

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

LAND APPEAL NO.155 OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala Land Application No.319 of 2015)

MOHAMED MAKARANI MOHAMED (Administrator

of the Estate of the late Makarani

Mohamed Abdallah) APPELLANT

VERSUS

UMRA IBRAHIM MAKARANI (Administrator of the

Estate of the late Ibrahim

Makarani Mohamed) 1ST RESPONDENT

EMMANUEL MASELE 2ND RESPONDENT

PASCHAL B. FIMBO 3RD RESPONDENT

JUDGMENT

Date of Last order: 21.10.2021

Date of Judgment: 25.10.2021

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal in Land Application No. 319 OF 2015. The material background facts to the dispute are not difficult to comprehend. They go

thus: the appellant and the respondent are disputing over a piece of land located. The appellant claimed that he is the administrator of the estate of his late Makarani Mohamed Abdallah who is the father of the appellant and the first respondent is his cousin. The first respondents claimed that they legally sold the disputed piece of land to the second and third respondents in a tune of Tshs. 11,400,000/=. The appellant claims that the sale was illegal and at the time when he sold the suit land, the first respondent was not appointed as an administrator of the estate. The first respondent claimed that the suit land was a family land and their late father divided some portion of the plot to his children thus the suit land is not part of those plots.

The appellant claimed that his late father did not give his later brother any piece of land. He said that he was not aware neither informed that the suit land was sold. The trial Chairman determined the matter and decided in favour of the respondent.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala and raise two grounds of grievance, namely:-

1. *That the trial Tribunal erred in law and fact by declaring the 1st respondent as lawful owner via the estate of the late Ibrahim Makarani without taking into consideration that the 1st respondent had no good title to pass to the 2nd and 3rd respondents.*
2. *That both Tribunals erred in law and fact by entering judgment in favour of the respondent without considering the evidence adduced by the appellant.*

When the matter came up for orders on 29th September, 2021, the Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to. In his submission, the appellant started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this application.

Submitting in support of the first ground of appeal, the appellant was brief and focused. He argued that the trial tribunal erred in law by declaring the 1st respondent as a lawful owner while he had no good title to pass to the second and third respondents. The appellant complained that the landed property was passed to his family thus the agreement could have involved both families instead of one individual. He went on to argue that the law is clear that disposition of joint properties cannot pass a good title

without the consent of the other party. To fortify his submission he cited the case of **Zakaria Barie Bura v Theresia Maria John Mubiru** (1995) TLR 211, The Court of Appeal of Tanzania held that:-

“ The sale agreement of the suit premises was of no legal effect because the vendor, as a joint owner, could not pass title of the house to the purchaser without the consent of the other joint owner.”

The appellant went on to submit that consent of other members of the family is the requisite procedure to be adhered to. They claimed that it is settled that land jointly owned cannot be subject to disposition without the prior consent of other joint owners. To bolster his submission he cited the case of **Nicolaus Komba v Kondrad Komba** (1998) TLR 172 HC, this court held that:-

“ Clan land cannot be sold to non-clan members without prior approval of other clan members. The respondent had no right to sell clan land to a non-clan member without clan members' consent.”

With respect to the second ground, the appellant claimed that the tribunal had miraculously failed to notice the evidence adduced before it that the said plot of land in dispute was a clan. He referred this court to the case of **Jibu Sakilu v Petro Miumbii** (1993) TLR 75 this court defined

clan land to mean land which has been inherited successfully without interruption from the great grandfather or a grandfather by members of the same clan. Insisting, the appellant lamented that the disputed land was inherited from the late Makarani Mohamed Abdallah who is the appellant's father and grandfather to the first respondent. He added that his later father gave the disputed land as an inheritance to his family and the same is supposed to be disposed of only by agreement of family members. Fortifying his submission he referred this court to the case of **Nicolaus Komba** (supra).

It was the appellant's further submission that during the hearing the appellant testified but his evidence was not considered by the tribunal. He valiantly argued that there was enough evidence on record regarding inherited jointly family land and showing that the disposition to the 2nd and third respondents was unlawful.

On the strength of the above submission, he beckoned upon this court to allow the appeal and declare the disputed land a lawful property of the late Makarani Mohamed Abdallah under the appellant who is the administrator of his estate.

Opposing the appeal, on the first ground, the 1st respondent argued that the appellant has hopelessly failed to grasp the fact that there were three triable issues before the trial tribunal and the tribunal did not leave any stone unturned. In his submission, he referred this court to Article 24 (1) (a) of the Constitution of the United Republic of Tanzania, 1977 which states that every person is entitled to own property and has a right to the protection of his property held in accordance with the law. He went on to submit that in light of the constitutional right the late Ibrahim Makarani Mohamed came into possession of the suit land vide exhibit P3/D1 without indicating that Makarani Mohamed Abdallah has bequeathed his land including the land under the dispute to his beneficiaries.

The respondent went on to state that the appellant has no any other evidence to prove the distribution of the land to the first respondent. He added that even other witnesses testified that their plots emanated from the estate of the late Makarani Mohamed Abdallah. He added that it is vivid that other beneficiaries had started to develop the land. He claimed that by virtue of exhibit P3/D1 Makarani Mohamed Abdallah had already bequeathed his estate to the other respondents thus the appellant cannot claim it back. To support his submission, he cited a case of **Salama**

Mohamed and another v Thadeo Mutasingwa Mutembe, HC Land Division No.50 of 2016 (unreported).

Concerning the second ground, the 1st respondent was brief and straight to the point he argued that the sale transaction of the suit land between the late Ibrahim Makarani Mohamed, the vendor, and Emmanuel Majele and Paschal Fimbo was legal. To support his submission he cited Articles 12 and 13 of the Constitution of the United Republic of Tanzania.

In her conclusion, the learned counsel for the respondent urged this court to dismiss the appeal with costs.

Before embarking on the merits of the appeal, I wish to address a point of law which I noted when composing the Judgment, therefore before delivering judgment I notified the parties on the point of law and explained to them in detail that the Chairman of District Land and Housing Tribunal for Kinondoni at Mwananyamala proceeded with the matter in nonattendance of assessors. The parties had nothing to add rather leave it to the court to decide.

Reading the District Land and Housing Tribunal for Kinondoni at Mwananyamala records it is crystal clear that the hearing of the applicant case commenced on 12th November, 2018 before Hon. Chenya however,

the records reveal that the Chairman proceeded with hearing the applicant case in the absence of members. It is plain, in the instant case, on 12th November, 2018, and following days, the trial Chairman proceeded with the trial in the absence of members or nonattendance of members. Likewise in the defence case which commenced on 12th February, 2020 the Chairman proceeded with hearing a defense case in the absence of members. In my considered view, the Chairman was required to list the names of the tribunal members. Otherwise, it is impossible to know if it was the members who participated in hearing the case and the ones who gave their opinions.

In a recent case of **B.R.Shindika t/a Stella Secondary School v Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No.128 of 2017, the Court of Appeal cited with approval the case of **Ameir Mbarak and Another v Edgar Kahwili**, Civil Appeal No.154 of 2015 (unreported), the court was confronted with a situation where the assessors were not present at different stages of the trial. Once. In the case of B. R. Shindika (supra) the Court of Appeal of Tanzania held that:-

“... trial commences with a certain set of assessors, no changes are allowed or even abandonment of those who were in the

conduct of the trial. In other words, cases tried with the aid of assessors had to be concluded with the same set of assessors..."

Guided by the above holding of the cases, I am in my view that the same applies in the case at hand that the quorum of members who participated in hearing the case from the commencement of the case had to be the same until the end of hearing the case.

Moreover, assessors' opinions cited by the Chairman in his judgment were not read in the presence of the parties before the judgment was composed, therefore, the same has no useful purpose. Under the circumstances, the judgment of the Tribunal is found to be improper. Inspired by the incisive decisions quoted above, applying the same in the instant appeal, it is evident that a fundamental irregularity was committed by the tribunal Chairman. Thus, there is no proper judgment before this Court for it to entertain in appeal. I shall not consider the remaining two grounds of appeal as the same shall be an academic exercise after the findings I have made herein.

Following the above findings and analysis, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional powers to this court and proceed to revise the proceedings of

the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.319 of 2015 in the following manner:-

- (i) The judgment, decree, and proceedings in Land Application No.319 of 2015 are hereby quashed and set aside.
- (ii) I remit the case file to the District Land and Housing Tribunal for Kinondoni at Mwananyamala, to start afresh before another Chairman.
- (iii) No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 25th October, 2021.




A.Z.MGEYEKWA

JUDGE

25.10.2021

Judgment delivered on 25th October, 2021 in the presence of the appellant and the respondent.




A.Z.MGEYEKWA

JUDGE

25.10.2021