

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**LAND APPEAL CASE No. 67 OF 2021**

*(Arising from the District Land and Housing Tribunal for Mara at Musoma  
in Land Application No. 137 of 2020)*

**NAOMI MASINZA ..... APPELLANT**

*Versus*

**LUCAS MUGENDI ..... RESPONDENT**

[As administrator of the Estates  
of the late Emmanuel Mugwe]

**JUDGMENT**

02.06.2022 & 02.06.2022

**Mtulya, J.:**

The **District Land and Housing Tribunal for Mara at Musoma** (the tribunal) in **Land Application No. 137 of 2020** (the application) determined a land dispute between Mr. Emmanuel Mugwe (the deceased) and Naomi Masinza (appellant). After a full hearing of the application, the tribunal decided in favour of the deceased. The reasoning of the tribunal as reflected at page 3 of the judgment shows that: *Eneo hili mdai alishawahi kushinda kesi dhidi ya ndugu yake mdaiwa aitwaye Maswe Bosco Masinza.*

This decision was protested in an appeal in this court by learned counsel Mr. Emmanuel Gervas, acting under the instructions

of the appellant. Mr. Gervas had registered a total of (5) grounds of appeal to contest the judgment of the tribunal in the application. However, this court upon perusal of the record found that the tribunal in resolving the application heavily relied on a previous dispute which is not reflected on the proceedings of application, but attached in the Land Application Form (the application form), which initiated the proceedings.

Following the fault, this court *suo moto* summoned the parties on 2<sup>nd</sup> June 2022 to register materials on the raised point and cherish the right to be heard as directed by the Court of Appeal in the precedent of **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018. However, at this time, the deceased had already expired and the letter of administration was in the hands of the present respondent.

During the production of materials on the raised issue, Mr. Gervas submitted briefly that the deceased had attached documents in his pleadings, specifically the application form, but did not tender the same during the hearing of the application hence the documents did not form part of either proceedings or exhibits. In his opinion, the documents cannot be relied by the tribunal in its reasoning to resolve the matter as even the appellant is not aware of them. In support of his argument, Mr. Gervas cited the law in section 110 (1)

& (2) and section 111 of the **Evidence Act** [Cap 6 R. E 2019] (the Evidence Act) and Order XIII Rule 1(1) & (2) of the **Civil Procedure Code** [Cap 33 R. E 2019] (the Code) contending that the tribunal committed errors material to the decision and prayed this court to invite section 43 (1) of the **Land Disputes Courts Act** [Cap 216 R.E. 2019] (the Act) to revise the proceedings and order necessary steps to be adopted in such circumstances.

The submission of Mr. Gervas was protested by Mr. Lucas Mugendi, who appeared as an administrator of the deceased's estates arguing that the deceased had admitted all necessary documents in the tribunal, but the tribunal misplaced them and this court, if may so wish, admit the documents at this stage to substantiate the allegations of the deceased. In a brief rejoinder, Mr. Gervas contended that the issue is absence of a display of an admission of the documents during the proceedings which was not done and as such no evidence on the record for the tribunal to rely in resolving the application.

I have perused the record of this appeal and found that on 14<sup>th</sup> September 2020, the deceased had filed the application at the tribunal. In his pleadings as depicted at the application form, three (3) documents were attached, namely: Minutes of Busegwe Ujamaa Village of 21<sup>st</sup> November 1990 referenced No. MK/BSG/M.1/64;

proceedings of Buhuzi Hamlet Council of 27<sup>th</sup> October 2008; and Zanaki Primary Court decision in Civil Case No. 3 of 2000 between Bosco Masinza at Emmanuel Mungwe delivered on 9<sup>th</sup> August 2001. However, the same documents were neither prayed for admission nor tendered during the hearing of the application.

Today, Mr. Gervas says that the tribunal relied on untendered documents to decide a land dispute, which is against the law on tendering and admission of documents for exhibits in courts of law or tribunals. He finally, prayed this court to issue necessary orders for want of proper record of this court. Mr. Lucas Mgendi on the other side protested the submissions contending that the misplacement of the documents should be shouldered to the tribunal.

I perused the record of this appeal and visited the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations**, 2003 GN. No. 174 of 2003 (the Regulations), which regulates matters brought before the tribunal for determination. Regulations 10 and 11 of the Regulations are regulating procedures of admitting documents in the tribunal, but are silent on admission of pleaded or attached documents during proceedings in the tribunal. However, Regulation 10 (3) (a) and (b) require the tribunal to make sure that the documents are served to the other party and

regard the authenticity of the same. In the present appeal, the record is silent as to whether the tribunal performed this duty. Similarly, I scanned the Act, but the Act is silent on admission of documents during proceedings in the tribunal. However, section 45 regards substantial justice in cases where there errors or improper admission or rejection of the documents.

In the present appeal there are documents which were attached in the application form, but the record is silent as to whether the appellant was served the documents. Similarly, the proceedings are silent on either admission or contests of the documents between the parties or inquiry by the tribunal on authenticity of the same. I am aware that the tribunal is not bound by the Code or Evidence Act in receiving documents for exhibits as per Regulation 10 (1) of the Regulations, but the same is silent on admission of documents attached in the application form during proceedings and consideration during drafting of the judgment.

I understand that section 5(2) of the Act allows invitation and application of the Code when there are *lacuna* in the Act and Regulations. The law regulating pleadings as enacted under Order VII Rule 18 (1) and Order XIII Rule 4 & 7 of the Code require all pleaded documents to be tendered for consideration of admission. In the present appeal, the pleaded documents were not tendered

during the proceedings. It is not known whether it was caused by the respondent's negligence or abandoned them for authenticity (see: **Japan International Cooperation (JICA) v. Khaki Complex Ltd**, Civil Appeal No. 107 of 2004 and **Zanzibar Telecommunication Ltd v. Ali Hamad Ali & Another**, Civil Appeal No. 295 of 2019).

The Court of Appeal in the precedent of **Japan International Cooperation (JICA) v. Khaki Complex Ltd** (supra), after visitation of other jurisdiction in common law legal tradition, arrived at the following statement as displayed at page 14 of the decision:

*This Court cannot relax the application of Order XIII Rule 7 (1) that a document which is not admitted in evidence cannot be treated as forming part of the record although it is found amongst the papers on record. The document must be either placed on the record or returned to the person producing it... with deep conviction submitted that even though the documents are not considered by the Court, yet there is sufficient oral evidence to entitle this Court to affirm the decision. With the greatest respect to the learned advocate, the documents are essential to the case and without them the trial judge could not have arrived at the decision he did. The inevitable conclusion is that the evidence properly before the trial court did not justify the learned*

*judge's affirmative answers to the first and second issues before him. We have seriously considered what course of action we should take under-the circumstances. This is not a case of improper admission or rejection of evidence. The documents in question somehow were not admitted in evidence. This was a substantial error during the trial which amounted to a miscarriage of justice.*

Having said so, it is obvious that the judgment before the tribunal invited materials and heavily relied to arrive at its decision without abiding with the laws and practice of the tribunals and courts of law in tendering evidence during proceedings. In presence of the Court of Appeal precedents, this court cannot invent a new course. I have therefore decided to invoke section 42 and 43(1) (a) & (2) of the Act to quash the judgment which was solely based on exhibits which were not tendered during the proceedings.

As the documents were presented but not admitted, and for interest of justice, and noting the parties, may still prefer fresh and proper application, I further set aside proceedings of the tribunal in the application. I have decided so without order to costs as the fault was caused by the parties but blessed by the tribunal. Any interested party who so wish may initiate fresh and proper

proceedings in accordance to the current laws regulating land disputes.

Ordered accordingly.




F. H. Mtulya

**Judge**

02.06.2022

This judgment was delivered in chambers under the seal of this court in the presence of the parties, Naomi Masinza and Lucas Mugendi and in the presence of learned counsel Mr. Emmanuel Gervas for the appellant.



F. H. Mtulya

**Judge**

02.06.2022