**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE DISTRICT REGISTRY]**

**AT ARUSHA**

**LAND APPEAL NO. 17 OF 2019**

*(C/F District Land and Housing Tribunal of Arusha, Land Application No. 59 of 2011)*

**ELIBARIKI JACOB.....APPELLANT**

**Versus**

**BABU LIBILIBI.....1ST RESPONDENT**

**MARTIN WARAE ANNEY.....2ND RESPONDENT**

**JUDGMENT**

***29/07/2020 & 26/10/2020***

**MZUNA, J.:**

Elibariki Jacob (appellant herein) sued Babu Libilibi and Martin Warae Anney (hereafter the 1st & 2nd respondents respectively) before the District Land and Housing Tribunal of Arusha (hereafter the trial Tribunal) for possession of a plot of land measuring half an acre located at Oloirien Village in Arumeru District. The claim by the appellant is that he obtained the suit land from his father in 1982. On the other hand, the first respondent said he sold the suit land to the second respondent for Tshs five (5) million after acquiring it from his father Babu Libibi @ David Libibi in 1994. It came to his possession from his grand father who passed away in 1979.

In his assessment the learned Chairman ruled out the appellant's evidence who testified to be 30 years old by 2016, and held that he was apparently not yet born by the year 1982 on the date of the alleged grant of the suit plot by his father. To the contrary, he believed the respondents' evidence based on the sale agreement executed in 2007 between 1st respondent (vendor) and the 2nd respondent (purchaser). The claim was dismissed with costs, prompting this appeal by the appellant.

The appellant preferred five grounds of appeal to challenge that decision. They range from failure to consider the testimony of AW3 (ground 1); Failure to observe mandatory procedures whenever there is a visit to the locus in quo (ground 2); Failure to consider the appellant's evidence instead relied on the sale agreement (ground 3): Failure to properly evaluate the evidence (ground 4); And failure to read the assessor's opinion (ground 5).

By order of the court, hearing was conducted by written submissions. Mr. Severin Lawena, learned counsel appeared for the appellant whereas Mr. Nelson Merinyo, also learned counsel, advocated for the respondents.

***The main issue for determination in this appeal is who as between the appellant and respondents is the lawful owner of the suit land?***

Arguing the appeal, the learned counsel for the appellant opted to abandon ground No. 4 which deals with the evaluation of the evidence. I propose to deal with this appeal in the order of submissions by the learned counsel for the appellant.

The question relevant for the first and 3rd grounds of appeal is, could the sale agreement between the 1st respondent and 2nd respondent legally pass title?

In the first and third ground of appeal, the learned counsel for the appellant faulted the trial Tribunal's judgment on the ground that the witness of the appellant one Losiyeku Memirieki (AW 3) stated that the sale agreement (exhibit D1) between the respondents was never signed by him since he knew the suit land does not belong to the 1st respondent who sold the same to the 2nd respondent. He is of the opinion that it was wrong to base the judgment on the sale agreement as it was illegal.

In the reply submissions, the learned counsel for the respondents submitted that failure to sign the sale agreement by AW3 does not in any way invalidate the sale agreement (exhibit D1) as other witnesses signed it including the seller and purchaser.

The issue before me is whether the purported sale (exhibit D1) could pass title? In the appellant's view, it could not because first one of the

witnesses to the sale agreement AW3 Losiyeku Memirieki never signed it. The learned counsel for the respondents says, that is a minor defect because other witnesses including the seller and purchaser as well as the cell leader were present and did sign. That customary title if it is passed by a will under section 18 (1) of the Village Land Act, Cap 114 RE 2002 (Cap 114) those who witnessed the will ought to have been summoned (citing GN No. 279 of 1963, Cap 358). That there cannot be bequeath while the testator is still alive. This court was invited to draw an adverse inference against the appellant for such failure to call his father citing the case of **Hemed Saidi v. Mohamed Mbilu** [1984] TLR 113

This court is of the view that the omission by AW3 to sign, as indeed found the trial tribunal, is not fatal. It is worth noting that the sale agreement (exhibit D1) was executed in the presence of (DW4) Lengai Loitha, then as a Public writer, (now an advocate) who confirmed that due diligence was well done. The disputed plot fell to the first respondent father who passed it to his son and therefore, based on the evidence which the trial tribunal assessed the credibility of witnesses, found that the sale was legal. It could have been different if the said exhibit D1 purported that DW1 signed it be it as a witness or as a seller, which is not the case here. The name was included in a typed

paper as a witness for the seller but a place for him to sign was left vacant. I see no reason to defer with that finding.

If I can hasten to add, all what the appellant's counsel said regarding the shortfalls in the sale agreement, parties had time to cross examine witnesses. It is too late to raise it at this hour as it was admitted without any objection. The appellant purport to raise issue of fraud. It was held in the case of **Omary Yusufu vs Rahma Ahmed Abdulkadr** [1987] TLR 169, 175 that;

> *"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."*

It is said the logic and rationality of that rule being *"...the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof.."*

In that case, just like in this case, there was allegation of "criminal conduct" i.e. fraud on the part of the vendor and the purchaser. Unfortunately, it has not passed the required test. The alleged fraud was not proved before the first trial tribunal including the fact that there was only rubber stamp of the Village Executive Officer without his name, the defect

which according to the evidence of DW4, he gave the signed sale agreement to the parties so that they take it to the VEO for final signing. There was explanation which was given and believed. I find no evidence to find otherwise.

Now to the second sub issue, the question for determination relevant for the 2nd and 5th ground of appeal is; Could the failure to record and read the assessor's opinion in the proceedings on what transpired at the *locus in quo* as well as failure to read to the parties the opinion of the assessor constitutes procedural aspect or there was failure of justice? If so, could it disentitle the respondents the award?

In the second ground of appeal, the appellant challenges the said judgment for failure to record and read notes to the parties or advocates arising from the visit to the locus in quo. That, parties and or advocates were never recalled to comment on the facts which transpired at the locus in quo. In that he referred to the case of **Nizar M. H Ladal v. Gulamali Fazal John Mohamed** [1998] TLR 29 to buttress the submissions.

In the 5th ground, the appellant's counsel submitted that the trial Tribunal disregarded the opinion of the dissenting assessor. He argued that there is no proof that the said opinion was actually given and kept on record.

He referred to the case of **Edna Adam Kibona v. Absolom Swebe (Sheli),** Civil Appeal No. 286 of 2017, CAT Mbeya (unreported) to bolster his argument.

On failure to comply with the procedure of recording what transpired during the visit to the locus in quo by the trial Tribunal and inform parties, the learned counsel for the respondent argued that the trial Tribunal's decision was never based on such visit. Commenting on the failure to read opinion of the only remaining assessor, the learned counsel said that the cited case of **Edna Adam Kibona v. Absolom Swebe (Sheli),** (supra) was decided *per incurium* because the court did not address itself to the provisions of section 45 of the Land Disputed Courts Act, Cap 216 RE 2002 (Cap 216). It was his view that such omission did not occasion a failure of justice as well stated by the Court of Appeal in the case of **Yakobo Magoiga Gichere v. Penina Yusuf,** Civil Appeal No. 55 of 2017 CAT (unreported). He urged the court to do away with the minor irregularities under the refuge of the Overriding Objective contained in the Written Laws (Misc. Amendments) (No.3) Act No. 8 of 2018 and that regard should be on substantive justice.

On the argument that the tribunal never read notes written at the *locus in quo* to the parties, I would say that it was not the main reason which

formed the basis of the decision. The cited case of **Edna Adam Kibona v. Absolom Swebe (Sheli),** (supra) in my view is also distinguishable as well submitted by the learned counsel for the respondents. I say so mindful of the fact that this court cannot fault the decision of the trial tribunal on "any error, omission or irregularity in the proceedings" unless it has "in fact occasioned a failure of justice" under section 45 of Cap 216. I find none. Above all there is "no degree of prejudice" which the appellant has suffered while he was represented throughout by the learned counsel; See the case of **Charles Bode vs. The Republic,** Cr. Appeal No. 46 of 2016, CAT at Dar es Salaam, (unreported).

It is true the learned Chairman recorded the opinion of the only assessor in the judgment and gave reasons for deferring with her. It is a detailed one. One of the reasons being that in awarding the appellant she based her opinion on long occupation by the appellant for 20 years. This however was ruled out by the trial Chairperson because the period was calculated from the time when the appellant was not yet born in 1982, and therefore never comprehended the facts. I see no reason to defer with the trial Chairperson as material facts supported his findings. The allegation that the evidence of the appellant was not considered is unfounded.

Lastly, on the main issue as to who is the rightful owner of the suit land? The counsel for the respondents submitted that if the suit land was bequeathed to the appellant's father there would be proof of a will under which the transfer was done. That the appellant's father Jacob Sailevu was present and pointed by Babu Libilibi when he testified in court but was not summoned. That there cannot be a bequeath of the suit land while the testator is still alive.

As a matter of fact, the appellant failed to call his father. I am aware that proof of any matter does not depend on the number of witnesses under section 143 of the Tanzania Evidence Act, Cap 6 RE 2002. Nevertheless, since his possession was bases on bequeath from someone who is still alive, this court has to draw an inference adverse to the appellant that if he had called him could have given evidence adverse to him on the averment that he inherited the suit land from him. It was held in the case of **Hemed Saidi v. Mohamed Mbilu** (supra), that:-

> *"Where, for undisclosed reasons, a party fails to call material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."*

The allegation that section 18 (1) (h) of Cap 114, on customary land that it is "inheritable and transmissible by will" would apply if the said father of the appellant is dead, that is not the case and therefore inapplicable. The necessity of calling the appellant's father is that he is still alive.

It was therefore vital to call his father due to the nature of this case. Secondly, at the time of the alleged bequeath in 1982, the appellant who was born in 1986 could not have possessed the suit land in 1982 before he was born. To the contrary, the first respondent summoned his father Babu Libilibi (DW1) who confirmed that Elibariki's father is still alive.

Having considered the appellant's evidence along with that of the respondent, I find that the appellant failed to prove title to the suit land albeit on the balance of probabilities. The respondents' occupation and sale, cannot be faulted.

Consequently, the appeal stands dismissed with costs.

**M. G. MZUNA,**

**JUDGE.**

**26. 10. 2020**