

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 25 OF 2019

(C/F District Land and Housing Tribunal for Moshi at Moshi in Application No. 97 of 2018)

1. JUMA ELIEZA.....1ST APPELLANT

2. HALIFA AGUST2ND APPELLANT

VERSUS

WILFRIDA JOSEPH MWANGA RESPONDENT

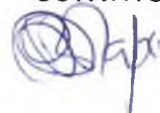
19th August 2020 & 9th OCTOBER 2020

JUDGMENT

MKAPA, J:

This appeal emanates from the District Land and Housing Tribunal for Moshi at Moshi (district tribunal) in **Application No. 97 of 2019** delivered by Hon. T. J. Wagine, chairman of the tribunal on 19th September 2019.

Brief facts which have given rise to this appeal is to the effect that the applicant (Respondent herein) was claiming against the respondents (1st and 2nd appellants herein) over two houses, one residential and the other and one for business/ commercial



purposes (suit properties). The suit properties are situated at Chemka Village, Ngulu Street, Hai district in Kilimanjaro region.

The Respondent is the rightful owner of the suit properties which are matrimonial properties acquired jointly with her husband (1st appellant) since 1997. It was alleged that the 1st appellant without the consent of his wife sold the suit properties to wit residential house to the 2nd appellant and the other commercial house he sold to another person (not a party in this case)

The respondent instituted a suit in the District Land and Housing Tribunal for Moshi at Moshi (district tribunal) claiming for the suit properties. The 1st appellant entered appearances once on 30/08/2018 and on subsequent 2nd and 3rd hearing only the respondent entered appearance while the 1st appellant was absent thus the trial tribunal had to proceed to hear the case ex-parte in the absence of the 1st appellant and judgment was entered in favour of the Respondent by declaring her the rightful owner of the suit properties. Aggrieved, the appellants preferred this appeal on the following grounds;-

1. That the tribunal Chairman erred in law and in fact in depriving the first Respondent (the 1st appellant herein) his right to be heard.



2. That the tribunal chairman erred in admitting;-

- (i) Defective applicant's application which paragraph 6 (a) stated the fact that the suit properties were bought since 1997 while sub paragraph (b) thereof stated the suit properties to have been acquired on 14/11/2011.
- (ii) The letter from the church as exhibit P3 instead of marriage certificate while the date when the marriage was contracted differs with what is stated in the affidavit.
- (iii) A marriage affidavit as exhibit P5- which was not only defective in the attestation clause but also the date when the marriage was contracted is stated as 26/0/2006 while such date does not exist.

3. The tribunal chairman erred in not visiting the area in dispute (locus in quo) in order to ascertain not only the boundaries of the 1st and 2nd appellants but also the value of the properties and also to consider the 2nd framed issue as stated at page 2 of the typed proceedings.

4. The tribunal chairman erred in law in disagreeing with the first assessor's opinion in the course of composing the judgment.

5. The appeal is timeously filed. (sic!)



At the date when this appeal was set for hearing parties consented the same to be disposed of by way of filing written submission. The appellants appeared in person unrepresented while the respondent was represented by Mr. George Raphael learned advocate.

Submitting in support of the appeal the Appellants submitted that, the vendor of the suit properties was one Mramba Bakari. At the tribunal the respondent had sued one Rafael Bakari Mramba. Furthering their argument the appellants challenged the district tribunal for hearing the matter ex-parte while the 1st appellant was not accorded the right to be heard.

It was appellants' contention that the district tribunal erred in law in admitting the application which did not state the boundaries and whether the said suit properties were built of bricks or otherwise. Furthering their contention the appellants submitted that the date of marriage differs with the one which is stated in the affidavit of marriage. It was the appellants' view that the practice has been for the church to issue to a wife and a husband separate certificates of marriage. Thus the hand written letter was fraudulently obtained.

The appellants went on explaining that the jurat of attestation is defective as it lacks the name of the attested officer and the place



where the affidavit was drawn. At the same time the date when the marriage was contracted differs from the date stated in the church's letter. The affidavit mentioned 26/0/2006; while the letter from the church stated 19/04/2020.

The appellants faulted the district tribunal for admitting defective documents with different names. While the affidavit of marriage referred the names of Winifrida Joseph Mwanga as the wife and that of Raphael Bakari Mramba being the husband the sale agreement dated 14/11/2004 is between Mr. Mramba Bakari (the purchaser) and Frida Joseph thus it was the appellant's view that no spouse consent was needed.

The appellants further challenged the tribunal chairman for disagreeing without giving reasons the first 1st assessor's opinion which had opined to the effect that, the 2nd and 3rd Respondents (appellants herein) were lawful purchasers of the suit properties. The appellants contended further that the respondent did sue the wrong party as the first respondent (at the district tribunal) because the vendor of the suit properties was one Mramba Bakari and not Raphael Bakari Mramba.

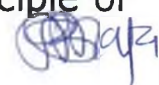
Finally, the appellants prayed for this court to allow the appeal with costs while setting aside the judgment and decree of the



district tribunal Submitting against the appeal, counsel for the respondent Mr. George submitted the fact that at the district tribunal the first respondent was accorded the right to be heard but he opted to file joint written statement of defence with other respondents. Mr. George went on submitting that the respondent (the appellant herein) was present on the hearing date 30/08/2018 when the matter was scheduled for next hearing on 27/11/2018. However on 27/11/2018 the appellant did not enter appearances without any reason.

On the ground that the tribunal chairman disagreed with the 1st assessor's opinion thus prejudiced the appellants, the learned counsel for the respondent refuted the same to the effect that the law requires the tribunal chairman not to be bound by the opinion of the assessor but in the event of disagreement should give reasons. It was Mr. George's argument that the Chairman gave reasons for disagreeing with the first assessor.

Mr. George finally prayed for the appeal to be dismissed with costs. Having carefully considered both parties' submissions the question for consideration is whether or not the appeal is meritorious. To begin with the 1st ground of appeal as to whether the 1st appellant was accorded the right to be heard, I am alive to the principle of



Natural Justice as elaborated in the decision in the case of **Abbas Sherally and Another Vs. Abdul Fazalboy Civil Application** No. 33 of 2002 (unreported) in which the Court held that:-

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

Applying the above legal position to the instant appeal, my perusal of records of typed proceedings has revealed the fact that on 30/07/2018 the 1st Respondent (the 1st appellant herein) together with other respondents did appear before Hon tribunal chairman T. J. Wagine and the case was adjourning to another date for hearing but for reasons best known to himself he did not enter appearances. Thus it is plain clear that the 1st appellant herein was accorded the right to be heard. Therefore this ground of appeal is meritless and is hereby dismissed.

Turning to the 2nd ground whether the district tribunal erred in admitting the defective application and the letter from the church,

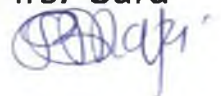


this ground of appeal should not detain me as I am in agreement with the counsel for the respondent the fact that, this argument on defective documents should have been raised at the trial tribunal's hearing for the honourable chairman to make his ruling. This ground of appeal is also meritless and I proceed to dismiss it.

As to the fourth ground whether the honourable tribunal chairman erred in law by disagreeing with the 1st assessor's opinion, the law is settled to the effect that assessors are required to give opinion before the chairman of the tribunal composes the judgment. However, the chairman of the tribunal is not bound by the opinion of the assessors and in the event he differs with the opinion of the assessor he has to give reasons for disagreement. Section 24 of the Courts (Land Dispute Settlement) Act No. 2 of 2002 is categorical on the fact as hereunder;-

"In reaching the decision the chairman shall take into account the opinion of assessors but shall not be bound by it, except that the chairman shall in the judgment give reason differing with such opinion"

It is on record at page 4 of the judgment, the tribunal chairman did give reasons why he did differ with the first assessor by agreeing with the opinion of the other assessor (Mrs. Sara



Lukindo) by stating that ("Mrs Sara Lukindo) was very right when she said;-

"na kwa vile wanunuzi hawakufanya utafiti wa kutosheleza mauziano hayo ni batili"

From the excerpt above, I am satisfied the fact that the opinion which was given by the other assessor Mrs Sarah Lukindo is what made the tribunal chairman to disagree with the opinion of the 1st assessor hence the suit properties were not matrimonial assets.

In the circumstances, I found no ground to fault the decision of the district tribunal. I therefore uphold the decision of the District Land and Housing Tribunal in **Application No. 97 of 2018**. Consequently, I dismiss the Appeal with costs.

Dated and Delivered at Moshi this 9th day of October, 2020.




S.B. MKAPA
JUDGE
09/10/2020