IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LAND APPEAL No. 10 OF 2020
(Arising from the Decision of the District and Housing Tribunal for Kahama in Land Application No. 103/2018)

NASORO YAHAYA NYONGOLY.....APPELLANT

Versus

SATAYI NTAMBI KAUNGU.....RESPONDENT

JUDGMENT

Date of the last Order: 14th August, 2020
Date of the Judgement: 21st August, 2020

MKWIZU, J.:

The appellant **NASSORO YAHAYA NYONGOLY** is aggrieved by the decision of the District Land and Housing Tribunal for Kahama in Land Application No 103 of 2018, he has preferred the present appeal advancing four grounds as follows:

1. That, the application No. 103 /2018 whose judgment is subject of this Appeal, being the claim for disregard of the agreement/breach of contract; the trial Tribunal had no subject matter jurisdiction to entertain it.

2. That the Tribunal erred in law and in fact in finding and holding that the suit property was sold to the respondent in disregard of appellant's evidence as to the loan.

3. That the trial tribunal erred in law on hold that the respondent purchased the suit property basing on evidence of the respondent who was not credible witness after he denied to have instituted a case claiming money against the appellant in any court of law, contrary to the evidence on record.

4. That according to the evidence on record regarding sale of the suit property, the trial Tribunal erred in law in holding that the ale was intact, contrary to the requirement of governing sale of the of the surveyed land.

5. The Trial tribunal erred in law in ignoring admission of appellant's mobile phone evidence.

Brief facts are that, at the District Land and Housing Tribunal, respondent filed Land application No 103 of 2018 for what he called ***a disregard of the sale agreement of his house situated on Plot***

No. 154 Bloc 'O" (High density) Nyasubi- Kahama Urban Area by the appellant. He thus sought for eviction order against the appellant and a declaration order that he is the owner of the suit premise. Appellant opposed the claim, he submitted that the house was pledged as a collateral in respect of a loan he took from the respondent.

The District Tribunal found for the respondent and ordered the appellant to vacate the disputed premise forthwith and he was permanently restrained from interfering with the respondent's enjoyment of his premise.

Before me the appellant is represented by Mr. Bakari Muheza Advocate, while the respondent appeared in person. The appeal was disposed of by way of written submissions.

Mr. Muheza argued 1st and 5th grounds of appeal separately and combined 2nd, 3rd and 4th grounds. Submitting on the first ground of appeal the appellant's counsel submitted that, the breach of agreement is not among the pillars of jurisdiction vested to the trial Tribunal under section 33 of the Land dispute Court Act. He argued that, respondent should have taken the matter to ordinary court of law and not the

Tribunal. The learned counsel prayed the court to find the trial Tribunal to have no jurisdiction to entertain the matter, nullify the proceedings and the decision thereof.

On the 2nd, 3rd and 4th, counsel for the appellant submitted that, while the Respondent alleged to have purchased the suit property from the appellant, the appellant alleged that, the sale agreement was a security for a loan advanced to him by the respondent. He referred the court to the exhibit R-2 and R-3 showing that the Respondent approached him and requested a loan of Tsh. 4,200,000/= which needed to be paid back on the 11/8/2017.And further that exhibits R-2, R-3 and R-4 are supported by exhibit R-1 which all together indicate that appellant was one among other persons who were indebted by the respondent at the tune of 4,200,000/= during the period of July/August. He said, it is unreasonable for the respondent to purchase a house worthy 42,000,000/= from the appellant while indebted to him 4,200,000/=, he was of the view that, the trial tribunal did not properly evaluate the evidence.

Mr. Muheza contended further that, the sale documents are contradictory, contents of exhibit A-5 contradicts the letter offer (exhibit

A7). He said, while exhibit A7 is of 33 years, exhibit A-5 shows that the sold property is of unexpired term. Another anomaly pointed out is that exhibits A3 and A4 show that the disposition was by way of transfer and not sale. And lastly that, there was no Form No 38 in the transaction allegedly done between the parties. Mr. Muheza argued that all the above proves that the transaction was a genuine transaction. Referring to the records, on the denial made by the respondent that he has never instituted a claim of money against the appellant, the learned counsel invited the court to find the respondent incredible, a liar and therefore unreliable witness under section 164 (1) (c) of the evidence Act.

On the 5th ground of appeal Mr. Muheza faulted the tribunal for refusing to admit the appellant's mobile phone as evidence. He said, the said mobile phone was aimed at providing conversation regarding respondent claiming refund of the money/debt by the appellant and the chairman did not give reasons for denying its admission. Respondent was not invited to say whether he object to the admission of the mobile phone or not, it just refused to admit the same without more.

Finally, Mr. Muheza requested the court to find and hold that no sale of the suit property was done between the parties herein, allow the appeal with costs.

Contesting the appeal, respondent attacked Written Submissions in support of the Appeal alleging that they suffers defect *(an imperfection)* for having no ENDOSEMENT contrary to the mandatory provisions of section 44 (1) of the Advocate Act Cap 341, he cited the case of Ashura **Adbukadri V. The Director of Tilapia Hotel,** Misc. Civil Application No. 2 of 2005 Court of Appeal at Mwanza (unreported).

On ground 1 of the appeal, respondent argued that, the contract between the appellant and the respondent falls within the ambit of section 33 (2) (a) and **section 64 (1) of the Land Act 1999 Cap 113** and therefore the DLHT had power to determine the matter.

On the 2nd, 3rd and 4th grounds of appeal, respondent argued that, trial tribunal was correct in holding that Respondent purchased the suit property as there was a contract for disposition of the right of occupancy. He said, the contract was in writing as required by section

64 (1) (a) of the Land Act Cap 113. He clarified that, appellant failed to show the connection between the loan and the agreement in dispute.

On ground 5 , respondent contended that, Exhibit A-5 which is said to have contradicted the letter of offer (Exhibit A-7) in relation to the term of Occupancy was prepared by the Land Office at Kahama who is responsible authority in issuing the same and therefore had knowledge of the information therein. He finally urged the court to struck out the appeal with costs.

In rejoinder, counsel for the Appellant attacked the respondent's submissions and prayed the court to accept his submissions in chief.

I have consciously considered the grounds of appeal presented, parties' submissions and the records. The main issue for consideration is whether the appeal is meritious or not. I understand that a first appeal is in the form of a re-hearing therefore I will be guided by this principle while determining this appeal.

I will begin with the legal issue raised by the respondent that the written submissions by the appellant were drawn contrary to section 44 (1) of

the Advocates Act, Cap 341, RE 2002. I think this should not detain me. Court of Appeal in **George Humba Vs. James M. Kasuka**, Civil Application No. 1 of 2005, in a similar matter, had time to construe the provisions of Section 44 (1) of the Advocates Act, on whether the pleadings should bear the name of the drawer or not. The Court of Appeal ruled that, it is only unqualified person who is not an advocate who has to provide his or her name revealing the drawer of such pleadings before the Court.

In our case, the written submission under attack were drawn and filed by an advocate. The written submission clearly indicated that they were drawn and filed at Kahama on 8th day of April, 2020 by Counsel for Appellant, BAKARI CHUBWA MUHEZA whose address was specified as BRAVO ATTORNEYS, KARAGWE HOUSE, ROOM No. 6, ISAKA ROAD-KAHAMA URBAN, BOX 28 KAHAMA. Email: braveattorneys@yahoo.com, Mob: 0753 41 90 06, 0714 912 100.The respondent's complaint is therefore without merit.

The first ground of appeal faults the tribunal for venturing into a matter of which it has no jurisdiction to determine. The reason in the appellants

submissions is that the cause of action arose out of contract which is not the domain of the District Land and Housing Tribunal.

It is a common ground that District Land and housing Tribunal's jurisdiction is only restricted on Land disputes. To answer the question ***whether the cause of action between the parties relates to land or contractual, the*** case of **East African Oversees trading Co. vs Tansukh Acharya** (1963) EA '168 is of guidance. In that case, it was held that:

> *"the question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached so as to form part of the it and upon assumption that any express or implied allegation of fact in it are true"*

Similarly, in Exim **Bank (T) Ltd V. Agro Impex (T) & Others**, Land Appeal No 29 of 2008, the court gave an insight on how to determine whether the claim is concerning land or not. It said:-

> *"Two matters have to be looked upon before deciding whether the court is clothed with jurisdiction. One,* ***you look at the pleaded facts that may constitute a cause of action****. Two;* ***you look at the reliefs claimed and see whether the court has power to grant them and whether they correlate with the cause of action****" (bold is mine).*

In our case, paragraph 6 of the application that was before the tribunal disclose what was at issue between the parties. The paragraph reads:

"*6(a) Cause of Action/Brief statements of fact constituting the cause of action.*

(i) *That, the Applicant* ***claims against the Respondent to have disregarded the sale Agreement of his house*** *situated on Plot NO. 154 BLOCK O (HIGH DENSITY) NYASUBI-KAHAMA URBAN AREA. Between him and the Applicant which was signed and confirmation by his WIFE, one HUSNA FRANSISCO on 11th day July, 2017 Whereon he (the Respondent) gave the OFFER OF RIGHT OF OCCUPANCY to the applicant and made application for approval of Disposition under section 39 of the Land Act, 1999 (No. 4 of 1999) whereby the Transfer of right of Occupancy (Under section 62 of Land Act, 1999 (No. 4 of 1999) was established in front of the Resident Magistrate of Kahama to the Land Officer of Kahama of the same day. Whereon, the applicant notified the Respondent as in the contract the Notice to VACATE from such promise/ Land by 11th July 2018 as evidenced by documents in paragraph (b) for Relevant Documents (Annexure" A")*

(ii) That, to the Applicant's astonishment, the Respondent, refrained to vacate from such Premises/ Land on 11th Day of July, 2018 as accorded in the contract on 11th Day of July, 2017.

(iii) That, despite of repeated several demands and intention to sue, the Respondent has refrained and/or neglected to vacate from the premise/Land he had sold to the Applicant by the 11th ***Day of July, 2018 (****Please refer to the document annexed hereto as ANNEXTURE B)*

(iv) That, the applicant has suffered a great mental torture for the Respondent's refusal to vacate from the suit Premise/Land on time. Hence this Application in this Honorable Tribunal becomes inevitable.

(v)That, the cause of action arose in Nyasubi- Kahama on 11th Day of July,2018 Whereon, the Respondent refrained to vacate from the Applicant Premises/Land he (the Applicant) had purchased from the Respondent. Hence this Honourable Tribunal has jurisdiction over the issue. "

I have carefully examined the above paragraph of Land application No 103 of 2018 to see whether the suit before the DLHT qualify to be a land dispute. The respondent's claim related to the sale of the house in dispute and refusal by the appellant to vacate the suit premise.

Respondent, who was the applicant at the tribunal had among other things prayed for eviction order against the respondent and rent payment which spin around the issues of trespass to land. In **Charles Rick Mulaki v. William Jackson Magero**, Civil Appeal No. 69 of 2017 (unreported) it was observed.

> *"In my opinion therefore the expression "matters concerning land" would only cover proceedings for protection of owner ship and or possessory rights in land."*

The respondent's claim was for a possessory interest over the suit premise as defined in the case of **Charles Rick Mulaki V. William Jackson** (supra) which is a pure land matter of which the District Land and housing Tribunal has jurisdiction under section 167 of the Land Act and section 3 (1) of the land Disputes Court Act, Cap 216 R.E 2019.

On the 2nd, 3rd and 4th grounds of appeal, appellant complains that the tribunal wrongly concluded that the house was sold to the respondent in disregards to the appellant's strong evidence that it was pledged to secure a loan between the two. Appellant's counsel submitted that; trial tribunal failed to analyze the evidence properly hence arriving into a wrong decision.

Indeed, the major issue in this case as it was at the trial tribunal is whether appellant did sale the suit property to the respondent. Respondent claimed that on 11/07/2017 he purchased the House from the Appellant located at Nyasubi Plot No. 154 Block O in consideration of Tsh. 42,000,000/=, the appellant's wife signed the contract as well as the consent Form dated 11/07/2017 which were all tendered and admitted as EXH. A-1 and A2 respectively. On the other hand, Appellant testimony at the tribunal was that on 11/8/2017 he entered into a loan

agreement with the respondent to the tune of Tsh. 3000,000/= which were to be paid back on 11/08/2017 plus 1,200,000 interest. To secure the loan, there were conditions, including to surrender a Letter of Offer to the respondent, sign a sale agreement instead of a loan agreement containing ten times the amount subject of the loan, the agreement which would come to an end on the full payment of the loan. Another condition was to have the borrowers' wife sign a consent agreement and a deed of transfer of the suit premise Plot No. 154 Block O Kahama to the respondent. Appellant said, he met all the conditions above.

I have examined the records. Exhibit A1 is a sale agreement executed between the appellant and respondent on 11/7/2017.In that contract, the appellant agreed to sale his house located at Plot No 154 Block O

(High Density), Nyasubi areas at a sale price of 42,000,000/= and it indicates explicitly that respondent did pay the agreed sum of money to the appellant. Both parties signed the contract before Leah Emil Kyomushula Magistrate at Kahama. In further execution of the said contract, appellant handled the respondent a letter of offer of the suit property (Exhibit A7). It is also evident from the records that Appellant's wife, Husna Francisco Kulamba who testified as RW1, signed a consent,

Exhibit A2 and they signed Land form No. 30, 29 and 35 admitted as exhibits A3, A4 and A5 respectively.

Appellant explained that, on the same day, he drew a cheque worth 4,200,00/- to be deposited on 11/8/2017. Unfortunately, the cheque could not be paid as he had no money in the account on the agreed date. From there on, they had been communicating with the respondent who later refused to receive any payment when the appellant wanted to pay. The debt amount kept on increasing. On discussion on why the amount is increasing, the respondent served the appellant with a copy of a counter book showing the process used for loan calculations with respondent's clients. The copy was admitted as exhibit R1 after the notice to produce under sections 67 (1) (a) and 68 of the Evidence Act was duly served and respondent who had in his custody the original copy failed to produce the same.

The dispute culminated into respondent filing a criminal case at Kahama district court on 10/1/2018 under section 332 B (1)(3) and (5) of the Penal code. A copy of the decision was received and admitted as exhibit R2. Page 3, first paragraph of the said exhibit goes thus:

"The accused in his defence said that he is a businessman. On 11/07/2017 he got a tender for supplying electricity at Halotel sites in Mwanza. He had insufficient money for running the project. He asked his friend namely Emmanuel Magema to assist him. His friend had no money. He directed him to the complainant. The two went to the complainant and the accused asked for 3,000,000.The complainant agreed to give him the money on condition that he should surrender the title deed of his house and pay interest of 40 %.Since the he had no lincence for lending money he asked the accused to pretend as if he had sold the house to him as a security for the loan and that after he had refunded the money the complainant would hand over the mortgage to him. He also required him to issue a cheque for the amount.

The accused complied with all conditions..."

The details of the decisions confirm what was testified by the appellant at the trial tribunal. Respondent lost the case.

Apart from filing the above-mentioned criminal case, on 15/2/2018 respondent filed civil matter on the same claim. In this Civil case, whose decision was tendered as exhibit R3, respondent had sued the appellant for, among other things, payment of 4,200,000 as a principle sum,19,600,000 as compensation and general damages and interest at 21% commercial rate. The respondent's own testimony was that

appellant borrowed from him a sum of 4,200,000/- paid through a cheque which was to mature by 11th August, 2017 which could not be paid on presentation as the appellant's account had no money. Appellant conceded to the debt and expressed his readiness to pay. The District Court found for the respondent and ordered appellant to pay a total sum of 4,200,000/. Execution thereof was done via Misc. Land application No. 13 of 2019 through Abajaja court Broker.

Weirdly, while being cross examined by the appellant on the issue whether the house was pledged as security of the loan and not otherwise, respondent at page 18 of the typed proceedings said, I quote:

> *"**I never loaned the respondent** but he once conned me*
>
> *He is supposed to pay my rent*
>
> *If he so wish let him bring evidence showing that I loaned him*
>
> *I sued him as he once conned me.*
>
> ***I used not to issue loan to people,***
>
> *I don't have any person who is indebted to me*
>
> ***It is not true that the respondent took a loan from me."***
> (Bold is mine).

The above evidence is contrary to what was said and supported by the respondent's evidence in exhibits R2 and R3 that is the two decisions of Kahama District Court, criminal case No. 12 of 2018 and Civil case No. 6 of 2018.

What do the above two cases connote? Exhibit R1, R2 and R3 corroborates what was testified by the appellant at the tribunal. The above evidence was not considered at all by the trial tribunal. Trial tribunal grounded its decision on the sale agreement signed by the parties. No consideration was made on the defence evidence including the exhibits mentioned above.

Sincerely, taking into account the general facts on the records, the tribunal was duty bound not only to consider the evidence by parties, but also to make judicial inquiry on the position and status of the parties as regards the proceedings and decisions in Criminal case No 12 of 2018 and Civil case No 6 of 2018. This is so important as would have a direct effect on the legality or otherwise on the matter at hand. This was not done.

Was the tribunal justified in not considering the defence? And what is the consequences of not considering such a vital piece of evidence?

It is a trite law that, failure or rather improper evaluation of the evidence leads to a wrong conclusion resulting into miscarriage of justice. In the same vein, failure to consider defence evidence is fatal and usually vitiates the proceedings. In the case of **Leonard Mwanashoka Vs Republic,** Criminal Appeal No. 226 of 2014 (unreported), the Court of Appeal spelt out useful guidelines on what is to be considered in the evaluation of the evidence, it said:

> *"it is one thing to summarise 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. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis."*

In deriving home its decision, trial tribunal assisted by two assessors had this to say at page 4 and 5 of the typed judgement:

> *"Having went (sic) through the evidence on Record there is no dispute that the Applicant and the Respondent signed sales agreement (Exh.A1) and there is no dispute that the Applicant and*

the Respondent signed Land Form No. 29 (Exh.A4), Land Form No. 30 (Exh.A3), Land Form No. 35 (Exh. A5), and there is also no dispute that the wife of the Respondent (RW-1) consented the dispute premises to be sold (Ref. Exh.A2) as also substantiated by AW-1, AW-2, RW-1; There is no evidence that they aimed at faking the transaction; yet it is cardinal law that parties to the contract are bound by terms and conditions executed by them as stipulated by section 37 (1) of the law of Contract Act, Cap 345 R.E 2002.

From the above finding it is my considered opinion that, the 1st issue is answered in affirmative that the disputed premises Plot No. 154 Block "O" Kahama was sold to the Applicant by the Respondent hence the second issue is very simple that if the premises Plot No. 154 Block "O" Kahama was sold to the Applicant it goes without saying that the lawful owner of it."

It is on records that one of the issues raised by the tribunal before the commencement of the trial was whether the house in Plot No. 154 Block "O" Kahama was sold to the Applicant by the respondent. A lot was said by the parties on this issue, however, as above indicated, the appellant's evidence was disregarded in the evaluation stage leading to unescapably wrong conclusion resulting into miscarriage of justice.This being a civil matter, the trial tribunal was required to have assessed

the probative value, credibility and weight of evidence ***adduced by both parties*** in order to determine whether respondent, original complainant, has proved his case in the balance of probabilities .

Citing with approval the case of **Lutter Symhorian Nelson V. Attorney General and Ibrahim Said Msabaha,** Civil Appeal No 24 of 1999, Court of Appeal in **Hamisi Rajabu Dibagula V. The Republic** (2004) TLR 181 said:

> *"••• A judgment must convey some indication the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In* ***Amirali Ismail v Regina*** *1 T.LR 370, Abernethy, J. made observations on the requirements of judgment, he said:*
>
> ***A good judgment is deer. systematic and straight forward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how."***

As stated above, trial tribunal's decision did not take into consideration the appellant's evidence including the obvious facts brought through exhibits R1, R2 and R3. It, instead, considered the evidence of the respondent that he bought the house and that parties did sign the sale agreement as well as the transfer forms without more.

In **Mkulima Mbagala v. R.,** (CAT) Criminal Appeal No. 267 of 2006 (unreported) Court of appeal held:

> *"For **a judgment of any court of justice to be held to be a reasoned one,** in our respectful opinion, **it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent**. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at. See, for instance, D.R. PANDYA v. R (supra), SHANTILAL M. RUWALA v. R [1957] E.A. li 570 and IDDI SHABAN @ AMSI v. R (supra). It now behooves us to discharge this duty." (Bold is mine).*

The trial tribunal disregarded material issues which would aid him to see whether the respondent's claim has any semblance of merit and make an appropriate finding. The omission led to a total delusion of evidence and violation of the law. It is therefore fatal irregularity that vitiates the proceedings.

Consequently, the appeal is allowed, proceedings and judgement of the trial tribunal in land application No 103 of 2018 are quashed and set aside. The original file is remitted back to the tribunal for trial denoval. The application to be heard afresh immediately, before another Chairman with a new set of assessors. Costs to follow the events.

It is ordered accordingly.

DATED at **Shinyanga** this 21st **day** of **August,** 2020.

E.Y.MKWIZU
JUDGE
21/08/2020

COURT: Right of appeal explained.

E.Y.MKWIZU
JUDGE
21/08/2020