IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

LAND APPEAL CASE NO 11 OF 2020

(Arising from Misc. Land Application No. 20/2020 Originated DLHT Kigoma Land Application No. 53/2018)

FRANK MIHARUGWA.....APPELLANT

VERSUS

1. JUMANNE RUSABA

2. HARID JUMA KILOLOMA @ LUSAKA KILOLOMA .....RESPONDENTS

JUDGMENT

Dated: 13/8/2020 & 26/8/2020

A. Matuma, J

The appellant Frank Miharugwa and the second respondent Harid Juma Kiloloma @ Lusaka Kiloloma stood charged by the first respondent Jumanne Rusaba in the District Land and Housing Tribunal for Kigoma over the ownership of a piece of land along Kasulu Road, Zuru area at Gungu Ward within Kigoma Municipality.

The first respondent had alleged to have bought the dispute land from the second respondent, and the appellant to have trespassed thereto.

The second respondent also maintained that it was true that he sold the dispute land to the first respondent and established to the satisfaction of the trial tribunal that he had bought the dispute plot from one Angelina Kanabuka, now the deceased. The said Angelina Kanabuka is the appellant's mother.

The trial tribunal was further satisfied that at the time Angelina Kanabuka sold the dispute land to the second respondent on 27/6/2002, the appellant was only six years old and could not therefore rebut the sale of the dispute land by his mother.

The trial tribunal was further satisfied that the late Angelina's elder children one Veronica Ezekiel Miharugwa and Alex together with some of her relatives including her brothers namely Benedicto Thadeo and Levocatus Zembi participated in the sale.

The trial tribunal thus found that the second respondent properly obtained title over the dispute land and properly passed it to the first respondent. The appellant was thus held a trespasser on land thereto.

Aggrieved with the said trial tribunal's judgment the appellant purporting to be an administrator of his deceased mother's estate but in his individual capacity as stood sued, preferred this appeal with a total number of eight grounds of appeal some of which were abandoned during the hearing, some argued together hence the memorandum of Appeal condensed into only four major complaints that;

i. *The 1st respondent who instituted the suit at the trial tribunal and prosecuted it had no locus standi nor cause of action.*
ii. *In the absence of administrator of the estate of the late Angelina Kanabuka who is alleged to have sold the dispute land in 2002 and partly paid, her relatives; DW4- Benedictor Deusi, DW5-Levocatus Zenobi and her daughter DW7-Veronica Ezekiel could not finalize the sale by receiving the outstanding balance from the second respondent.*

iii. *The trial tribunal erred in law to allow the 1st respondent's claims despite of the smell of falsehood and uncertainties of the purported sale agreements between the respondents.*

iv. *The trial was a nullity for having violated section 23 (2) (3) and 24 of Act No. 2 of 2002.*

At the hearing of this appeal the appellant was present in person and had the service of Mr. Ignatius Kagashe learned advocate while on the other hand the 1st and 2nd respondent were present in person with the services of Mr. Sadiki Aliki and Mr. Silvester Damas Sogomba learned advocates respectively.

Mr. Kagashe learned advocate started to address the first complaint supra in that according to the sale agreements between the respondents exhibit P1 the buyer/purchaser from the second respondent was one Said Mkubwa Jumanne the son of the 1st respondent. In the circumstances, he argued; the 1st respondent had no locus standi nor cause of action to sue on the said contract or else the named purchaser was a necessary party in the suit. He cited the case of ***Tweddle versus Atkinson (1861) EA 762*** to the effect that under the doctrine of privity to contract rights and obligations are imposed on the parties to the contract alone and not on the stranger.

On their party the two learned advocates for the respondents, Mr. Sadiki Aliki and Silvester Damas Sogomba bitterly contested this ground. They argued that it is in evidence through exhibit P1 that at first the 1st respondent bought the dispute plot in his own name from the second respondent but paid the purchase price by instalment. When came to pay the second and last instalment he decided to endorse the name of his son Said Mkubwa Jumanne as he intended to

give that land to him. In the circumstances he had interest in the dispute land and had the requisite locus standi to sue for it.

I am of the settled view that this first ground of appeal is without any substance as rightly submitted by the two learned advocates for the respondents.

This is due to the fact that it is undisputed fact from the second respondent that he who purchased the dispute land from him was the 1st respondent. Their initial sale agreement exhibit P1 is also descriptive to that effect. It read;

> *"Mimi Lusaka Kiloloma nimepokea shs 300,000/= (Laki tatu tu) kutoka kwa nd. Idirisa Kasoma* ***kwa niaba ya ndugu Jumanne Rusaba ambaye nimemuuzia*** *nyumba iliyopo mtaa wa Kasulu road Jirani ya nd. Kunkumoba kwa thamani ya shs 1,100,000/= (milioni moja na laki moja tu). Hivyo bado shs 800,000/= (laki nane tu)".*

From that exhibit it is quite clear that the buyer was the 1st respondent. So, his introduction of the name of his son into the second and last installment as per their agreement did not vitiate his tittle over the land particularly when he stated clearly in evidence that he did so as he had intended to give that land to his said son. The second piece of written paper for the second instalment was thus not an independent sale to the said Said Mkubwa Jumanne but merely to finalize the earlier on sale to the 1st Respondent. Even if I had to agree that it was an independent sale, I would have ruled out that the same was ***invalid ab initio*** because the 1st Respondent having in the first place sold the dispute land to the 2nd Respondent, had no title to pass the same land to a third party namely Said Mkubwa Jumanne. The title from the

second Respondent did thus pass to the first Respondent as against the alleged Said Mkubwa Jumanne. Even though Said Mkubwa Jumanne has not claimed any title over the dispute plot.

Having said all these, I find the first ground of complaint vexatious and frivolous to have been brought baselessly without any useful intent due to the fact that it does not in any manner resolve the dispute between the parties. It is like the appellant purporting to be an advocate of the said Said Mkubwa Jumanne wants to establish before this court that he who possesses the dispute plot is Said Mkubwa Jumanne and not the first respondent. In any manner resolving that ground would in no way benefit the Appellant. I accordingly dismiss it.

Mr. Kagashe then argued the second set of complaint in that, after the death of Angelina Kanabuka in 2004 who is alleged to have sold the dispute land to the 2nd respondent in 2002 and received an advance payment, there was no administrator of her estate until on 2019 when the appellant was appointed for the purpose. In that respect the two brothers of the deceased DW4 and DW5 supra along with her daughter DW7 supra could not take the balance of the sale price. That, their receiving of the balance sale price was therefore invalid.

He cited the case of ***Ndamo Kulwa versus Salum Mihangwa, Land Appeal No. 30 of 2011 (HC)*** to the effect that a mere appointment by family members does not confer title to act on behalf of the deceased until one is appointed by the Court.

Mr. Sadiki Aliki and Silvester Damas Sogomba learned advocates for the respondents on their party argued that payment of the balance to the deceased's relative and her own children was not an issue as by that time the land in question was no longer the property of the

deceased as she had already sold it to the 2nd respondent who in turn sold the same to the 1st respondent. They argued that the act of the deceased's relatives to receive the last instalment was just their acknowledgment of the fact that the deceased had already sold the said land and had received the first instalment.

Mr. Sadiki Aliki leaned advocate further argued that by that time the appellant was too minor to be involved as he was only six years old. He cited the case of ***Issa Juma Ntaliligwa versus Mrisho Kalima, Land Appeal No. 21 of 2014*** in which the High Court of Tanzania at Tabora refused the evidence of one Kivumbi Mrisho which was referring to issues raised in the year 1970 when he was a minor of only 9 years old.

He finally argued that the Appellant was thus too minor at the time and could not therefore challenge what was done at the time and that his only existing right is to claim his share from those who received the payment balance.

I agree fully with the submission of the leaned advocates for the respondents that indeed the late Angelina sold the dispute land herself.

Her death before the last payment of the sale price, did not vitiate the sale as her existing right was only to recover the balance as per agreed terms in the sale contract. Such balance could be taken by her administrator of the estate for distribution to the heirs.

But as evidenced on record since her death, her relatives and children did not opt to petition for letters of administration so that to step into the shoes of the deceased and claim the balance. Instead, they decided

to receive the balance as a family. By then the appellant was too minor to be involved as rightly argued by Mr. Sadiki Aliki learned advocate.

DW4 Benedicto Deusi the brother of the deceased testified during trial at page 17 of the proceedings that as the deceased's family they agreed to take the balance from the 2nd respondent;

> *"As a family of Angelina Kanabuka, we went to the 2nd respondent paid us the remaining monies of 440,000/=. It was 14/4/2004. We were with the first born of the deceased and we as brothers of the deceased...As a family we agreed".*

The same evidence was repeated by another brother of the deceased DW5 and even more so confirmed by the elder daughter of the deceased DW7 who received the share and according to her evidence she was elder of the other deceased's children. She therefore acted on behalf of them including the appellant who was too minor as herein stated.

In the circumstances, the appellant could in no way rebut the transactions because; **first,** he was too minor as revealed herein, **second,** he was also not an administrator of the estate and therefore, fall into the same footing with DW4, DW5 and DW7 at the time.

He had even no locus standi to defend the suit on the purported title of being administrator of the estate in question because up to the time the suit was instituted against him as a trespasser on the 9th July, 2018 he was yet appointed as an administrator as such.

He only rushed into the Primary Court in 2019 to petition for letters of administration just to frustrate the suit against him. His appointment

however, did not change his status in the suit up to this time in which he stands on his individual capacity, sued as a trespasser.

His purported appointment as administrator of the estate confer to him only locus to sue his uncles DW4, and DW5 and his elder Sister DW7 and even the second respondent just to recover the stated balance of the sale agreement of the dispute land by his deceased mother. It does not in any manner empower him to cancel or rebut the sale agreement between his mother and the 2nd respondent. I therefore, dismiss this ground as well.

In the third set of the ground of complaint, the learned advocate for the appellant submitted in an attempt to challenge the sale agreement by the deceased Angelina Kanabuka to the 2nd respondent. He submitted that the purported sale agreement exhibit D1 as between the deceased and the 2nd Respondent had a smell of falsehood and uncertainties and therefore, could have not been relied to rule out that the deceased did actually sale the dispute plot. The alleged smell of falsehood and uncertainties is that the witnesses of both parties contradicted on who was exactly the husband of the deceased at the time of the alleged sale and who is said to have witnessed his wife (the deceased Angelina) selling the dispute land to the 2nd respondent.

Mr. Kagashe pointed out that while the 2nd respondent during cross examination at page 12 of the proceeding stated that the husband of the deceased was one **Ally** and he is the one who reduced the sale agreement in writing, but other defence witnesses such as DW4, DW6 and DW7 stated that the husband of the deceased was one **Selestine.** Mr. Kagashe was of the view that since the real husband of the late Angelina was Selestine and not Ally, and since the witness purported

that the deceased's husband participated in the sale, and since there is no evidence that Selestine was the one involved, the alleged sale was doubtful with uncertainties hence could not be relied upon to conclude that the deceased really sold the dispute land as stated herein.

Mr. Sadiki Aliki learned advocate contested this ground arguing that it is immaterial whether the husband of the deceased was Ally or Selestine and that what matters for the purpose of this suit is whether there is sufficient evidence that the deceased sold the dispute plot. He argued that there is such evidence. Mr. Sogomba joined hands with his fellow counsel.

I agree with the learned advocates for the respondents that this ground is without any substance and ought to be dismissed as I hereby do.

The reason behind my rejection of the ground is that, according to the evidence on record and my personal inquiry to the appellant himself, the deceased had several men who lived with her as husband and wife. There was Ezekiel Miharungwa, Selestine, and Ally. Each lived with her at his time.

But when it comes to who among them was with the diseased at the time of sale and reduced in writing the sale agreement, the record is very clear that it was Ally. That is seen in the evidence of DW1 now the second respondent at page 10 of the trial Court's proceedings.

"As she did not know how to write, so her husband one Ally wrote the sale agreement for her".

This witness clarified why he referred Ally as a husband of the deceased during cross examination at page 12 that at the time Ally was living with the deceased as husband and wife.

Not only that but also DW3 Joka Hemedi who was an eye witness to the stated sale stated at page 16 of the proceedings that at that time it was Ally who was the husband of the deceased Angelina;

"Ally was the husband of Angelina....Ally also died later but I do not remember the year".

Therefore, it is really immaterial, and shamefully so to speak; to count the number of men the deceased lived with whether as husbands or concubines. All what matters as rightly argued by advocate Sadiki Aliki is whether there was sufficient evidence that the deceased sold the dispute land to the 2nd respondent.

On this I again agree with the learned advocates for the respondents that there is abundant evidence to the effect;

i. There is exhibit D1 the written sale agreement signed by the deceased by a thumb print and no one has categorically disputed such signature.

ii. There is oral evidence of the 2nd respondent himself on how he purchased the dispute plot and the manner in which he paid the purchased price. His oral evidence is equally admissible to prove the sale and purchase as it was decided by the Court of Appeal in the case of ***Loitare Medukenya V. Anna Navaya, Civil appeal no. 7 of 1998*** that oral evidence is equally measured and given weight;

"We think with due respect the learned Judge in the High Court grossly misdirected herself by holding in effect that only documentary evidence can support a sale. Oral evidence is also admissible".

iii. There is the evidence of an eye witness to the said sale agreement. This is DW3 Joka Hemedi who under affirmation testified at page 16 of the proceedings that he was a witness to the sale agreement and signed it on the same date 27/6/2002. He explained further how the deceased signed the sale agreement by a thumb print as she did not know how to read and write. He further testified that it was Ally who wrote the sale agreement and by that time he was the husband of the deceased but he is also not living (dead).

The evidence of Joka Hemedi is an oral direct evidence which is again admissible in terms of section 62 of the Evidence Act, Cap. 6 R.E 2002 and or R.E 2019 which provides that, oral evidence must be direct and if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. DW3 saw the transaction, participated in it by putting his signature as a witness and so does, he touched the sale agreement during that time and observed it.

I had time in a number of cases to use the guidance of the Court of Appeal that every witness is entitled to credence and have his testimony accepted unless there is good and cogent reasons for not believing such witness as it was decided by the Court of Appeal of Tanzania in the case of ***Goodluck Kayando versus Republic (2006) TLR 363.*** That principle although it was established in a Criminal case, I applied it in various Civil cases such as ***Yassin Said***

@ Selemba versus Rumaco Agricultural Marketing Cooperative Society, consolidated DC Civil Appeal No. 1 & 3 of 2020 (High Court at Kigoma), Super Magalla Investiment and General Supply versus Tanzania Red cross Society (TRCS), High Court Civil Case No. 6 of 2019 at Kigoma, and ***Ulimwengu Rashid t/a Ujiji Mark Foundation versus Kigoma/Ujiji Municipal Council, Land case No. 13 of 2016,*** among many others.

In the instant matter I have no reason to disbelieve the evidence of DW3 who seems to be an independent witness with no any interest to serve.

iv. There is again the evidence of DW4 and DW5 the brothers of the deceased who confirmed that their deceased sister sold the dispute land to the 2nd respondent and that she took only part of the payments and they themselves together with the deceased's elder children took the remaining balance after the death of their sister.

I therefore, dismiss the third set of the ground of complaint by the appellant for having been brought without any substance.

Mr. Ignatius Kagashe learned advocate in the last ground of complaint tried to challenge the propriety of the proceedings of the trial Court.

At first, he wanted to twist with the trial Court's record that on the 15/1/2019 when the evidence of the first witness was taken, there was no assessors in attendance and therefore violation of the mandatory provisions of section 23 (2) & (3) together with section 24 of the land disputes courts Act. He forcefully argued that the proceedings thereof were a nullity.

As I noted that it were the same advocates in this appeal except Mr. Sogomba who represented the parties at the trial, I asked them to state the true status of the coram on the complained date as to whether the assessors were in attendance or not, and if not why did they let the proceedings go on illegalities while they were officers of the Court.

They anonymously agreed that in actual fact, the assessors were there only that the Court clerk in filling the Coram omitted to put their names on the Stamp Coram.

More important, the Appellant himself stated before me that the same assessors who heard the evidence of the first witness for the prosecution case were the same who heard the whole case throughout up to the closure of the defence case.

Having settled that there was a presence of assessors throughout the trial, Mr. Kagashe switched on the other aspect attacking the manner in which their respective opinions were taken.

Before discussing the alleged defect in the taking of the opinion of assessors, let me say why I decided to reflect in this judgment the issue of whether the assessors were present on the date of first hearing despite the fact that the parties settled before me that they were there.

It has been a tendency of some litigants, advocates so to speak; to try misleading the Court by taking advantage of some mere commissions and human errors like indicating the presence of assessors on the Coram to frustrate the substantive justice despite of being sure that, what they stands for didn't actually happen.

In this matter Mr. Kagashe a highly respected advocate in the Region and perhaps country-wide, the intelligent one, possessor of good knowledge of the law, who always appeared to be a honest lawyer, tried to kick back his role as an officer of the Court and struggled to frustrate the substantive rights of the parties on a technical base taking advantage of a mere omission by the Court clerk and or chairman to endorse properly the Coram of the day. So, he was arguing on the none presence of assessors merely because the Coram did not reflect them but was in fact aware that the assessors were actually present and never changed throughout.

He only felt Shameful after his client (the appellant) had decided to state the true status of the Coram of that day.

With this highlight, I appeal and call upon all advocates and other Attorneys to be honest both to the Court and to their clients. They should not raise false claims/grounds which is contrary to the real intention of the law for dispute resolutions. They should stand by the true status of the records despite of some mere commissions and or errors that might have been occasioned due to human errors. They should thus not use human errors as an advantage because they have been adjudged losers.

In the case of ***Kabasa Investment Company Limited and 3 others versus World Vision Tanzania, Misc. Civil Application No. 52 of 2016*** which cited the English case of ***Gale versus Superdrug plea (1996) 3 All ER 468*** at page 276 it was held that administration of justice is a human activity and accordingly cannot be immune from errors, and when a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right, even if that

would cause a delay and expenses provided that it can be done without injustice to the other party.

Likewise, Court Clerk, Personal Secretaries, Judges, Magistrates and all other Judicial officers in the Course of their daily duties in the administration of justice as human being, they are not immune from errors.

Those errors provided that they did not cause any injustice to either party should not be used as an advantage to rip-off the substantive right dully determined. Let me rest this issue as such.

Now back to Mr. Kagashe's contention on the manner the assessors gave their opinion he argued that the opinions were not reflected in the proceedings and the same were not read to the parties. He cited the case of ***Fatuma Idd & 29 others versus M/S Lusungu High School, Land Appeal No. 1 of 2020*** (high Court at Kigoma), and ***Ameir Mbaraka and another versus Edgar Kahwili, Civil Appeal No. 154 of 2015 (CAT)*** to the effect that the opinion of assessors must be reflected on record and a mere recognition of it by the trial chairman in the judgment is not enough. To him the term "Record" means "Proceedings". Therefore, the proceedings of the trial must reflect the actual opinion of the assessors.

On their party learned advocates for the respondents argued that unlike in the cited cases by the appellant's advocate in which the assessors opinion was no where to be seen on record, in this case the assessors gave their respective opinions in writing and the same is on record in compliance to regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003. To them

the term "Record" is more than the "Proceedings" as it entails all filed documents and exhibits.

I agree with the respondents' advocates because there is no dispute that the assessors gave their opinion in writing and the same is on record.

Mr. Kagashe argued that "record' means **"proceedings"** and not **"a file"** while the respondents' advocates avers that everything in the case file including summonses and filed documents are all said to be "on record" and therefore for their opinion of assessors to be on record not necessarily be in the proceedings. It suffices that the assessors wrote their respective opinion and filed them in Court within the case file.

In the case of Ameir Mbaraka supra, the Court of Appeal observed that there was change of the set of assessors in the course of hearing the suit and at the end their opinion was completely missing but the trial chairman tried to reflect the gist of it in the judgment. The Court of Appeal held that it is wrong to make change of assessors in the course of trial, it is wrong to allow the assessors who did not hear the suit throughout to opine, and it is wrong for not putting the assessors' opinion on record so as to ascertain if the chairman did consider such opinion in preparing the judgment.

In the case of Fatuma Idd supra which I personally presided, I held that;

"The chairmen should abide with the law that requires them to take the opinion in writing and in the presence of the parties in a dully constituted tribunal"

It is from that quotation Mr. Kagashe learned advocate argues that in the instant matter the opinion was not read to the parties as it was taken in their absence.

In that case I did not intend what the learned advocate for the Appellant tries to argue. In fact the law does not dictate that the opinion of assessors must be taken in the presence of the parties and or that it must be read to them. The law is enacted in an optional manner depending the circumstances of each trial. Under Regulation 19 (1) of G.N no. 174 of 2003 supra it is provided that;

*"The tribunal **may,** after receiving evidence and submissions under regulation 14, **pronounce judgment on the spot** or reserve the judgment to be pronounced later"*

I had such provision in mind when decided the case of Fatuma Idd. In my view under the quoted paragraph of regulation 19 supra, the chairman may in his absolute discretion pronounce the judgment on the spot after receiving the last evidence in the trial. Under the circumstances both parties and assessors would be present. Since it is mandatorily that before the judgment is entered assessors must be accorded opportunity to opine and that their opinion be taken in writing and considered, it is when I stated in Fatuma Idd's case that chairmen should take the opinion of assessors in the presence of the parties.

But on the other hand, the chairman may in his absolute discretion adjourn the judgment to be pronounced later. Under this situation, the law only requires that such opinion must be taken in writing as per sub-regulation (2) of regulation 19 supra. Such provision does not dictate that the opinion must be taken in the presence of the parties and be read to them. It thus appears that the chairman may require

assessors to write down their opinion and file them for his consideration at the time he shall be composing the judgment.

In the circumstances of that provision, the chairman is at liberty either to receive the opinion of the assessors orally in a dully constituted tribunal but reduce such opinion in writing as I stated in Fatuma Idd's case, or to require the assessors to write down their respective opinions and present them into the Court record to be considered in the course of writing the judgment.

Therefore, my holding in Fatuma Idd's case supra was just in one of the option available. In the instant case, the later option was opted and it is not bad in law. The assessors wrote their respective opinions and filed them. The trial chairman considered such opinion which was in favour of the Appellant but differed with it on the stated reasons in the judgment which in my view was the right position taken by him/her.

Mr. Kagashe learned advocate faulted the opinion of assessor to remain on papers they wrote by themselves without the chairman copying them into the proceedings for them to be said that they are reflected on court records.

It is my firm view that ***"Court record"*** is a wider term than the term ***"proceedings".*** The ***"proceedings"*** are therefore part of the ***"Court records"*** just like judgment, rulings, orders, documents dully filed like pleadings, written submission, summonses etc.

In the circumstances, the opinion of assessors in the instant matter are sufficiently on Court record and this Court can exactly ascertain what was exactly opined by each assessor as it was held in Ameir Mbaraka's case supra.

It is therefore wrong for the appellant's learned advocate to give a narrow definition to the term ***"Court record"*** limiting it to ***"Court proceedings".***

The opinion of assessors may thus feature into the proceedings of the suit or on record generally through a filed written opinion.

I therefore, find the last ground of appeal to have no any substance as the provisions of section 23 (2) and (3) and 24 of the Land Disputes Courts Act as well as regulation 19 of the Regulations thereof were fully complied. This ground is therefore, dismissed.

In the ultimate, this appeal stands dismissed in its entirety with costs.

Right of further appeal to the Court of Appeal of Tanzania subject to the requirements of the relevant laws is fully explained.

It is so ordered.

THE HIGH COURT OF TANZANIA COURT SEAL

A. Matuma

Judge

26/08/2020

Court: Judgment delivered in the presence of the Appellant in person and the 1st Respondent in person and in the absence of the 2nd Respondent.

Sgd: A. Matuma

Judge

26/08/2020