

**IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA**

**CIVIL APPEAL 60 OF 2016
FROM ORIGINAL CIVIL CASE 136 OF 2013
OF THE LAND TRIBUNAL HELD AT VUGA
MAJESTIC**

**FATMA UBWA MSIYU
AND OTHERS**

.....

APPELLANT

VERSUS

**BAKAR UBWA MSIYU
AND OTHERS**

.....

RESPONDENTS

JUDGMENT

HON. MKUSA J

Appellant are represented by advocate Rajab Abdalla Rajab while all respondents are represented by advocate Ishaq Shariff. Appellant lost their case which they had instituted against all respondents before Land Tribunal. And after being dissatisfied with the decision of Land Tribunal have filed their first appeal before this court against whole judgment and decree passed in favor to respondents. In their memorandum of appeal have raise following grounds written in English and Kiswahili language as hereunder:-

1. That, the Land Tribunal erred in law by excluding the assessors from fully participating in the trial; hence making the entire trial a nullity. (Kwamba, Mahakama ya Ardhi imekosea kisheria kwa kutowashirikisha wazee wa Mahakama katika mwenendo mzima wa shauri, hivyo imeufanya mwenendo mzima wa shauri hilo kuwa batili).

2. That, the entire proceedings, judgment and decree nullity as the Hon. Magistrate erred in law by departing from the opinions of assessors without giving reasons of such departure. (Kwamba, mwenendo wa kesi, hukumu na tuzo ya mwisho ni batili kwani Mh. Hakim amekosea kisheria kwa kuachana na maoni ya wazee bila ya kutoa zababu za kuachana na maoni hayo).
3. That, the Land Tribunal erred in entertaining the document which have neither been tendered nor admitted as evidence during the trial, hence making the entire proceedings, judgment and decree a nullity. (Kwamba, Mahakama ya Ardhi imekosea kisheria kwa kugemea nyaraka ambazo hazijatolewa wala hazijakubaliwa na Mahakam ya Ardhi wakati wa usikilizwaji wa kesi, hivyo kufanya mwenendo wa kesi, hukumu na amri kuwa batili).
4. That, the Land Tribunal erred in law in conducting visit of the dispute shamba (locus in quo) contrary to the requirement of the law, hence making the entire proceedings, judgment and decree a nullity. (Kwamba, Mheshimiwa Hakim amekosea kisheria kwa kufanya ukaguzi wa shamba bishaniwa (locus in quo) kinyume na matakwa ya sharia, hivyo kufanya mwenendo wa kesi, hukumu na tuzo ya mwisho kuwa batili).
5. That, the entire judgment and decree of the Land Tribunal dated 9th September in civil Case No. 136 of 2013 is anullity for being made contrary to the requirement of the Land Tribunal Act No. 7 of 1994 as amended by Act No. 1 of 2008 of the Laws of Zanzibar. (Kwamba, hukumu na amri iliyotolewa na Mahakama ya Ardhi tarehe 9 Septemba, 2015 katika Kesi ya MAdai Nam. 136 ya 2013 ni batili kwa vile hukumu hiyo imetolewa kinyume na matakwa ya Sheria ya Mahakama ya Ardhi Nam. 7/1994 kama ilivyorekebishwa na Sheria Nam. 1 ya 2008 ys sharia za Zanzibar).

**IN THE ALTERNATIVE
(VYENGINEVYO)**

6. That, the Land Tribunal erred in law and fact in deciding Civil Case No. 136 of 2013 against the appellants based upon weak and incredible evidence adduced by respondents before the Land

Tribunal. (Kwamba, Mahakama ya Ardhi imekosea kisheria na kiuhalisia kwa kuitolea maamuzi Kesi ya Madai Nam. 136 ya 2013 dhidi ya waomba rufaa kwa kuegemea ushahidi dhaifu uliotolewa na waombewa rufaa mbele ya Mahakama ya Ardhi).

7. That, the Land Tribunal did erred in law and fact in failing to consider the strong evidence of appellants adduced evidence before the Land Tribunal. (Kwamba, Mahakama ya Ardhi imekosea kisheria na kiuhalisia kwa kushindwa kuzingatia ushahidi mzito uliotolewa na waomba rufaa mbele ya Mahakama ya Ardhi).

On 29/5/2017 this appeal was called for hearing and on that day advocate Rajab Abdalla on first ground submitted that assessors did not take part in that case as per section 37 of Act 7 of 1994 as amended by Act 1 of 2008. At page 37 of typed proceedings first assessor said “**naiwachia Mahakama**” so did 2nd assessor. While section 7 (1) and 37 of Act 7 of 1994 as amended gives penal members opinion and by the way assessors stated it shows that they were not involved. As well at page 50 of typed proceeding 1st assessor said “**some people sold**” while 2nd assessor said “**sale was legal**”.

While in the judgment trial court at page 62 on 6th and 7th paragraph from the top there is no connection and trial magistrate should have connected his decision with what had been submitted by both assessors. He had no room to depart from their opinion there are number of cases which gives importance of assessors to be part of such decision. Upon such turn it shows that they were not involved therefore while judgment is nullity and to order de novo. Furthermore, advocate Rajab Abdalla said he had covered second ground with first ground.

On third ground said trial magistrate entertained some documents which were not tendered or admitted before the court. In the judgment at page 60 of typed proceedings trial magistrate on 4th and 5th paragraph from the top where he refer to WSD. And it was one Bakari who tendered FZ 1 and FZ 2 which were not admitted rather those exhibits DEA 1 and DEA 2 were admitted as seen at 6th and 7th paragraphs of the page which he had mentioned and it was not part of the proceedings.

There is no contract or agreement for exchange of money which was admitted by trial court rather there is a letter and proceedings which were tendered and admitted before trial court. Advocate Rajab Abdalla pointed out that Order XV Rule 7 (2) of Cap 8 clearly states that documents not admitted shall not form record of the court and the same should be returned and they were not tendered. But trial magistrate mentioned and used them, that is nullity to this regard cited case of **SHEMSA KHALIFA AND TWO OTHERS VS SULEIMAN HAMED ABDALLA Civil Appeal 82 of 2012 Court of Appeal of Tanzania at Zanzibar** and case of **JAPAN INTERNATIONAL COOPERATION AGENCY (JICA) VS KHAKI COMPLEX LIMITED Civil Appeal 107 of 2004 Court of Appeal of Tanzania at Dar es Salaam.**

On fourth ground submitted that procedure to conduct visit are well explained in the case of **NIZAR M. H. LADAK VS GULAMALI FAZAL JANMOHAMED TLR 1980 at page 29.** At page 6 of typed proceedings is seen that visit was done by trial magistrate but witnesses were not called to testify. And this is clear that the true intent to such visit was not properly conducted. Therefore this is another reason for nullification.

While on fifth ground appellant advocate Rajab Abdalla said procedure was not followed by trial court as at page 22 of typed proceedings is seen that defendants were not even given right to cross-examine. As well at page 23 of the same typed proceedings is seen that 4th defendant was absent and was not awarded right to be represented while at page 31 of the same is seen that one Bakari was allowed to represent other defendants. During all that time section 12 (6) of the Constitution of Zanzibar as amended from time to time was violated. During whole trial 3rd and 4th plaintiffs were not involved till defence case commenced and nowhere it shows that they were properly served or that they have waived their right still unclear.

At the end advocate Rajab Abdalla said in alternative sixth and seventh ground which he join and argued them together said, evidence and main issue was “**whether the dispute shamba was sold or not**” one Fatma Ubwa was not join is the case the same seen in the judgment of trial court at the same time not all of them gave power of attorney. Even adduced evidence and some of witnesses admitted that some people were not join.

Therefore based on that it is clear that sale was not done, and due to that advocate Rajab Abdalla prayed for this court to nullify the documents with an order that the shamba still owns to the family of appellant. And for that shamba in dispute to be inheritance.

On his part advocate Ishaq Shariff submitted that he join hands with decision of trial court. First and 2nd grounds they do not agree that assessors were not involved in proceedings. While typed proceedings shows that trial magistrate involved them throughout and what matters here is voting at page 62 of typed proceedings trial magistrate needed assessor's opinion by voting. Here question arises if there was a voting or not, there was an opinion delivered by assessors and since proceeding has been there and it helped trial magistrate to reach that decision. And that he has departed it is immaterial at this stage and since assessors were involved from the beginning and therefore there is no reason to nullify whole proceedings.

On third ground the dispute is on land and the case is head before Land Tribunal. Section 16 of Land Tribunal Act is very clear to that regard and aim of this section is how to dispose justice between parties. Since section 16 and 36 (1) of the same as well by reading both section it is clear that trial magistrate is correct to use those documents. Furthermore, advocate Shariff submitted that those exhibits containing family meeting to that effect which is very clear and therefore trial magistrate used that. On the other hand Order XV Rule 7 (2) of Cap 8 is not mandatory to be used even those it is correct provision of the law. Therefore advocate for respondents objected of nullifying of whole judgment because there is no logic as procedure had been followed. And cited cases are distinguish from what we have at hand as this case commenced at Land Tribunal due to that prayed for this court to uphold decision of trial court.

On fourth ground advocate Shariff said, yes indeed such visit took place and they went by themselves and Land Tribunal is not bind by Cap 8 seen case of **NAZAR (supra)**. And they call upon witnesses as they same is not mandatory, there is no dispute on land therefore there was no necessity to call upon witnesses to testify. Therefore this is not a strong argument at all.

However, on fifth ground advocate Shariff said it is baseless as well appellants always have to show grounds to who were aggrieved at that point are respondents. Because it does not show of how they are aggrieved in order for this court to order trial de novo. And here once again advocate Shariff prayed for this court not to allow this appeal and to uphold decision of trial court.

On sixth ground and seventh respondent advocate prayed for this court to find that there is enough evidence to prove their case. Now appellants want to delay this case as they were fully involved and she refused to sign power of attorney. Therefore this court should see and find that whole transaction is correct and sections cited by appellant advocate Rajab were not read up to the end by him. Based on that advocate Shariff for respondent prayed for this appeal to be dismissed.

In rejoinder advocate Rajab argued that respondent advocate Shariff admitted that those documents were not tendered before the court and if so they cannot be used. Section 16 of Act 7 of 1994 has been amended by section 15 of Act 1 of 2008 therefore they have to be in accordance with Cap 8. As well section 36 of Act 7 of 1994 is about limitation. And the case of **SHEMSA VS NARZA (supra)** is not distinguished at all.

On first and second ground argued that assessor's opinion has to be there and not to state "naiwachia mahakama" instead to give their opinion his argument is that both assessors stated that "shamba limeuzwa na watu wachache" and there is no question of law rather there is question of facts. On fourth ground adopted what stated earlier while on fifth grounds submitted that as advocates are officers of the court therefore he states that some were not given right to be heard in accordance with Constitution (supra), therefore advocate Rabaj prayed and stated whole proceedings to be quashed and trail de novo.

On sixth and seventh ground said statement from the bar is not evidence as they have not seen any person from WAKFU to state some are trying to delay. And they should have sold their portions therefore that is illegal. And yet advocate Rajab prayed for this court to nullify whole proceedings or to declare that for everything to remain **status quo**.

Well to begin with records of trial court shows that both assessors were involved in the whole trial. As I perused whole proceedings nowhere is seen that they were not part of the proceedings and at the same time they were given opportunity to question witnesses from both side respectively. And they even gave their opinion as seen in those typed proceedings therefore first and second ground are hereby overruled. While on third ground I must say that by looking at page 37 of typed proceedings is seen that trial magistrate admitted some exhibits and marked them as DEA 1 and DAE 2. Being that the case than trial magistrate had all rights and obligation to use them in his judgment while analyzing adduced evidence. Due to that this point as well fails to be taken into consideration.

Furthermore, I have carefully gone whole Act 7 of 1994 as amended by Act 1 of 2008 and failed to seen of where exactly is given procedure to conduct visit *locus in quo* and indeed Land Tribunal is not governed by rules of Civil Procedure Cap 8. On the other hand typed proceedings shows that this case commenced before Hon. Faraji (RM) continued before Hon. Abdulrazak (RM) then it passed to hon. Zahra (RM) for mention and thereafter it ended before Hon. Hussein (RM). Hon Hussein is the one who heard defence side and wrote judgment and made visit to the locus in quo as seen at page 49 of typed proceedings. And during that visit both parties were at attendant together with both assessors.

On last ground by looking at page 29 till 31 of typed proceedings is seen that 1st Respondent was given power of attorney and that request was granted by trial court. Being that the case he had all obligations to legality to stand on behalf of other Respondents and typed proceedings shows that he was present throughout whole trial. Therefore there was a compliance with all requirement of the law.

Before conclusion I wish to point out that it is unethical and embarrassing to see that two advocates from one office are on opposite sides. Like one Fadhil Ramadhan Mberwa from **AJM SOLICITOR & ADVOCATE CHAMBER** prepared document for Respondent known as **"MKATABA WA KULIPA NA KUPOKEA FEDHA TSH 100,000,000/= ZA MAUZO YA SHAMBA"** exhibit DEA III and before this court today comes advocate Rajab Abdalla Rajab from **AJM**

SOLICITOR & ADVOCATE CHAMBER representing Appellant and at the same challenging document which was prepared by their office as seen in his grounds of appeal and during his submission before this court. Legal practitioners must be careful while conducting their duties and responsibilities as failure of which they embarrass our Noble profession.

Having said everything hereinabove mentioned this court finds that this appeal has no merit and therefore it is hereby dismissed with no order as to costs.

Appeal dismissed with no order as to costs.

Sgd: Mkusa I. Sepetu – J
Date: 26/10/2017

I certified that this is a true copy from original.


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REGISTRAR
HIGH COURT
ZANZIBAR



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DATE: 20/2/2018