

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 18 OF 2019

(C/f Land Application No. 13 of 2014 District Land and Housing Tribunal of Moshi at
Moshi)

HERCA MARUNDA APPELLANT

VERSUS

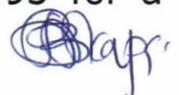
DASKORI DANIEL TEMBA..... RESPONDENT

8th May, 2020 & 17th July, 2020

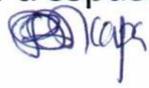
JUDGMENT

MKAPA, J:

The decision of the District Land and Housing Tribunal for Moshi at Moshi (the tribunal) in **Land Application No. 13 of 2014 delivered on 6th December, 2017** by Hon. J. Silas (the Chairman) aggrieved the appellant hence the present appeal. At the trial tribunal the respondent sued the appellant for trespass and forcible entry and prayed that the trial tribunal declare him a rightful owner of a piece of land measuring $\frac{3}{4}$ acre, located at Ongoma village Uru, Moshi district Kilimanjaro region (the suit land). At the tribunal the respondent adduced evidence to the effect that the suit land was partly sold to him in 1993 for a



consideration of fifty thousand shillings. (50,000/=) and partly he acquired through a WILL of the late Stephen Kimaro in 2008. The appellant further alleged that she is the daughter of the deceased and the suit land was neither sold nor given to the respondent since it was a clan land from her great grandfathers, thus being the only heir in line she is entitled to ownership. After full hearing of the case the trial tribunal decided in favour of the respondent. Aggrieved, the appellant preferred this appeal raising a total of seven grounds, but going through them I found them to have the same character which can be summarized as follows;

1. That the trial tribunal's chairman erred in law and fact in proceeding with the matter without complying with the mandatory requirements of regulation 12 (1) (2) (3 a and b) of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003.
2. That, the trial proceeding is nullity as a result of changing of the assessors and chairmen without proof and legal justification.
3. That, the trial tribunal erred in law and fact in declaring the respondent the lawful owner and the respondent a trespasser basing on contradictory evidence. 

4. That, the trial tribunal's decision lacks legal basis and does not disclose analysis of submissions, exhibit evidences, testimonies of the witnesses and reasons for the decision.

At hearing of the appeal parties consented to argue by way of written submissions. The appellant had the services of Ms. Esther Kibanga, learned advocate while the respondent was represented by Mr. Peter Eliuforo Shayo, also learned advocate.

Arguing in support of the appeal, Ms. Kibanga explained that the appellant is the administrator of the estate of her father the Late Stephen Kimaro dully appointed by Moshi Urban Primary Court vide **Shauri la Mirathi Na. 168 of 2013**. She went on explaining that, the trial tribunal did not adhere to Regulation 12 (1) (2) (3 (a) & (b) of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003. (DLHT Regulations) to the effect that at the commencement of the trial the chairman did not read over the claims to the appellant and record whether she did admit or deny the same before framing of issues, instead he proceeded with the hearing.

Ms. Kibanga contended further that, the said requirement is mandatory and non-compliance of the same results into injustice on the part of the appellant . To support her argument she cited the decision in the case of **Tengeru Flowers Limited, Ismail**

Rashid and A.A.R. Insurance (T) V Beatus Kisusi (CAT) Civil Appeal no. 67 of 2017 which is informative on the fact. It was Ms. Kibanga's further argument that, on several occasions there were changes of assessors and chairmen without advancing reasons thereto contrary to the requirement of section 23 (1) and (2) of the Land Disputes Courts Act, (Act No. 2 of 2002). She went on explaining that on different dates there were different sets of assessors namely, Mushi and Mchau, Mmasy and Temu while on the side of the chairman, Mr. Mahelele was the first to preside over the matter then he passed on to Kagaruki who gave reasons, but from Kagaruki to Silas no reasons were advanced.

Ms. Kibanga contended further that, the respondent's evidence at the trial tribunal was weak, unreliable and unsubstantiated yet the trial tribunal declared him the rightful owner of the suit land. Ms. Kibanga mentioned few variances namely, the exact size of the suit land, the unclear purported sale agreement and the WILL which was not proper in the eyes of the law as the same was never admitted at the probate cause before the Moshi Urban Primary Court thus it was Ms. Kibanga's view that the trial tribunal erred in declaring the respondent the rightful owner despite all the variances.



Ms. Kibanga finally submitted that the trial tribunal's decision had no legal basis and was procured contrary to Regulation 20 (1) (a) (b) (c) and (d) of the DLHT Regulations which requires judgment to contain contested issues, reasons for the decision as well as evaluation of evidence. She prayed this court to nullify the proceeding and judgment of the trial tribunal and allow the appeal with costs.

Resisting the appeal, Mr. Shayo submitted that, the appeal is time barred as was filed out of time he thus prayed for the court to dismiss or struck the same with costs. It was Mr. Shayo's view that since the appellant was represented by an advocate the omission to read out the claims is curable under **section 45 of Act No. 2 of 2002**. Regarding the second ground, Mr. Shayo conceded the irregularity that the trial tribunal chairman did not advance reasons in the proceeding as to why he took over the case from the previous chairman, however, he contended that parties were made aware of the said changes and the same did not occasion miscarriage of justice.

It was Mr. Shayo's further contention that there was no contradictory evidence which proved the respondent as the rightful owner of the suit land which he acquired through sale in 1993 and the other piece was given to him through a WILL in

2008. Furthermore, his witnesses also proved his ownership through their testimonies and the trial tribunal did not error in declaring him as the rightful owner. He finally prayed for the appeal to be disallowed for lacking merit. In her brief rejoinder the appellant reiterated her submission in chief and further prayed for the trial tribunal's decision to be quashed and set aside.

Having considered the parties' submissions I find it necessary to dwell on the 2nd ground first namely, change of chairmen and assessors in the course of proceeding without assigning reasons which suffices to dispose of the appeal. On the issue of change of chairmen, **Order XVII Rule 10 of the Civil Procedure Code** Cap 33 R.E. 2002 provides the following;-

"Where a judge or a magistrate is prevented by death, transfer or other cause from conducting a trial suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage which his predecessor left it."



On the outset, it seems this rule also does not specifically point out for reasons to be advanced once there is a change of judicial officer in the course of the proceeding. However, its broader interpretation has been well articulated in the decision of the Court of Appeal in the case of **M/S Georges Centre Limited V. The Honourable Attorney General and M/S Tanzania National Road Agency, Civil Appeal No. 29 of 2016 (unreported)** as hereunder;

"... once the trial of a case has begun before one judicial officer, that judicial officer has to bring it to completion unless there are some reasons that 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... the one who sees and hears the witness is in the best position to assess the witness credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law.

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Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

The rationale behind these provision is to be able to analyse well the credibility of witnesses, promote transparency and integrity and to minimize chaos in the administration of justice. See also **Inter- Consult Limited V Mrs Nora Kasanga and Mathew Ibrahim Kassanga, Civil Appeal No. 79 of 2015** and **Hatwibu Salim V Republic, Criminal Appeal No. 372 of 2016**, CAT at Bukoba (unreported) where the Court of Appeal stated at pages 11 to 12 of the typed judgment that:-

"The requirement to state the reasons of change of magistrates from one magistrate to another is a very important issue to consider. This is for the reason of controlling and avoiding the danger of some mischievous persons who might be able to access the file and do issues not in accordance with the procedure or requirement of the law."

From what is stated in the above cited cases it is my view that, the requirement for a successor chairman to state in the proceedings of a case the reason for taking over a trial from his



predecessor is not only to show the parties have been given right to know why there is a change of chairman without prejudicing their rights but also it enables the successor chairman to properly assume jurisdiction of continuing with the trial without chaos in the administration of justice.

Applying the above position in the instant appeal the emphasis here is when a case is **partly heard** by another chairman then the successor has to advance the reasons for the change. I have had the opportunity of perusing the trial tribunal's records which revealed that, when the dispute was filed at the tribunal it was assigned before Hon. Mahelele, who presided over the case up to the fifth witness, (AW5) then Hon. Kagaruki took over and gave reasons to the effect that she took over upon the transfer of Hon Mahelele. She heard the case until the applicant's case was closed and when the matter was scheduled for defence Hon. Silas took over and delivered a judgment. However, he did not disclose why he took over from Hon. Kagaruki failure of which rendered the whole proceeding a nullity.

On the issue of the assessors, I also had the opportunity of perusing the proceedings and observed that there had been only one set of assessors who took part in the trial throughout namely, Julia Mmasi and Teddy Temu, thus the Tribunal complied with



the requirement of section 23 (1) and (2) of Act No. 2 of 2002. However, as rightly submitted by the appellant the proceedings do not reveal assessor's opinion nor does the record of the trial tribunal. The duty to ensure assessor's opinion are compiled is imposed on the chairman under **Regulation 19 (2) of The DLHT Regulation** which provides that;-

"Notwithstanding sub-regulation (1), the chairman SHALL before making his judgment, require every assessor present at the conclusion of hearing give HIS opinion in writing."

The case of **Tubone Mwambeta V. Mbeya City Council, Civil Appeal No. 287 of 2017** (Unreported) is informative on the fact where the court held that:-

"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, ... they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed ... since Regulation 19 (2) of the Regulation requires every assessor present at the trial at the conclusion of the hearing give his opinion in writing, such opinion

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must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict.”

This second ground of appeal alone suffices to dispose of the matter. Thus, I hereby invoke the revisional powers vested in this Court by **section 43 of the Land Disputes Courts Act, Cap. 216, [R.E. 2019]** and nullify as well as quash the proceedings and set aside the judgement and decree of the trial tribunal. I further order the case be remitted to the trial tribunal for re- trial before another Chairman with new set of assessors. I give no orders as to costs since the irregularities were not occasioned by the parties.

It is so ordered.

Dated and delivered at Moshi this 17th day of July, 2020




S.B. MKAPA
JUDGE
17/07/2019

