

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 228 OF 2021

(Appeal from the decision of District Land and Housing Tribunal for Kinondoni in Land Application No. 332 of 2015 delivered by Hon.R. Mbilinyi, Chairperson on 8th September, 2021)

KARIM HEMED APPELLANT

VERSUS

ESSAU S. SWILLA RESPONDENT

JUDGMENT

Date of last Order: 20.10.2022

Date of Judgment: 17.11.2022

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is a parcel of land located at Kimara B Mavurunza Area within the Municipal council of Kinondoni. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal in

Application No. 332 of 2015. The material background facts to the dispute are not difficult to comprehend. They go thus: Essau S .Swilla, the respondent herein claimed that he is the lawful owner of the land in dispute. That he purchased the same on 29th October, 1994 and he claimed that the respondent had no legal title of the suit land. On the contrary, the respondent disputed the allegations. The respondent prayed to be declared a lawful owner of the suit land. The District Land and Housing Tribunal for Kinondoni determined the matter and found that the respondent was the lawful owner of the suit land.

Believing the decision of the District Land and Housing Tribunal for Kinondoni was not correct, the appellant lodged an amended petition of appeal containing five grounds of appeal as follows: -

1. *That Honourable tribunal erred in fact and law for failure to evaluate the evidence adduced by parties to the suit and as a result, declared the respondent as the lawful owner of the suit and as a result declared the respondent as the lawful owner of the suit plot which the appellant is owning the same legally.*
2. *That Honorable Tribunal erred in fact and in law by failing to observe that the respondent's claim of land was located at Kimara Mavurunza / Matangini a place much far from Kimara B Temboni.*

3. *The Honorable Tribunal erred on evidence and law in relying on hearsay evidence in arriving at its decision.*
4. *The Honorable Tribunal erred in law and procedure for failure to observe the rules applicable to the involvement of the assessors in the proceedings and decision delivery.*
5. *The Honorable tribunal erred in law and fact for failure to observe and make an order joining all necessary parties in the proceedings including the original owners of the land.*

When the matter was called for a hearing before this court on 20th October, 2022, the appellant was represented by Mr. Masatu who hold brief of Mr. Brash whereas the respondent was represented by Mr. Masatu Learned Advocate.

Hearing of the appeal took the form of written submissions, preferably consistent with the schedule drawn by the Court whereas, the appellant filed his submission in chief on 28th October, 2022 and the respondent filed his reply on 07th November, 2022, and rejoinder was filed.

The appellant in his written submission started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal. The appellant opted to combine his reasons, into two

groups, one being on the pure point of law grounds No.4 and 5 and the others on the point of law and facts that is grounds No. 1, 2 and 3.

The learned counsel for the appellant submitted that, if grounds No. 4 and 5 are allowed, the effect therefrom will take away the need to determine the rest of the grounds and that the court is likely to order retrial. On the 4th ground, Mr. Rutabingwa contended that at the beginning at the commencement of hearing the case a pair of assessors were Prof. Kulaba and Mrs. Mbakileki, but that such pair did not fully participate in hearing the parties on the proceedings.

He went on to submit that on 14th September, 2017 when the matter was scheduled for hearing, only Prof. Kulaba was present. To buttress his submission he referred this Court to page 15 of the typed proceedings and that on 19th March, 2019 when the matter was called for hearing, only Mrs. Mbakileki was present as per page 34 of the typed Proceedings, in the absence of the other assessor, he stated that the same was contrary to Section 23 (3) of the Land Disputes Court Act, Cap.216 [R.E 2019] and Regulation 19 (1) of the Land Disputes (The District Land and Housing Tribunal) Regulations, 2002.

The learned counsel for the appellant did not end there he contended that opinion was never read to the parties in their presence as required by the

regulation. Fortifying his submission he cited the cases of **Betty Kampota vs Thureiya Mohamed**, Land Appeal No. 231 of 2019 adopting the finding in the case of **Awiniel Mtui and Others v Stanley Ephata Kimambo and another**, Civil Appeal No.97 of 2015 and **Samson Njarai and Another v Jacob Mesoviro**, Civil Appeal No. 98 of 2015 which held that: -

'Moreover, the consequences of allowing the assessors to avail opinion while he has not heard all the evidence were articulated in JOSEPH KABUL VS REGINA [1954-55 [ACAA] Vol. XXI -2] the court said

'Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity.'

On the 5th grounds, the appellant's counsel contended that the vendor of the disputed land was not called as a witness or joined in the suit to establish ownership.

On ground No. 1 and 2, the counsel for the appellant stated that the ownership of the disputed land to the respondent was not well established because the respondent did not show how he became the owner of the suit property. He went on to argue that, the sale agreement tendered by the respondent revealed that his land was located to a different place from

the disputed land in Kimara Temboni.

The learned counsel for the appellant opted to abandon the 3rd ground of appeal.

On the other hand, despite the fact that the respondent responded to the other grounds of appeal, still the respondent admitted the trial tribunal Chairperson misdirected himself and there are procedural irregularities in proceedings during the hearing of Application No. 332 of 2015. For ease of reference I reproduce the submission of the counsel for the respondent on page 3 of the reply submission he stated that:-

'We have noted that, it is true that on 14.09.2017 only one assessor, prof. Kulaba was present and the hearing continued.'

*However, when the matter came for a continuation of hearing on 19.03.2019 the same continued in the absence of Prof. Kulaba but in the presence of Honourable Assessor Mbakileki who was not present on 14.09.2017. This was a fatal irregularity as was stated in the case of **Republic vs Assa Singh** [1937] EACA 41, where the court of Appeal of East Africa was confronted by an akin scenario and it stated as hereunder:*

'The question then is whether, if in a trial held by a judge with the aid

of two assessors, one of the assessors is absent for a considerable portion of the time during which the most important part of the trial, viz, the examination of witnesses, is proceeding the court ceases to a court of competent jurisdiction. It seems to me that there can be no doubt that that in such circumstances, the trial is rendered null and void...'

He went on to state that:

*'It follows, therefore, that the proceedings from 19.03.2019 when assessor Mbakileki who had not heard the previous testimonies of the hearing held on 14.09.2017 participated made the proceedings from that date to the Judgment a nullity. Consequently, the judgment and decree obtained therefrom have to be set aside. Thus, we submit that instead of the court nullifying the entire proceedings and ordering retrial, should nullify proceedings from the date of the infraction namely 19.03.2019 as was done by the High Court in the case of **Projestus Rweyemamu Petro v Helios Tower Tz Ltd & 2 Others**, Land Appeal No. 72 of 2020"*

Having gone through the submission of the parties, and being guided by the provision under section 23 (3) of the Land Disputes Court Act, Cap 216 [R.E. 2019] which provide that:-

'The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.

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

(3) Notwithstanding the provisions 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.'

It appears that on 14th September, 2017, only one assessor was present and the other was absent without reason. On the same date, the court proceedings reveals that five witnesses were heard, that is, PW3, PW4, PW5, PW6, and PW7, however, again on 19th March, 2019 only one assessor was present who was not present on 14th September, 2017 and the tribunal proceeded with hearing DW1 testimony in the absence of one assessor Prof. Kulaba, the one who was present on 14th September, 2017. Yet, on 19.05.2021 both assessors gave their opinion on the same paper. In the case of **Bartazar S. Matony & Others v Mariam Juma Mtemvu &**

3 Others Land Appeal No. 137 of 2019 on page 5 where my learned sister Maghimbi, J. held that: -

'The proper procedure was for every assessor to give his own opinion and sign in a separate document since the word "shall" is used, the provision makes it mandatory for every assessor to give out his opinion in writing. The law doesn't allow joint opinion as far as assessors' opinion in writing.'

See also the case of **Batromeo P.Chiza v Essau William Ndize & 3 others**, Misc. Appeal No. 216 of 2017.

Equally, in the case of **B.R. Shindika t/a Stella Secondary School v Kihonda Ptsa Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 the court when dealing with a similar issue like in the instant case held that:-

'...we hasten to hold that the irregularities discussed in this case are fatal and render the proceedings and judgment of the trial court a nullity'

The Court further held that,

'In the event, we accept the invitation extended to us by the learned counsel of the parties and hereby invoke our power of revision bestowed upon us under section 4(2) of the Appellate Jurisdiction Act, Cap 141 of the Revised edition 2019 and nullify and quash the

proceedings from where Rumanyika J. ended onwards and Judgment of the High Court and set aside the orders thereof...'

For the foregoing reason, I find that the assessor's involvement during the hearing of Application No. 332 of 2015 was not correct, as it has been admitted by counsel for the respondent.

The above finding sufficiently disposes of the Appeal. Consideration of other complaints raised will not affect the above finding. I, therefore, refrain from delving into other grounds of appeal.

Following the above findings and analysis, I invoke the provision of section **43 (1), (b) of the Land Dispute Courts Act**, Cap. 216 [R.E 2019] which vests revisional powers to this court and proceed to revise the proceedings of the District Land and Housing Tribunal for Kinondoni in Land Application No.332 of 2015 in the following manner:-

- (i) The Judgment, Decree, and Proceedings of the District Land and Housing Tribunal in Land Application No. 332 of 2015, from 14th September, 2017 are quashed.
- (ii) I remit the case file to the District Land and Housing Tribunal for Kinondoni for retrial before another Chairman in accordance with

the law. I direct, the case scheduling be given priority, hearing to end within nine months from the date of Judgment.

(iii) No order as to costs.

(iv) Appeal is allowed.

Order accordingly.

Dated at Dar es Salaam this date 17th November, 2022.




A.Z.MGEYEKWA

JUDGE

17.11.2022

Judgment delivered on 17th November, 2022 via video conferencing

whereas the appellant was remotely present.




A.Z.MGEYEKWA

JUDGE

17.11.2022