

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND APPEAL NO. 23 OF 2022

**(From the District Land and Housing Tribunal for Njombe District,
at Njombe, in Land Application No. 48 of 2020).**

EXAVERY CHUNGWA.....APPELLANT

VERSUS

FABIANO CHUNGWA.....RESPONDENT

JUDGMENT

15th September & 12th December, 2022.

UTAMWA, J:

In this first appeal, the appellant EXAVERY CHUNGWA challenged the judgment (impugned judgment) of the District Land and Housing Tribunal for Njombe, at Njombe (The DLHT) in Application No. 48 of 2020. In the DLHT, the appellant sued the respondent, FABIANO CHUNGWA for trespassing into the suit land located at Ikando Village, Kichwa Ward in Njombe District.

The suit was basically footed on the following brief facts: that, the respondent trespassed into the suit land of the appellant and destroyed 27 bamboo trees which belonged to the appellant. The appellant had warned the respondent several times to vacate the said property, but he did not do so. The DLHT dismissed the application and held that the respondent is the lawful owner of the suit land. The appellant was also ordered to pay costs to the respondent. The appellant was aggrieved by the impugned judgment, hence this appeal. The appellant's petition of appeal is based on five grounds as follows:

1. That, the DLHT erred in law and fact in deciding in favour of the respondent ignoring the use of Tribunal assessors by the reason of having not renewed their contract with the Tribunal.
2. That, the DLHT erred both in law and facts by not respecting the evidence adduced by the appellant concerning the consent of the real wife of the appellant.
3. That, the DLHT erred in law and facts by not taking note of some vital evidences adduced by the appellant.
4. That the DLHT erred in law and facts by not visiting the disputed land as it was requested by the appellant.
5. That the DLHT erred in law and fact in ordering the appellant to leave the disputed land with the costs of the case No. 48 of 2020.

Based on the above grounds, the appellant urged this court to quash the impugned judgment, set aside its orders and the appeal be sustained with costs.

At the hearing of the appeal the appellant was represented by Mr. Alatanga Nyagawa. The respondent was represented by Mrs. Joyce Kasebwa, learned advocate. The respondent resisted the appeal. The appeal was argued by way of written submissions.

In his submissions in-chief supporting the first ground of appeal, the appellant's counsel argued that, the law provides that the DLHT cannot be fully composed unless chaired by a Chairman sitting with not less than two assessors. Before making his judgment, the chairman has to require every assessor present to give his opinion in Kiswahili as per section 23 and 19(2) of the Land Disputes Courts Act, Cap. 216 RE. 2019 (The LADCA). To support his submissions, he cited the cases of **Sikuzani Saidi Magambo & Another v. Mohamed Roble, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania (CAT) at Dodoma, Ameir Mbarak & Another v. Edgar Kahwili, Civil Appeal No. 154 of 2015, CAT (unreported) and Hosea Andrea Mushongi (Administrator of the estate of the Late Hosea Mushongi) v. Charles Gabagambi, Land Appeal No. 66 of 2021, High Court of Tanzania (HCT) at Bukoba.**

The appellant's counsel also argued on the second and third grounds of appeal that, the DLHT did not consider the appellant's strong evidence. When the suit premises was sold to Yustini Kihumbu by one Anna, the appellant was sick and unconscious at Ikelu hospital. He could not thus, write. The alleged sale by Anna was not justified since she had no right to pass. Moreover, the appellant had other wives other than the said Anna. He also had other sons who would have been aware of the situation. The DLHT ought to have relied upon other corroborative evidence adduced by

witnesses who are free from the alleged sale agreement. The case before the Kichiwa Ward Tribunal is different from the present case as it involved another piece of land. The impugned judgment and its proceedings contain irregularities because, documentary evidence was tendered by a person who was not party to the case as shown at page 5 of the proceedings. The said documents ought to be tendered by the respondent and not by the witnesses as it was done in the present case.

It was also the contention by the appellant's counsel that, documents not admitted in evidence do not form part of the record and shall be returned to persons producing them as provided under Order XIII Rule 7(2) of the Civil Procedure Code, Cap. 33 RE. 2022 (The CPC). He cited the case of **Robinson Wanjisi and 3 Others v. Republic (2003) TLR 218** to support his contention. This precedent, he argued, set steps in admitting a document in evidence. He also cited the case of **Salum Mateyo v. Mohamed Mateyo (1987) TLR 111** which held that proof of ownership of land is by one whose name is registered and the onus of proof of such ownership lies on the plaintiff who alleges that fact.

Regarding the fourth ground of appeal, the counsel for the appellant contended that, it was very crucial for the DLHT to visit the *locus in quo* for the sake of proving without any reasonable doubt that the suit premises belongs to the respondent. In his view, the DLHT relied upon hearsay evidence which is not reliable. He cited the cases of **Juma Mohamed Juma v. Sara Ibrahim (2002) TLR 45** and **Nizar M. H v. Gulamali Fazal John Mohamed (1980) TLR 29** which provide for conditions that necessitates a court to visit a *locus in quo*.

On the last ground of appeal, the appellant's advocate contended that the alleged seller of the suit land had no *locus standi* and the respondent's witnesses were those who conspired with the alleged seller. They were thus, not qualified witnesses. He thus, urged the court to quash and set aside the impugned judgment and its orders with costs.

In her replying submissions, the advocate for the respondent submitted on the first ground that, the Chairman fully explained at page 7 on the absence of the assessors who were with him from the beginning of the trial. The law allows the Chairman to proceed in the absence of assessors who were with him from the beginning of the hearing. This is in accordance to section 23(3) of the LADCA). This ground therefore, lacks merit.

In relation to the second and third grounds, the respondent's counsel contended that, the DLHT heard and analysed well both parties' evidence and reached into its decision. It was the duty of the appellant to call any person to establish his case since the law guides that, whoever alleges must prove. Nonetheless, the appellant failed to prove his allegations. This being the first appellate court can re-evaluate the evidence before the DLHT as it was held in the case of **Peter v. Sunday Post Limited (1958) E.A 424.**

It was also the contention by the respondent's advocate that, the DLHT did not rely upon documentary evidence that was not admitted in evidence. The appellant had an option to object the admission of the said

documents during the hearing and he had chance for questioning the same during cross-examination.

On the fourth ground of appeal, the advocate for the respondent submitted that, it is the position of law that, visiting a *locus in quo* is totally at the discretion of the court. It follows thus, that, if the DLHT was satisfied by the evidence before it and thought it was enough to make a decision, the law could not compel it to visit the *locus in quo*. To cement her submission, she cited the case of **Bomu Mohamedi v. Hamisi Amiri, Civil Appeal No. 99/2018, CAT at Tanga** (unreported).

It was further the contention by the respondent's counsel on the last ground of appeal that, section 30 of the CPC gives powers to courts and tribunals to determine costs and to whom the same should be given. This was also the position underscored in the case of **Jasson Mwambola v. Ahobokile Mwansasu, Misc. Land Appeal No. 18 of 2020**. She thus, urged the court to dismiss the appeal with costs for being meritless.

In rejoinder submissions, the appellant's advocate claimed that, the respondent is trying to justify the acts of the Chairperson in not using assessors for the reason that their contracts were not signed. This ground in his view is baseless as the matter was not under certificate of urgency. Section 23(3) of the LDCA does not cover circumstances where the assessors have not signed a contract. He also contended that the DLHT did not fully analyse the evidence adduced by the appellant. The appellant in the DLHT adduced evidence that he has three wives, the first wife and his children still live with him, and that, in the disputed land the third wife

never lived there and had nothing to do with such land. He cited sections 59(i), 56, 57, 58 and 59 of the Law of Marriage Act, 1971 which provide that, where any estate of interest in the matrimonial home is owned by husband or by the wife, the same cannot be disposed of without the consent of either spouse. The first wife, second wife and their children were totally unaware with the action done by Anna Mwinami while their husband was admitted in hospital. After recovery, the appellant denied to have sold the disputed land. He thus, urged this court to quash and set aside the impugned judgment of the DLHT and sustain the appeal with costs.

I have considered the arguments by both parties, the law and the record. I will now consider the merits of the grounds of appeal listed above.

In relation to the first ground of appeal, the same calls for an issue of *whether assessors in the present case were fully involved in the trial before the DLHT*. The record clearly shows that, the matter first came before the Chairman of the DLHT on 17th July 2020. The proceedings on that day show that the Chairman sat without any assessor. He did the same thing on 6th August, 2020, 22nd September, 2020, 4th November 2020, 19th January, 2021, 4th March, 2021, 15th April, 2021 and on 19th May, 2021. On these dates the proceedings are silent as to why the assessors were not involved. The record shows further that, on 20th May, 2021 Mr. Mwapinga and Mr. Ng'winamila (assessors) sat as members of the Tribunal with the Chairman. Nonetheless, on 29th June, 2021 only Mr. Mwapinga sat with the Chairman. In fact, section 23(1) and (2) of the LDCA provides for the

composition of the DLHT, it reads as follows, and I reproduce it for a readymade reference:

"(1) The District Land and Housing Tribunal established under section 22 shall be composed of one 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."

From the above cited provisions of the law, it is clear that on the above mentioned dates the DLHT was not properly constituted for the Chairman began to sit without any assessor. Indeed, my construction of the above quoted provisions of the LADCA is that, a Chairman of a DLHT lacks jurisdiction to commence any proceedings of the DLHT by sitting without assessors and make any proper order of the DLHT even for purposes of adjournment. He can sit alone only under the provisions of section 23(3) of the LADCA which provides for an exception. It permits the Chairman to sit alone only when both members of the Tribunal who were present at the commencement of the proceedings are absent, under which said case, the Chairman may continue and conclude the proceedings notwithstanding such absence. The circumstances of the present case however, do not fall under this exception since the Chairman commenced the proceedings alone in the pretense that he was the DLHT and he involved the assessors at the later stage of hearing.

There was therefore, a serious violation against section 23 of the LDCA in the proceedings related to the case at hand. It is more so since no reason was recorded in the proceedings showing why the Chairman had to sit without assessors on such dates. I consequently answer the issue posed

above negatively that, assessors in the matter at hand were not fully involved in the trial before the DLHT.

In my further view, for the reasons shown above, the irregularity committed by the Chairman of the DLHT was fatal since it touched the jurisdiction of the DLHT. It thus, vitiated the proceedings. This means that even the orders that were pronounced on the dates that the Tribunal was not properly constituted are invalid. The irregularity cannot thus, be saved by the principle of overriding objective. This principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) which construed section 45 of the LADCA.

Nevertheless, it cannot be considered that the principle of overriding objective suppresses other important principles that were also intended to promote justice. The holding by the same CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view. Indeed, this precedent is a good authority that, the principle of overriding objective does not operate mechanically to save each and every blunder committed by parties to court proceedings or by courts of law themselves.

Having made the findings above, I uphold the first ground of appeal. I consequently find that, there is no pressing need to consider the rest of

the grounds of appeal. The reason for this course is that, the findings I have made above in relation to the first ground of appeal are forceful enough to dispose of the entire appeal, otherwise I will be performing a superfluous or academic exercise which is not the core function of the adjudication process.

I consequently allow the entire appeal. I further nullify and quash the proceedings of the DLHT. I also set aside the impugned judgment. If parties still wish, they can pursue their rights before the DLHT. If they opt to do so, the same shall be heard by another Chairman and another set of assessors. Each party shall bear its own costs since it was the Chairman of the DLHT who was instrumental in causing the irregularity discussed above. It is so ordered.



JHK UTAMWA

JUDGE

12/12/2022

12/12/2022 (AT NJOMBE RESIDENT MAGISTRATE COURT).

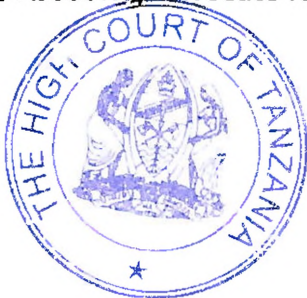
CORAM: JHK. Utamwa, J.

Appellant: Absent.

Respondent: present in person.

BC: G. Mpogole,

Court: Judgment delivered at Njombe Resident Magistrate Court in the presence of the applicant, the respondent and MS. Dorine Gaspar, advocate holding briefs for Mrs. Joyce Kasebwa, advocate for the respondent in in court, this 12th December, 2022.



JHK UTAMWA

JUDGE

12/12/2022