

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 129 OF 2021

(Originating from the Judgment and Decree in Land Application No. 18 of 2017 at Kibaha District Land Housing Tribunal for Kibaha delivered on 07th December, 2018 Hon. Jerome Njiwa, Chairman)

HADIJA MWARABU1ST APPELLANT
SALMA MOHAMED MWARABU (Administrator of the
Estate of the late MOHAMED OMARY CHUMA)2ND APPELLANT

VERSUS

ATHUMANI MWINYIMKUU CHUMA1ST RESPONDENT
SALUMU OMARY GABRIEL2ND RESPONDENT
DEWJI ZUKHEL.....3RD RESPONDENT

J U D G M E N T

Date of last Order:22/09/2022
Date of Ruling:30/09/2022

K. D. MHINA, J.

This is the first Appeal. It arose from the proceedings commenced in the District Land and Housing Tribunal (“the DLHT”) for Kibaha where the Appellants vide Land Application No. 18 of 2017, sued the Respondents for recovery of a parcel of Land (disputed land) which was allegedly trespassed by the 3rd Respondent.

The brief background leading to this appeal is as follows; the third respondent bought the land in dispute measuring 17.2 acres located at Chang'ombe, Mzenga within Kisarawe District from the 1st Respondent. He paid TZS 24,080,000/= as the purchase price.

At the trial, the appellants claimed that the disputed land belonged to them. Originally their late father owned that land; therefore, they acquired ownership after he passed away.

On the other hand, the respondents claimed that the suit land belonged to the family of Dendegu, and the same was lawfully sold to the third respondent by the first respondent and his family. Further, the sale agreement was valid and was blessed by the Village Council meeting.

In the end, the trial Tribunal adjudged in favour of the respondents and declared the third respondent as the lawful owner of the disputed land.

Aggrieved by that decision, the Appellants preferred this Appeal, raising the following four grounds: -

- 1. The trial Tribunal grossly erred in Law by composing and pronouncing a Judgment without gentlemen assessors are required by the provision of Act No. 2 of 2002;**

- 2. The trial Tribunal misdirected itself by failing to determine the first and vital issue in view of the tendered evidence before it showing who is the Lawful owner of the disputed land premises;**
- 3. The trial Tribunal misdirected itself on the validity of the sale agreement to undesirable purchaser the sale was conducted by the respondents without the presence and/or particular of the Appellants;**
- 4. The trial Tribunal failed to critically evaluate the evidence for and against the parties.**

At the hearing of the appeal, the appellants had the services of Ms. Aneth Christopher Makunja, learned counsel, while the respondents by, Mr. Sindilo Lyimo, also learned counsel.

Arguing in support of the appeal in respect of the first ground, Ms. Makunja contended that Section 23(2) of the Land Disputes Courts Act requires the Chairman of the Tribunal to sit with two assessors at the hearing. The law further needs assessors to give their opinion.

Elaborating further, Ms. Makunja submitted that in this matter, the Chairman sat with only one assessor at the trial before the Tribunal.

On the second ground of appeal, briefly, Ms. Makunja stated that the trial Tribunal did not decide on who was the lawful owner of the land in dispute. She referred to page 12 of the Tribunal (Typed) decision and invited this Court to revisit that decision.

Ms. Makunja consolidated the third and fourth grounds and argued them together. She submitted that the disputed land sale was unlawful because the appellants, who were the land owners, were not involved in the sale.

On his part, Mr. Lyimo strongly opposed the appeal and replied as follows.

In respect of the first ground, he submitted that it is true that the law requires the Chairman of the Tribunal to sit and be assisted by two assessors. But at the time of delivering the decision, only one assessor is required to present the opinion of both assessors. He said that was done by the trial tribunal.

On the second ground. Mr. Lyimo submitted that at the trial, the appellants had five witnesses. None tendered any document to prove the appellant's ownership over the land in dispute.

Furthermore, PW1 and PW2 at the trial contradicted themselves. While PW1 testified that they inherited the land from their parents in 1975, PW2 testified that in 1966 they were given the land in dispute by their late father.

Mr. Lyimo further submitted that Section 110 and 111 of the Tanzania Evidence Act, [Cap. 6 R. E. 2019] provides that he who alleges must prove. At the trial, the appellants failed to tender any documentary evidence to show that either they inherited or were given the land in dispute.

On the other hand, respondents tendered Sale Agreement (Exh. D2) minutes of the Village Council (Exh. D1) and an introduction letter of the third Respondent from the Ward execution officer to the land officer of Kisarawe District (Exh D3). He cemented his position by citing **Rogers s/o Andrew Lumenyela vs. Masaka c/o Mussa** Land Case No. 4 of 2020 (High Court Kigoma) unreported.

For the third and fourth grounds, Mr. Lyimo submitted that during the sale, there was no need to involve the appellants because they were not the owners of the disputed land.

In a brief rejoinder, Ms. Makunja stated that in the Judgment of the tribunal, it was indicated that the Chairman sat with only one assessor as opposed to what had been submitted by Mr. Lyimo in his reply.

On the second ground, she insisted that the appellants owned the land in dispute through inheritance from their parents.

She concluded by submitting briefly on the third ground that one Athuman Mwinyimkuu, who posed as the close relative of the Appellants at the village council meeting, was a distant relative and not a close relative.

Having heard the submission from advocates, I wish to begin to determine this appeal by disposing of the first ground of appeal.

The starting point is Section 23(1) and (2) of the Land Disputes Courts Act Cap. 216 R. E. 2019 (LDCA), which provides for the composition of the District Land and Housing Tribunal (DLHT):

"(1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be dully constituted when held by a Chairman and two assessors and two assessors who shall be required to give out their opinion before the Chairman reaches the Judgment."

From the provision of Section 23(1) and (2) of the LDCA, the composition of the Tribunal has been pegged to be mandatory for a chairman to sit with not less than two assessors.

The appellants' allegations in this matter were that the Chairman sat only with one assessor, and even the Judgment indicated so; that there was an opinion from only one assessor.

Canvassing through the proceeding of the Tribunal (Handwritten), I found there were two assessors when the hearing commenced on 9th October 2017 by names of Millinga and Mwesingo were present. That day PW1 and PW2 testified. On 4th December 2017, when PW3, PW4, and PW5 testified, the same assessors, Milinga and Mwesingo, were present.

When the defence case commenced on 22nd February 2018, the same assessors, Millinga and Mwesigo, were present, and that day DW1 and DW2 testified.

On 11/04/2018, when DW3 and D4 testified, there was only one assessor, one Mwesingo. The trial chairman recorded: -

"The service contract of Mama Milinga, wise assessor, has ended and is yet to renew; hence hearing shall proceed with single assessor under Section 23(3)".

The record further reveals that the tribunal proceeded with one assessor on 30th May 2018, 06/08/2018, and 05/10/2018, when DW5 testified. Also,

when DW2 and DW3 were recalled and the tribunal visited the *locus in quo*, only one assessor, Mwesingo, appeared on the record.

Furthermore, the record of the Tribunal indicated that the only same assessor Mwesingo gave out his written opinion, which was reflected in the Judgment.

The sequence of the above events made me visit Section 23(3) of the LDCA. The section provides that:-

"Notwithstanding the provision of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the chairman and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."

The Court of Appeal of Tanzania has already settled the position regarding the cases tried with the aid of assessors in numerous cases.

In **B. R. Shindika t/a Stella Secondary School vs. Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 (Tanzlii), the Court held that:-

".....cases tried with the aid of Assessors had to be conducted with the same set of assessors unless the circumstances stated under Rule 5F (2) above applied."

Elaborating further, again, the Court of Appeal in **Erica Christostom vs. Chriostorm Fabian & Another, Civil Appeal No. 137 of 2020 (Tanzalii)**, the Court stated that rule 5F referred in **B. R. Shindika** (Supra) was the Rule 5F of the High Court Registries (Amendment) Rules 2001 as amended GN. No. 364 of 2005, which reads:-

"Where in the course of trial one or more of assessors is absent the Court may proceed and conclude trial with the remaining assessor or assessors as the case may be of the LDCA."

Therefore, in the appeal at hand, the trial tribunal commenced the trial with the aid of two assessors, but later one assessor was unable to proceed. The Chairman recorded the reason and proceeded with the single remaining assessor.

The first ground, therefore, of appeal lacks merit because the trial was conducted properly with the aid of assessors.

On the second ground, Ms. Makunja referred to this Court on page 12 of the Judgment of the tribunal and argued that the tribunal did not decide who was the lawful owner of the land in dispute.

I revisited page 12 of the trial tribunal Judgment, and I found the tribunal held that;

"The testimony of DW1 – to DW5 has established that the suit land belonged to the family of Dendegu and the same was lawfully sold to the 3^d Respondent by the 1st Respondent and his family.

Therefore, as opposed to what Ms. Makunja submitted, the trial Tribunal decided that the land in dispute was owned by Dendegu family who later sold to the 3rd Respondent.

In that respect, the issue of ownership was decided and sorted out after the Tribunal evaluated the evidence record. Therefore, the argument by Ms. Makunja Advocate is unfounded, and this ground is also unmeritorious.

Regarding the 3rd and 4th grounds of appeal, the lamentation was that the appellants, as owners, were not involved in selling the disputed land.

On my part, as rightly submitted by Mr. Lyimo, there was no need to involve them because they were not the owners of the disputed land. The

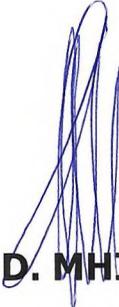
Tribunal, in its decision, held that the land belonged to the Dendegu family, who, through the 1st Respondent, sold the land to the 3rd Respondent.

Therefore, this ground also must fail.

In the upshot, for the reasons elaborated above, I hold that the appeal lack merits, and I dismiss it with costs.

It is so ordered.




K. D. MHINA
JUDGE
30/09/2022