

TANZANIA / JUDGMENT

francis mtawa vs christina raja lipanduka 2022 tzca 719 15 november 2022

COURT
TZCADECIDED
15 November 2022

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: MKUYE, J.A..
KIHWELO. 3.A. And MAKUNGU. J.A.T CIVIL APPEAL NO. 15 OF 2020 FRANCIS
MTAWA..... APPELLANT VERSUS CHRISTINA RAJA LI
PAN DUKA 1st RESPONDENT HAMAD
RAIS..... 2nd RESPONDENT PROCHES
MARES.....3rd RESPONDENT (Appeal from the Judgment
and Decree of the High Court of Tanzania, (Land Division) at Dar es Salaam) (Khadav, J.) dated
the 5th day of August, 2015 in Land Appeal No. 110 of 2014 JUDGMENT OF THE COURT 1st & 15th
November, 2022 KIHWELO. J.A.: The appellant, Francis Mtawa, seeks the reversal of the decision
of the High Court of Tanzania, Land Division (Khadav, 3.) in Land Appeal No. 110 of 2014, dated
5th August, 2015 which allowed the respondents' appeal against the decision of the District Land
and Housing Tribunal for Temeke in Land Application No. 154 of that was decided in favour of
the appellant. i The facts of this appeal are quite simple and straight forward but in order to
appreciate the issues of contention in this matter, we find it apt to begin with a very brief
background of the case. In the District Land and Housing Tribunal for Temeke (DLHT), the
appellant lodged a complaint against the respondents and two others not part to this instant
appeal for the following reliefs: "(i) Declaration that the applicant is the law ful owner o f the
disputed farm and the respondents are trespassers thereon. (ii) Declaration that the subsequent
sale agreem ents made by the & and 5th respondents to the 2nd and J d respondents including the
purported sale to the 1st respondent by the original seller one Ja fa ri Athum ani Shaha
@Luambano were void. (Hi) Dem olition o f a ll structures erected thereon. (iv) Vacant possession
be given by the respondents.

(v) Perpetual injunction restraining the respondents and their agents from continuing
trespassing to the applicant's piece o f land and o r plots be issued. (vi) The respondents jo inly
and severally be condemned to pay the sum o f TZS. 20,000,000.00 as general damages fo
r the trespass over the land in dispute. (vii) Costs and any other re lie fs." The essence of the
appellant's claim before the DLHT as pleaded in the Amended Application is that, on
25.08.1988 the appellant purchased a piece of land at Buza Makangarawe Ward (the suit
land) from one Jafari Athumani Shaha @ Luambano who is now deceased for a
consideration of TZS. 20,000,000.00 which was paid in four instalments. It was alleged that at

the time of sale, the suit land had 19 coconut trees, 8 cashew nut trees, and a small farm cottage comprising of 2 rooms with a single verandah. It was further alleged that the sale agreement was witnessed by one Ngapela the then CCM Chairman and soon thereafter, the appellant entrusted Raphael Kameta and Eliutha Mangosongo to take care of the suit land. It was also alleged that in 2005 when the appellant went to look after the suit land, he came to realize that the respondents had trespassed onto the suit land and when requested to give vacant possession the trio adamantly resisted claiming that they legitimately purchased the suit land from lawful owners. While the first respondent claimed to have bought the suit land from Jafari Athumani Shaha @ Luambano, the second and the third respondents claimed to have bought the suit land from Ally Bakari and Owen A. Chasanga respectively. 3 It is instructive to interject a remark, by way of a postscript that, while Ally Bakari and Owen A. Chasanga were parties to the application before the DLHT as fourth and fifth respondents respectively, the decree of the DLHT which granted the application in favour of the appellant, did not touch upon the two and that is why they were not made parties to the appeal before the High Court and hence this Court. On their part, the respondents stoutly resisted the application and their line of argument was that the applicant could not have entrusted the suit land to someone else for more than 17 years and went further to argue that, the first, second and third respondents have been in peaceful and uninterrupted occupation having bought different plots in the suit land from different people in 1986 and 1991. It was alleged further by the respondents that, they have built houses in the suit land and they have been in peaceful and uninterrupted occupation for over 12 years. Upon full trial, the DLHT in a unanimous decision found out that the appellant proved the case to the required standard showing that he was the lawful owner of the suit land and therefore, granted the application with costs. Disgruntled, the respondents approached the High Court armed with 4 four grounds of appeal challenging the decision of the DLHT. After listening to the parties, the High Court found in the balance of probability that the evidence of the respondents was more credible than that of the applicant and therefore, allowed the appeal and set aside the decision of the DLHT which declared the appellant as lawful owner of the suit land and instead, the respondents were declared lawful owners. This is what precipitated the present appeal before us. The appellant has filed this appeal which is grounded upon six (6) points of grievance, namely:

1. That, the Honourable Judge erred both in law and fact when she held that there was no evidence to prove that the land in dispute belongs to the appellant.
2. Having found that the cause of action arose in 2005, the Honourable Judge erred both in law and fact by holding in the alternative that the respondents are lawful owners of the disputed piece of land by virtue of adverse possession.
3. That, the Honourable Judge erred both in law and fact by her failure to decide the grounds of appeal which were preferred by the respondents and having framed an issue as to whether there was sufficient evidence to prove the respondent's case, failed to afford parties an opportunity to address her on the framed issue which was not a ground of appeal.

4. That, the Honourable Judge erred both in law and fact by her failure to properly analyze the appellant's evidence on record by erroneously concluding that the respondent left his property to Raphael Kameta and Eliuta Mangosongo for a period between 1988 when he purchased the disputed property and 2005 when he returned to the place and found the said Raphael Kameta and Eliuta Mangosongo dead contrary to the evidence on record.
5. That, the Honourable Judge erred both in law and fact by restricting the evidence to prove that the appellant entrusted his property to Raphael Kameta and Eliuta Mangosongo who are deceased, only to the deceased's children or neighbours.
6. That, the Honourable Judge erred both in law and fact by finding that the appellant recklessly left the disputed land for 17 years contrary to the evidence on record. At the hearing of the appeal before us on 1st November, 2022, the appellant was represented by Mr. Wilson Edward Ogunde, learned advocate and the respondents were fending for themselves, unrepresented. They both, prayed to adopt the written submissions which were lodged earlier on in terms of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) respectively, without more. We hasten to remark that, in the course of this Judgment, we will not be able to recite each and every fact comprised in the submissions but we can only allude to those which are conveniently relevant to the determination of the matter before us. We propose to begin with the third ground of appeal whose complaint is based upon failure by the learned Judge to determine the grounds of appeal which were raised by the respondents and in the contrary, the learned Judge framed a different issue which she resolved without inviting parties to address her. Arguing in support of the third ground of appeal, the appellant contended that before the first appellate court, the respondents abandoned the fourth ground and argued the remaining three grounds, however, the learned Judge in determining the appeal raised another issue as to whether or not the appellant proved the case on the balance of probabilities and in dealing with this issue the learned Judge raised and dealt at considerable length with the doctrine of adverse possession which became the basis of her decision. Elaborating, the appellant argued that, admittedly the law permits the court on appeal to raise a question for determination suo motu. However, the court is duty bound to call upon the parties to address it on the issue raised. To support his argument, he referred us to Order XXXIX rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2019 and the case of Raza Somji v. Amina Salum [1993] TLR 208 in which we emphasized the need for judges to invite parties to address the court, upon raising an issue suo motu before resting its decision. As to the consequences that should befall the anomaly pointed out above, the learned counsel zealously submitted that, the appeal should be allowed and the judgment of the High Court should be set aside. In reply to the third ground of appeal, the respondents prefaced their written submissions with some preliminary issues which for obvious and practical reasons we will not recite them. They went ahead to deliberate at considerable length that the issue of adverse possession was prior raised and adequately covered, first before the DLHT when it was raised by Mr. Abubakar as a defence during the preliminary objection which was overruled. They further argued that, the issue of adverse possession was once again raised before the first appellate

court in support of the first ground of appeal, and referred us to page 131 of the record of appeal. They prayed that the appeal should be dismissed with costs. 8 It is now our duty to determine the appeal by considering the competing arguments made by the learned trained minds, in line with the grounds of appeal. The third ground of complaint, in essence concerns the propriety of the judgment of the first appellate court. Records bear out that the respondents raised a total of four grounds of appeal, however, at the hearing they elected to abandon the fourth ground and therefore, they remained and actually argued three grounds. Quite surprising, and for an obscure cause, the learned Judge did not address all the grounds of appeal and instead she raised two questions at pages 139 and 140 of the record of appeal. The first question which was part of the first ground, was whether the matter was time barred, and the second question was whether there was ample evidence on record to prove the case in favour the appellant. For clarity, we wish to let record of appeal at pages 139 and 140 speak itself: "Having heard both sides of the case, and having gone through evidence so adduced before the trial DLHT, I find the issue for determination here is whether the appeal before us is meritorious. Questions to ask include as to whether the matter before DLHT was time barred and whether there was or is ample evidence that proved the case for the present respondent" 9 Clearly, from the record, the learned Judge did not resolve all the grounds of appeal that were raised and argued by the parties as submitted by the learned counsel for the appellant. We must quickly and respectfully point out here that, the learned Judge went wrong. To say the least, the first appellate court judgment is not the judgment which the law envisages. Luckily, this is not the first time we are confronted with this scenario. In the often-cited case of *Malmo Montagekonsult AB Branch v. Margret Gama*, Civil Appeal No.86 of 2001 (unreported) in which the High Court had determined the appeal after consolidating several grounds of appeal into one, the Court had this to say: "In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal *seriatim* with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately." The logical conclusion drawn from the above, is that, the appellate court is bound to consider the grounds of appeal presented before it and in the instant appeal the learned Judge did not consider all the grounds of 10 appeal. With respect, the impugned judgment fell far below the required standard and for that reason, it was not a judgment known in law. It was a nullity. We held similar position in the case of *Simon Edson @ Makundi v. Republic*, Criminal Appeal No. 5 of 2017 and *Muhidin Mohamed Lila @ Emolo and Three others v. Republic*, Criminal Appeal No. 44 of 2015 (both unreported). As to the way forward, we shall, at a later stage of our judgment, revert to this disquieting aspect of the proceedings to determine its consequences. We would be justified to allow the appeal on the basis of this glaring flaw alone as indicated above. However, we feel compelled to go a step further and deliberate on the complaint in the same ground three which by extension touches upon the failure by the learned Judge to decide on the fault by learned Chairperson of the tribunal for composing a lopsided judgment without assigning reasons. This was a very serious

complaint which the learned Judge did not decide on it despite the fact that both parties addressed her on it. For the sake of clarity, and for completeness of records we will let records of appeal at page 114 on the judgment of the DLHT speak for itself. ii "According to the evidence adduced by both parties I hold the first issue that the applicant bought the suit land from the original owner Jafari Athum ani in 1988 in the presence of Village Chairman by that time. Therefore, Jafari Athum ani Shah had nothing to pass to the 1st respondent because by that time the ownership of the land in dispute was in August 1988 from Jafari Athum ani (original owner) to the applicant. And other person who sold the suit land had no locus stand because they were not the owners. The owner of the suit land in dispute is the applicant". Quite clearly, the excerpt above underscores the fact that the learned Chairperson of the DLHT after summarizing the evidence of both parties made a skeletal and scanty judgment not commensurate to the evidence on record and arguments by the parties and without clear reasoning. To say the least, the submission by the learned counsel for the appellant has merit and in our considered opinion, we think that, this is a serious anomaly which should not have missed the attention of the learned Judge and more in particular bearing in mind that this was a ground of appeal before the first appellate court. It bears reaffirming that, the duty of judicial officers and any other adjudicator to assign reasons for the decision given, needs no emphasis. 12 This is a mandatory requirement and a judgment which fails to comply with that requirement is null and void. There is a considerable body of case law on this. See, for instance, the case of Willy John v. R [1956] 23 E.A.C.A 509, the erstwhile Court of Appeal of East Africa stated the principle which was also referred in the case of R v. Heziron Magari [1970] HCD 148 in which we take inspiration it was held that: "One cannot state strongly the Importance of subjecting the evidence to analysis before arriving at any conclusion upon it It is not enough merely to set out conclusions without setting out the process of reasoning which has led to them ." We also take inspiration from the passage by Asprey, JA in the decision of the New South Wales Court of Appeal in Pettitt v. Duckley [1971] 1 NSWLR 381 in which the court discussed at considerable length the rationale of reasons which support judicial decisions and orders: "The rights of appeal are statutory rights granted by the legislature to the parties and the failure of a trial judge in the appropriate case to state his findings and reasons amounts, in my view, to an encroachment upon those rights. The omission of the trial judge makes it impossible for an appellate court to give effect to those rights, either for one party to the appeal or another, and so carry out its own appellate function. It is unnecessary to stress the prime importance to a party to an appeal, whether he be appellant or respondent, of the findings and reasons at first instance and this is not limited to the acceptance or rejection of the evidence on the basis of demeanour for, in arriving at his conclusions, the trial judge may simply have preferred one possible view of the primary facts to another as being in his opinion the more probable, or he may have preferred the evidence of one witness to another for a variety of reasons, although both were considered by him to be telling the truth as they may have observed the facts to be... Just as it is impossible to confine the grounds upon which an appellate court will order a new trial within rigid categories....so the ambit of the difficulties confronting parties to an appeal will place the appellate court

to which they look for the exercise of their statutory rights in many cases in a position which may prevent the court from giving effect to the paramount consideration of obviating a miscarriage of justice." It is instructive to state that, the only exceptions to the duty to assign reasons is where a decision is "too plain for argument" or where a procedural decision is made and the reasons for it are clear from the context. 14 We think it is momentous that we should remark in passing before we take leave of the matter that, there has been a recurring problem of failure by the court and tribunals to evaluate and analyze evidence on record before arriving at the reasoned decision. In the case of Leonard Mwanashoka v. Republic, Criminal Appeal No. 226 of 2014 (unreported) in which one of the complaints by the appellant was failure to consider the defence case, we held that: "It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain." In the upshot, and based upon the foregoing, we find that the judgment of the DLHT was equally not a judgment in the sense of the Judgment known in law and therefore, the first appellate court had nothing upon which to determine the appeal in the first place. It follows therefore, that, the totality of the above disquieting aspects of the judgments both at the DLHT and the High Court, we are inclined to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and nullify the judgments of both the DLHT as well as that of the High Court. Having nullified the judgments, we remit the record 15 to the DLHT for it to compose a fresh judgment in accordance with the law. For avoidance of doubts, the said judgment shall be composed by the same Chairperson who presided over the application, unless there is change of circumstances. The appeal is therefore allowed, but given the circumstances of this case, each party to bear own costs. DATED at DAR ES SALAAM this 14th day of November, 2022. R. K. MKUYE JUSTICE OF APPEAL P. F. KIHWELO JUSTICE OF APPEAL O. O. MAKUNGU JUSTICE OF APPEAL The Judgment delivered this 15th day of November, 2022 in the presence of Mr. Sylvester Korosso holding brief for Mr. Wilson Ogunde, counsel for Appellant and all Respondents appeared in person unrepresented, is hereby certified as a true copy of the original. J21 A. L. KALEGEYA M DEPUTY REGISTRAR W COURT OF APPEAL 16

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