

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO.204 OF 2020

*(Arising from Land Application No.249 of 2011 of Ilala District Land and
Housing Tribunal)*

YUSUF MAGOGO APPELLANT

VERSUS

1. MARY MKANABO

2. SAID JAMES

}

..... RESPONDENTS

JUDGMENT

Date of last Order: 12.07.2022

Date of Judgment: 20.07.2022

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal for Ilala in Land Application No. 249 of 2011. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and respondent are disputing over a piece of land located at Viwege, Kivule at Majohe. The respondent filed a suit against the appellant and Said James claiming that she is the lawful owner

of the suit land. The matter proceeded *ex parte* against the Said James. The appellant filed a counter claim, claiming that the respondent is aware that he has no land appellant prayed for a permanent injunction to restrain the respondent to claim ownership of the appellant's plot and a declaration order that the contract is void. The appellant demanded general damages to a tune of Tshs. 10,000,000/= . The tribunal determined the application and the respondent was declared the lawful owner of the suit land.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Ilala and raised seven grounds of grievance, namely:-

1. *That the trial tribunal erred in law and fact for not assigning reasons for the succession of the case from one chairman who partly heard the case to another chairman who concluded it nor was the parties allowed to exercise their right whether to proceed with a partly heard case or not.*
2. *That the trial tribunal erred in law and fact by holding that the 1st respondent obtained the disputed land by exchanging it with another piece of land contrary to PW1, PW2 oral testimonies, and Exhibit P1.*
3. *That the trial tribunal erred in law and fact by holding wrongly that the 1st respondent and PW2 proved that Petro Mahoga was allocated land*

by the Mtaa leadership of Viwege without summoning him to corroborate that assertion nor was there any documentary evidence to support the said finding.

- 4. That the trial tribunal erred in law and fact by holding that the disputed area belonged to Petro Mahoga and not the 2nd respondent on the grounds which are not supported by the evidence on record.*
- 5. That the trial tribunal erred in law and fact by not deciding on the appellant's counterclaim.*
- 6. That the trial tribunal is a nullity as the 2nd respondent was not summoned to attend the judgment date.*
- 7. That the trial tribunal decision is irregular and a nullity as the assessor's opinions were not given and or recorded before the Chairman reached the judgment contrary to law.*

When the matter came up for orders on 13th June, 2022 the appellant appeared in person, and Mr. Juda, learned counsel represented the 1st respondent. On the parties' concurrence, the hearing of the matter was through written submissions the filing of which followed the schedule drawn by the Court.

In his written submission, the appellant's Advocate opted to combine the third and fourth grounds and argued the first, second, fifth, sixth, and

seventh grounds separately. Likewise, the respondent's counsel opted to follow the submission style of the appellant's Advocate.

Submitting in support of the first ground, Mr. Mgare submitted in length. He contended that the trial tribunal did not indicate the issue of succession of the case from Honourable Mlyambina, Chairman who tried the matter before the same was transferred to Ms. Bigambo, Chairman who finalized the matter. He claimed that the successor Chairman took over the partly heard case without assigning any reason. To buttress his submission he cited section 51 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019 and Order XVII Rule 10 (1) of the Civil Procedure Code Cap.33 [R.E 20019].

The learned counsel for the appellant continued to submit that the need of assigning reasons is based on the cited above provisions of the law that once the trial starts before one Chairman then he is required to bring to its completion unless for some reasons she/he is unable to do so, the credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. He went on to submit that the integrity of judicial proceedings hinges on transparency of justice hence it enhances the integrity of judicial proceedings. Fortifying his

position he cited the case of **Priscus Kimaro v R**, Criminal Appeal No.301 of 2013 (unreported).

The learned counsel for the appellant continued to argue that parties are required to have been asked whether they had any objection or not to proceed with the partly hears case by the predecessor Chairman or to start afresh, these right was not accorded to parties. It was his view that the omission went to the root of the case and vitiated the trial tribunal decision. Supporting his stance he cited the case of **Arbogast Fundi v Masudi Zaidi** (1980) TLR 126.

As to the second ground, Mr. Marwa contended that the trial tribunal erred by holding that the 1st respondent obtained the disputed land by exchanging it with another piece of land. In his view, the said holding was contrary to the oral testimony of the 1st respondent (PW1) and exhibit P1 which clearly shows that Petro Mahoga who was not summoned by the 1st respondent as a witness handed over a piece of land to the 1st respondent. He added that the 1st respondent during cross-examination changed his testimony that she bought the piece of land from Wambura Iganacha. It was his submission that the 1st respondent's testimony was full of contradiction. He added that since there were inconsistencies and contradictions in the 1st respondent's evidence, then the trial tribunal was

not justified to hold that the dispute's piece of land was given to the 1st respondent in exchange for the forcefully taken piece of land. He went on to submit that Petro Mahoga was a material witness. It was his view that the failure to call Petro Mahoga, the trial tribunal ought to draw an adverse inference that if he was called to testify he would have given evidence contrary to the 1st respondent's interest.

Arguing for the third and fourth grounds, the learned counsel for the appellant argued that the trial tribunal hold that the 1st respondent and PW2 proved that Petro Mahoga was allocated land by the Street Government leader of Viwege. He claimed that Petro Mahoga was not called to testify and to prove the assertion that Viwege street leadership lawfully allocated him the suit landed property nor was there any documentary evidence to corroborate the 1st respondent and PW2 evidence that the disputed land was allocated to Petro Mahoga. He added that there was no evidence to prove that the Viwege street leadership had land and power to allocate land to its residents. He claimed that the trial tribunal was not justified in its holding he invited this court to fault the trial tribunal's findings.

As to the fifth ground, the learned counsel for the appellant was brief. He simply submitted that examining the trial tribunal judgment there is

nowhere shown that the appellant's counterclaim was considered and decided upon and dismissed. He added that it is the principle of law that if a court of law decides to accept or reject a party's claim it must demonstrate, consider the same, and set out the reasons for rejecting the claim. He went on to submit that otherwise, the decision becomes an arbitrary one and therefore a nullity. To fortify his position he referred this court to the case of **Tanzania Breweries Ltd v Antony Nyingi** (2016) TLR 100.

Submitting on the sixth ground, he contended that the trial tribunal decision is a nullity because the 2nd respondent in this appeal was not summoned to appear in court when the decision was set for judgment to attend the tribunal on the judgment. To support his position he cited the case of **Cosmas Construction Co. v Arrow Garments Ltd** (1992) TLR 127, CAT. It was his submission that the 2nd respondent was not summoned to appear before the tribunal for judgment, the same is a serious irregularity which goes to the root of the case to the extent of rendering the trial tribunal decision a nullity.

As to the seventh ground, Mr. Yuda contended that the trial tribunal decision faces a serious irregularity of lacking the assessors' opinion and the omission renders the whole decision a nullity. He submitted that it is

now settled law that in land cases heard at the District Land and Housing Tribunal with the aid of assessors and they must give their opinions in writing before the Chairman composes a judgment. To support his position he cited section 24 of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and Regulation 19 (2) of the Land Disputes Courts (the District Land Housing Tribunal) Regulations, 2003.

He went on to claim that the Chairman acknowledged the assessors' opinion in his judgment but it was not safe to assume the opinion of the trial assessors which are not in the tribunal records. To fortify his submission he cited the case of **Edina Adam Kibona v Absolom Swebe (sheli)**, Civil Appeal No. 286 of 2017 CAT (unreported), and **Ameir Mbarak and Azania Bank Corporation Ltd v Edgar Kahwili** (2016) TLR 54. He continued to submit that the assessors' opinions in the presence of the parties is to enable them to know the nature of the opinions and whether or not such opinions have been considered by the Chairman in the judgment. To buttress his position he cited the cases of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No. 287 of 2017, and **Regina Reinford Kaonja v Alvina Lipinga & Another**, Land Appeal No. 105 of 2020 (unreported).

On the strength, Mr. Yuda beckoned upon this court to allow the appeal with costs, the respondent be ordered to pay the costs of the trial and appellate tribunals and quash the decisions of tribunal.

In his rebuttal submission, Mr. Mgare's confutation was strenuous. The respondents came out forcefully and defended the District Land Housing Tribunal's decision as sound and reasoned. On the first ground, he contended that the judgment of the trial tribunal does not indicate the issue of succession of the case from Hon. Mlaymbina, Chairman (as he then was) tried the matter before it was transferred to Hon. Bugambo, Chairman finalized the matter. He added that the reason to transfer the matter is stated in the trial tribunal proceedings. He invited this court to reject this ground of appeal.

On the second ground, Mr. Mgare argued that the testimony of PW1 and PW2 is clear on how the 1st respondent acquired the plot in dispute, and the Street Government leader (PW2), testified to the effect that he is aware of the former land dispute between the 1st respondent and Petro Mabongo. He added that the dispute was successfully determined and Petro handed over an alternative plot to the 1st respondent as compensation. He added that Petro testified to know Said James as a caretaker of the suit land of the 1st respondent.

The learned counsel went on to submit that it is the principle of the law that the standard of proof in a civil case is on the balance of probability. He insisted that the trial tribunal correctly analysed the evidence on record and concluded that 1st respondent's evidence was heavier hence the trial tribunal rejected the appellant's evidence.

With respect to the 3rd and 4th grounds, Mr. Mgare contended that the tribunal records clearly show that PW2 was a Street Government leader of Kivule area thus he was aware of what transpired in his area, he added that PW2 evidence is strong compared to the testimony of Peter Mabongo which needed to be corroborated.

Submitting on the 5th ground, Mr. Mgare was brief and straight to the point. He contended that the framed issues were intended to answer both application and counter claim since there was no any separate issue for arguing counter claim. In his view, the tribunal correctly demonstrated and stated the reasons for its decision and rejected the counter claim.

Arguing for the 6th ground, the learned contended that the records of the tribunal indicated that the tribunal attempted to serve the 2nd respondent by normal service using the court process server but he was nowhere to found thus the process server had to swear an affidavit. He added that hence the tribunal ordered service be effected through publications of

service through Mwananchi newspaper dated 27th November, 2012. He went on to argue that the matter proceeded *ex parte* against the 2nd respondent. Thus, in his opinion, the trial tribunal's efforts taken were justified.

Concerning the 7th ground, the learned counsel for the 1st respondent argued that there was no any irregularity since the Chairman considered the assessors' opinion when he was composing his judgment. He added that the judgment of the tribunal complied with the provision of the law. He claimed that the appellant's counsel submission is based on assumptions, and he invited this court to disregard this ground of appeal.

On the strength of the above, the learned counsel for the 1st respondent beckoned upon this court to dismiss the appeal with costs.

I have revisited the evidence and submissions of both sides now, I am in a position to determine the appeal. I will consolidate the first and third grounds because they are intertwined. The second and fourth grounds will be determined separately. In order, they appear.

Addressing the first and third grounds, having cautiously considered the submissions of learned counsel for the parties and the record before me, the issue for determination is whether the omission of succession of

Judges did vitiate the trial and the resulting judgment. The irregularity complained of hinges on the dictates of Order XVIII Rule 10 (1) of the Civil Procedure Code. He added that section 51 of the Land Disputes Courts Act, Cap. 216 allows the application of the Civil Procedure Code where there is no specific provision in the Land Disputes Courts Act, Cap. 216. Order XVIII Rule 10 (1) of the Civil Procedure Code, Cap.33 provides that:-

*"10 (1) Where a judge or magistrate is prevented by death; transfer or other cause from concluding the trial of a suit, **his successor may** deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*

The essence of the cited order is to ensure that the trial commenced by the trial Judge, Magistrate or Chairman is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for the continuation of the trial of a partly heard case. The rationale behind this is that the one who sees and hears the witness is better placed to assess the credibility of

such witness which is crucial in the determination of the case before the court and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be compromised. See the cases of **Ms. Georges Centre Limited v Attorney General & Another**, Civil Appeal No. 29 of 2016 and **Leticia Mwombeki v Faraja Safarali & 2 others**, Civil Appeal No. 133 of 2019 (unreported).

The records reveal that on 24th June, 2014 Hon. Mlyambina, Chairman (as he then was) started to determine and record the evidence of the first witness (PW1) until 5th March, 2015. Then on 30th June, 2015 Hon. Mgulambwa, Chairperson recorded that the matter is called for hearing, the presiding Chairman has been transferred to the District Land and Housing Tribunal for Ilala for Kinonodni and fixed a hearing date. Then on 9th September, Hon. Bugambo, the successor Chairman took over. However, the records are silent if the case file was assigned to the successor Judge, and such circumstances put to test the integrity and transparency of the proceedings in question. See the case of **Leticia Mwombeki** (supra).

In the case at hand, the successor Chairman was required to assign reasons before presiding over the applicant and respondent case. In the

case of **Ms. Georges Centre Limited** (supra), the Court of Appeal of Tanzania held that:-

*"In the absence of any recorded explanation as to why the **successor** magistrate took over the matter from the predecessor magistrate, the former had no jurisdiction to subsequently preside over the trial at that stage." [Emphasis added].*

Additionally, the issue of noncompliance with the law in hearing the case is clearly featured when the successor Chairman continued with the hearing the evidence of the remaining applicants and respondents, and proceeded to compose a judgment without asking the parties whether or not they are ready to proceed with hearing the case or start afresh. In my opinion, the irregularity complained of hinges on the dictates of Order XVIII Rule 10 (1) of the Civil Procedure Code Cap.33. Failure by the successor Chairman to ask the parties offended the mandatory requirements of the law. The incisive reasoning in the cited decision was not observed by the tribunal Chairman in his judgment. Therefore this ground has merit.

On the way forward, I invoke the power vested on this court under section 43 (1), (b) of the Land Disputes Courts Act, Cap.216 [R.E 2019].

I, therefore, nullify the proceedings before the successor Chairman from 9th September, 2015 to 25th September, 2017, the respective judgment, and the subsequent orders. The case file is returned to the District Land and Housing Tribunal for Ilala for a continuation of the trial in accordance o the law. The first ground is merited and since the first ground sufficiently disposes of the appeal, I shall not determine the remaining grounds of appeal. Thus, I allow the appeal to the extent stated above with no order as to costs bearing in mind the circumstances surrounding the trial subject of the appeal.

Order accordingly.

Dated at Dar es Salaam this date 20th July, 2022.

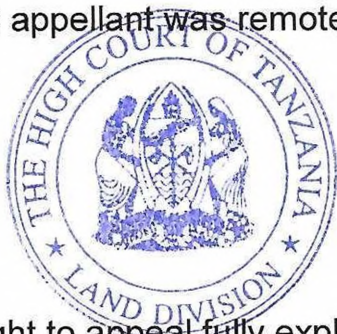



A.Z.MGEYEKWA

JUDGE

20.07.2022

Judgment delivered on 20th July, 2022 via audio teleconference whereas the appellant was remotely present.




A.Z.MGEYEKWA

JUDGE

20.07.2022

Right to appeal fully explained.