

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

LAND APPEAL No. 4 OF 2022

(Appeal from the judgment and decree in Land Application No. 63 of 2018 before
District Land and Housing Tribunal for Babati at Babati)

MAGRETA BASSO..... APPELLANT

VERSUS

FERDINAND GILGO LULU.....RESPONDENT

RULING

Date: 2/5/2023 & 30/5/2023

BARTHY, J.

The appellant and the respondent herein are mother and son respectively. Their presence in this court was not for family reunion, but on the farm dispute over the land measuring about 38 acres situated at Darijojik Bassotu Village of Hanang' District (hereinafter referred as the suit land).

The appellant filed the suit against the respondent on a claim of land trespass on the suit land, vide Land Application No. 63 of 2018 before Babati District Land and Housing Tribunal (hereinafter referred as the trial tribunal)



for assortment of reliefs against the respondent, including a declaration that she is the lawful owner of the suit land.

Upon hearing the matter, the trial tribunal dismissed the application. The appellant was aggrieved with the decision hence she preferred the instant appeal with six grounds, which I will not reproduce them here.

During the hearing of this appeal Ms. Fauzia Mustapha learned advocate represented the appellant while Mr. Ndibalema Johnson represented the respondent. This court ordered the hearing of this appeal to be by way of written submissions in which the parties dully complied with the court's order.

However, in the course of composing the judgment I came across some pertinent issues which necessitated the opening up of the proceedings so that the parties can address the court on the following issues;

- i) The legality on the change of trial chairpersons*
- ii) The propriety of the tribunal to vacated its order to rehear the mater.*
- iii) The legality on the change of assessors.*
- iv) The legality of the decree not reflecting the judgment of the tribunal.*



In regard to the issues raised, when the parties were invited to address the court on the issues raised the appearance was, Ms. Fauzia Mustapha appearing for the appellant, on her submission she argued that, the decree is the proper expression of the judgment on the rights of the parties. She was further of the view that, the decree of the trial tribunal did not state who is the owner of the suit land.

On the propriety of the order of the trial tribunal vacating its order and proceed to rehear the matter, Ms. Fauzia contended that on page 24 of the typed proceedings it shows that after the successor chairperson had taken over the matter, he gave an order for retrial due to the change of assessors.

However, later on the chairperson vacated his previous order and proceeded to hear the matter as indicated on page 25 of the typed proceedings. She contended that the successor chairperson was not correct to vacate his previous order as he was functus officio. She therefore invited the court to nullify the proceedings and judgment of the trial tribunal.

Ms. Fauzia went further to argue that, the successor chairperson took over the matter but the parties were not afforded the right to comment on the same.



On the other side Mr. Joseph Mniko appeared for the respondent to address the court on the issues framed by the court. He contended that; the decree reflects the judgment of the trial tribunal. He added that the relief sought by the appellant was to be declared the lawful owner of the suit land.

However, the appellant did not prove her claims, he therefore stated the trial tribunal rightly dismissed the matter and ordered each party to bear its own costs. He was firm that, there was no obligation to mention who was the lawful owner of the suit land.

Regarding the issue of the trial tribunal to vacate its previous order and proceeded with the hearing without the aid of the assessors; Mr. Mniko submitted that, the record reveal that there were two assessors when the trial had commenced but their term had expired, as reflected on page 5 of the judgment.

In terms of Section 23(3) of the Land Disputes Courts Act [CAP 216 R.E 2019] (hereinafter referred to as the Act), after the expire of term of the presiding assessors, the chairperson would have proceeded with the hearing and even composing judgment without the assessors. Rather than giving an



order for retrial and vacate the said order as it was done by successor trial chairperson.

There was argument made by Mr. Mniko that, the order to proceed with the hearing of the matter which was made after the order to rehear the matter was made it did not finalize the matter. It was his argument that, the trial chairperson was not functus officio.

Mr. Mniko responding to the arguments that the parties were not afforded the right to address the trial tribunal on the change of chairperson, he was firm that, the successor chairperson gave reasons for taking over the matter. As there is no law that requires the parties to address the trial tribunal after the successor chairperson took over the matter.

Having heard the arguments of both sides on the issues raised, I will begin with the issue on the change of assessors. The records show that, the matter commenced before Hon. M. S. Malele Chairperson with two assessors namely Mrs. Rebecca and Mr. Hassan Orondi.

The trial chairperson proceeded to record the testimonies of PW1 to PW4. For some reasons he could not finalize the matter and the same was reassigned to Hon. F. Mdachi who proceeded with the matter to finality.



The record further reveals that, the successor chairperson took over the matter with new set of assessors namely M. Barie and J. Hyera. Then the trial chairperson with his assessors went ahead to hear the testimony of DW1. The record reveals that the trial chairperson went ahead to deliver the judgment without the opinion of the assessors.

Despite the fact that the successor chairperson stated reasons for taking over the matter, but he did not comply with the requirement of the law regarding change of assessors. As the trial chairperson did not proceed alone, but he had new set of assessors as reflected on the record when DW1 testified.

The provision of Section 23(1) and (2) of the Act requires tribunal to be properly composed with not less than two assessors. Section 23(3) of the Act further provides that, where one assessor is unable to proceed with the matter, the trial chairperson is required to proceed with the remaining assessor and where both assessors are unable to proceed with the matter, then the chairperson is required to proceed alone in determination of the matter.

In the instant matter the contract of the assessors was said to have expired, therefore the learned trial chairperson had to proceed with the



matter alone. However, the trial chairperson proceeded with hearing of the matter with new set of assessors. This position is fortified by the decision of the Court of Appeal in the case of **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017, Court of Appeal of Tanzania at Dar Es Salaam (unreported), where the court held the proceedings were nullity for introducing of new set of assessors.

Also, in the case of **Ameir Mbarak and Another v. Edgar Kahwili**, Civil Appeal No. 154 of 2015 (unreported), the Court of Appeal succinctly pointed out that;

"The consequences of unclear involvement of assessors in the trial renders such trial a nullity."

Since the learned trial chairperson never complied with the requirement of the law, then the proceedings of the trial tribunal are rendered nullity. This issue alone would have sufficiently disposed of the appeal before me.

However, looking on the judgment and decree of the trial tribunal, there is variation between the two. The provision of Order XX Rule 6(1) of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC), that;



6.-(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

On this issue, Mr. Mniko argued that the decree properly reflects the judgment of the trial tribunal. In order to address this issue, the records of the trial tribunal in determining the first issue framed had this to say on page 16 paragraph 2;

*Baada ya kuwa nimeuzingatia na nimeupima Ushahidi wa pande zote kama ulivyoonyeshwa hapo juu nimeshawishika kuona na itakuwa ni uamuzi wangu kwamba ushahidi wa upande wa utetezi una uzito zaidi kuzidi ule wa upande wa madai. **Ushahidi huo uliweza kuthibitisha madai ya utetezi ya mjibu maombi kuwa ardhi ya daawa ni mali yake** baada ya kuwa aliifungua yeye mwenyewe na aliihudumia kwa muda wote kuanzia mwaka 1985 hadi mgogoro ulipojitokeza.*



In dealing with the first issue, the trial tribunal had decided that the suit land belonged to the respondent. On page 18 last paragraph and page 19 on the first paragraph the trial tribunal further held that;

Hivyo, kwa mujibu wa kanuni iliyonukuliwa hapo juu na ukilinganisha baina ya wadaawa katika shauri hili utabaini kwamba mjibu maombi ambae Ushahidi unaonyesha aliongeza thamani kwenye ardhi ya daawa ndie alikuwa na haki ya kudai umiliki wa ardhi hiyo. Mleta maombi hakuwa na haki hiyo kwa kuwa hakuna thamani yoyote aliongeza kwenye ardhi husika.

*Kwa sababu zote nilizojaribu kuonyesha hapo juu, kiini hiki kitajibiwa kwa kusema kwamba ni **mjibu maombi ndio mmiliki wa halali wa ardhi ya daawa.***

Then it was further held that;

Kwa jinsi kiini kilichotangulia kilivyojibiwa ni wazi kwamba madai ya mleta maombi yatashindwa kwa sababu hiyo nafuu pekee inayoweza kutolewa kwenye kiini hiki cha mwisho ni kutupilia mbali maombi.

According to the records available it is clear that the first issue was resolved in respondent's favour as he was declared the lawful owner of the suit land. However, the decree does not reflect this relief.



In the event where the memorandum of appeal has been accompanied with defective decree the only remedy is to strike it out. This was pointed in numerous decisions such as **Kapinga and Co. Advocates v. National Bank of Commerce Limited**, Civil Appeal No. 42 of 2007, **Robert Edward Hawkins and Another v. Patrice P. Mwaigomole**, Civil Appeal No. 48 of 2006 and **Tanzania Motors Services Limited v. Tantrack Agencies**, Civil Appeal No. 61 of 2007 (all unreported).

Having pointed out the glaring irregularities and omissions above, which I find them to be fatal, this court will not address the remaining issues as these two disposes off the matter. The only remedy therefore is to nullify the judgment, decree and all the proceedings of the trial tribunal and order a retrial before another chairperson with a new set of assessors.

I further order that new hearing be expedited as soon as possible owing to the fact that the matter has been pending in court since 2018. As the omissions leading to the nullification of the judgment, decree and proceedings were pointed out by the court *suo motu*, I make no order as to costs.



It is so ordered.

Dated at Babati this 30th May 2023




G. N. BARTHY,
JUDGE

Delivered in the presence of the appellant and the respondent in person and the absence of their advocates.