IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA

LAND APPEAL NO. 11 OF 2020

(Originating from Land Application No. 15 of 2018 at the District Land and Housing Tribunal for Karatu at Karatu)

TSAFU BAHA AKONAAY..... APPELLANT

Versus

VERONA MAHO HOTAY..... RESPONDENT

JUDGEMENT

14th September & October 9, 2020

Masara, J

Tsafu Baha Akonaay, the Appellant herein, is appealing against the judgment of the District Land and Housing Tribunal for Karatu (the Tribunal) which decided in favour of Verona Maho Hotay, the Respondent herein. The Respondent was the Applicant at the Tribunal where she sued the Appellant for trespass into a piece of land measuring 20x30 metres. After hearing evidence from both parties, the Tribunal was satisfied that the Appellant was a trespasser into the piece of land belonging to the Respondent.

At the trial, it was the Respondent's evidence that she bought the piece of land from one Baha Daati, the Appellant's husband (or co-parent) and his wife Tluway Baha in 2015. The sale agreement was reduced into writing in 2016. That in 2017, the Appellant trespassed into the said land, culminating to the dispute that was filed at the Tribunal. Baha Daati and

Tluway Baha testified for the Respondent and confirmed that the disputed piece of land was sold to the Respondent by themselves.

The Appellant, on the other hand, testified that she was the owner of the suitland and that the same was given to her by her husband, Baha Daati, following a case between them at Karatu Primary Court. She stated that the suit land was part of the one acre given to her to assist in covering costs of education for their children. The Appellant further stated that she was surprised to be arrested on allegation of trespass despite of having used the said piece of land for a while after it was handed to her.

The Tribunal visited the locus in quo which led it to conclude that the suit land did not form part of the land given to the Appellant pursuant to the Primary Court decision. The Tribunal Chairman and the Assessors were unanimous that the Respondent had proved ownership of the suit land and thus adjudged the Appellant to be a trespasser to the suit land. The Appellant was dissatisfied. She has preferred this appeal on the following grounds reproduced verbatim:

a) *That, the Respondent's case before the trial District Land and Housing Tribunal has not been proved to the required standard;*
b) *That, the honourable Chairperson of the District Land and Housing Tribunal erred in law and facts in adjudging that the land sold (sic) to the Respondent is quite different with the area given to the Appellant; and*
c) *That, the judgment and proceedings of the trial District Land and Housing Tribunal is bad in law in contravening clear provisions of*

Regulation 19(1) and (2) of the Land Disputes Courts (District Land and Housing Tribunals) Regulations, 2002.

She thus asked this Court to set aside the decision of the Tribunal and declare her the owner of the suit land instead. The Respondent filed a reply to the petition of Appeal whereby she strongly disputed all the grounds of appeal. She asked that the appeal be dismissed and that the decision of the Tribunal be upheld with costs.

Both parties appeared before the Court in person, unrepresented. They did not have anything to add to what they had filed as grounds of appeal and reply thereof respectively. They asked the Court to revisit the trial Tribunal's records and make a decision. I have considered the petition of appeal and the reply thereof plus the trial court judgment and proceedings. The main issue in this appeal is whether the Tribunal's decision should be nullified on the grounds submitted.

I will deal with the third ground of appeal before turning to the first and second grounds of appeal which are interrelated. Regulation 19 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 impose a duty on a chairperson of the Tribunal to require every assessor present at the conclusion of the trial of the suit to give his or her opinion in writing before making his final judgement on the matter. The said Regulations 19 (1) and (2) provide that:

" (1) The Tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgement on the spot or reserve the judgement to be pronounced later;

(2) Notwithstanding sub-regulation (1) the chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili"

The gist of the third ground of appeal is that the requirements of the above Regulation were not complied with. Unfortunately, the Appellant did not amplify this point in her submissions. The Court of Appeal of Tanzania in the case of ***Edina Adam Kibona Vs. Absalom Swebe (Sheli),*** Civil Appeal No. 286 of 2017 (unreported) had the opportunity to digest the above cited provisions. With respect to Regulation 19(2), the Court of Appeal had this to say:

> *"We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require everyone of them to give his opinion in writing. It may be in Kiswahili.* ***That opinion must be in the record and must be read to the parties before the judgment is composed****." (emphasis added)*

I have revisited the record of the Tribunal and find this complaint to be untrue. Pages 23 and 24 of the typed proceedings show that the Tribunal Chairman did schedule a date for receiving the opinion of assessors and that the opinions were delivered by the two assessors (P. Mushi and J. Akonaay) on 21/1/2020 in the presence of both parties. The record further shows that assessors' written opinions in Kiswahili language are in the Tribunal file. This ground is therefore devoid of merits and is dismissed accordingly.

Turning to the first and second grounds of appeal, the Appellant faults the decision of the Tribunal in that the Respondent did not prove her ownership of the suit land to the required standard and that the Tribunal was wrong to decide that the suit land was not part of the land *"sold to the Respondent"*. I believe the Appellant meant that the Tribunal erred to decide that the land sold to the Respondent herein is different from the land "given" to the Appellant herein. I say so because there was no evidence to suggest that the Appellant bought the suit land, but that she was given land by her husband for the education of the children.

I have taken time to review the evidence given at the trial, the proceedings thereof and the judgment of the Tribunal. From the record, the Tribunal acknowledged that there was a Primary Court decision in Case No. 40 of 2001 which resulted in the Appellant getting a piece of land from Baha Daati. A copy of that decision is in the original Tribunal file. Also included is an attachment evidence that was done by the Ward Executive Officer of Endamarariek Ward dated 11/04/2003. The size of land handed over to the Appellant was said to be about two acres (183 metres X 56 Metres). When the Tribunal visited the locus in quo, it did not take measurements of the suit land vis a vis the land allegedly given to the Appellant. Furthermore, the Tribunal only heard evidence from the same witnesses who had testified at the trial. The Tribunal also drew the sketch plan of the suit land and concluded that the Appellant had in fact trespassed to the Respondent's land.

The Court of Appeal had the opportunity of outlining the procedure on visiting the *locus in quo* in the case of ***Nizar M. H. Ladak Vs. Gulamali Fazal JanMohamed*** [1980] TLR 29 where it stated:

> *"When a visit to a **locus in quo** is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, with such witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of a road is a matter in issue, have the room or road **measured in the presence of the parties, and notes made thereof. When the court reassembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated..."*** (Emphasis added).

This position was reaffirmed by the Court of Appeal in ***Avith Thadeus Massawe Vs. Isdory Assenga***, Civil Appeal No. 7 of 2017 (unreported). I am aware that the law gives powers to Tribunals to regulate their own procedures and they are not bound by technicalities in their endeavours. However, that latitude is not a waiver and does not entail jeopardising the rights of any party. It only extends to relaxing procedural hiccups that would hinder the attainment of a just decision. From the decisions cited above, although the proceedings of the *locus in quo* were form part of the records of the trial Tribunal, they should have contained actual demarcations and size of the piece of land allotted to each of the parties herein.

The question to ponder is whether failure to take measurements and have actual demarcations of the suit land vis a vis the land given to the

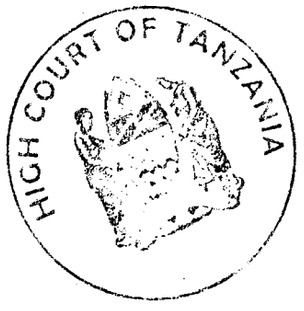
Appellant occasioned a failure of justice. In my considered opinion it did not. There was no dispute that the Respondent bought the suit land from Baha Daati, the Appellant's husband (or co-parent) and his wife Tluway Baha in 2015. These witnesses corroborated the Respondent's evidence. Baha Daati confirmed to the Tribunal that the piece of land sold to the Respondent was not part of the land given to the Appellant following the decision of the Primary Court in civil case No. 40 of 2001. The Respondent did not support her evidence with any witness other than her daughter (SU2) whose evidence cannot be said to have corroborated that of the Appellant. It was expected that the Appellant should have summoned persons who witnessed the handover of the land in 2003, or neighbours. Therefore, even without a visit to the locus in quo, the Respondent's evidence appeared to have been sufficient to prove her ownership over the suit land.

Consequently, it is the finding of this Court that the Respondent proved on the balance of probabilities that the suit land was hers and that she had bought the same from the Appellant's husband and co-wife. The Appellant's evidence over her ownership of the suit land was week; thus, the Tribunal was justified in deciding against her. The first and second grounds of appeal are also without merits.

In the upshot, this Appeal fails in its entirety. It is dismissed accordingly. The decision of the Tribunal declaring the Respondent the owner of the suit land measuring 20 metres by 30 metres is upheld. Considering the

factors surrounding this matter, I direct that each party bears their own costs.

Order accordingly.



Y.B. Masara

JUDGE

October 9, 2020