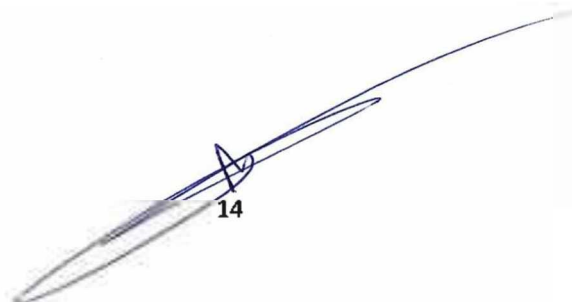
The commissioner however had the view that since the land had already undergone the changes over ownership the new registration to the respondent could have not been ignored.

It is my firm view that the long-standing illegal practices that in Kigoma Afisa Mipango Miji used to assume powers which he legally had not to issue Letter of Offers for various plots, does not in any way acquire legality in law. In the circumstances that the Urban Planning officer was not entitled to issue the letter of offer to the respondent's father, all what he did leading to the change of ownership of the dispute land from its owner to the respondent was illegal, null and void ab-initio. It is not a question that he used to do, but that he had no legal mandate so to do.

Therefore, all subsequent title documents which Issa Shabani Kalukula obtained were illegal with no legal force.

I have gone through Iddrisa Shabani's letter dated **4/1/1987** which requested the registration of the dispute plot in the names of his brother.

That letter is very short and clear. For easy of reference and purposely, let me reproduce it.



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IDDRISA SHABANI

S.L.P 187

KIGOMA.

4/1/1987

AFISA MAENDELEO,

YA ARDHI (M),

S.L.P 163,

KIGOMA.

***YAH: MAOMBI YA KUTAYARISHIWA HATI YA
MUDA MREFU KIWANYA NO. 92 BLOCK "O"
MAJENGO.***

*Ninakujulisha kuwa mimi ninayo hati ya muda mfupi L.O
Na. 296146 ya kiwanja hiki. Sasa ninataka hati hiyo
itayarishwe kwa jina la ndugu yangu Issa Shabani Kalukula.*

Nitashukuru kwa msaada huo.

Ndimi raia Mtiifu.

Iddrisa Shabani".

From the herein above letter it is obvious, the same was directed to the relevant **land officer** who is responsible for change of titles over the land and issue of letters of Offer.

But according to the land officer's letter as quoted above it transpired that such letter did not pass into his hands, it seems to have been snatched by the Urban Planning Officer on its way before reaching to its intended destination. The said Urban planning officer then processed the transfer illegally and without the knowledge of the relevant Land Officer.

It is my firm view that with the analysis of the land officer as per exhibit D5 herein above had this letter passed through him and or reached him as addressed, he would have inquired the purpose of the intended transfer and perhaps he would have advised the late Iddrisa Shabani the due processes of the Law to effect his intention including but not limited to initiate the formal transfer for the government to get its transfer revenues.

Secondly, from the above letter, it is obvious, no consideration for the transfer was stated as rightly complained by Advocate Kabuguzi. A prudent land Authority could have not authorized the transfer without any consideration. Even though there was no formal transfer according to the Land Act by then Land Ordinance for registered land like the instant one as per Land forms no. **29, 30, 35** and **38** under such law. Those land forms are for; *Notification of Disposition under section 36 – Land form no. 29, Application for approval of disposition under section 39 – Land form no. 30, Transfer of a right of occupancy under section 62 – Land form no. 35 and Contract for disposition of right of occupancy under section 64 – Land form no. 38.* Not only that but also there was no ***Spouse Consent for the disposition.***

In fact, there is no such a transfer which is legally accepted. The letter did not disclose why should the title over the property change to another person.

But on 3/3/1988 as here in above stated Iddrisa Shabani wrote another letter to the land officer to stop his previous letter. Let me reproduce it as well;

“

IDRISA SHABANI

S.L.P 187,

KIGOMA.

3/3/1988.

AFISA MAENDELEO YA,

ARDHI (M)

S.L.P 163,

KIGOMA.

*YAH: KUSIMAMISHA UTAYARISHAJI WA HATI YA MUDA
MREFU KIWANJA NO. 92 BLOCK "O" MAJENGO.*

Somo hilo hapo juu lahusika.

*Niliomba kwako kwa barua ya 4/1/1987, nikiomba
unitayarishie hati ya muda mrefu kwa kiwanja hiki No. 92
Block "O" Majengo na hati hiyo ya muda mrefu itayarishwe
kwa jina la ndugu yangu Issa Shabani Kalukula ili aweze
kuwa na dhamana ya kutosha kuombea mkopo wa shamba
lake la ekari 180.*

*Kwa kuwa hadi sasa haijafanyika hivyo naomba isifanyike
tena, **kwani tumeshindwa kukubaliana na ndugu
yangu huyo Issa Shabani Kalukula, na ibakie hivyo
hivyo na hati yake ya muda mfupi ambayo ni L.O No.
296146 ambayo ninayo mwenyewe hapa nyumbani.***

Ndimi raia mtiifu

Iddrisa Shabani".

From the herein letter it is obvious that at first the two brothers had some agreements that would benefit them but in the due course they conflicted. Therefore, their previous agreement, was not conclusive and final. It depended on some other outcomes which never happened and therefore frustrated their prior arrangements.

To cut a story short the purported agreement on the change of title was a dubious transaction, illegal and legally intolerable. I quash them.

Having said all these and by considering that no proof of any consideration for the purported transfer, I restore the parties to their original status which existed before Iddrissa's letter dated 4/1/1987 which requested for the change of title.

I therefore, quash the trial tribunal's judgment and set aside the decree thereof. I allow this appeal and order the Land Authority to cancel the title of the property from the name of **Issa Shabani Kalukula** and restore the title to its original owner **Iddrissa Shabani Kalemela**. Since the said Iddrissa is dead, his administrator of the estate, the appellant herein above be recognized as the legal owner thereof for all intent and purpose of administration and distribution to the legal heirs of the late Iddrissa Shabani Kalemela.

This being a family dispute, and by taking into consideration that the current litigants are mere administrators of estates who relied on documents left behind by their respective deceased parents, I order no costs to either party.

Whoever aggrieved with this judgment has the right of further appeal to the Court of appeal of Tanzania. It is so ordered.




A. Matuma

Judge

21/7/2020