THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPEAL NO. 15 OF 2018

(Arising from Land Appeal No. 49 of 2017 District Land and Housing Tribunal for Kyela and Original Land Dispute No. 26 of 2017 Katumbasogwe Ward Tribunal)

ALFRED MWALWIBA.....APPELLANT

VERSUS

WILLIAM MWAKYELU.....RESPONDENT

JUDGMENT

Date of last order: *31/01/2020*
Date of Judgment: *17/03/2020*

NDUNGURU, J.

This is the second appeal being preferred by the appellant. The appellant, one Alfred Mwalwiba has been aggrieved with the decision of the District Land and Housing Tribunal of Kyela in Land Appeal No. 49 of 2017, hence lodged this appeal. The matter started at Katumbasogwe Ward Tribunal in Land Dispute No. 36 of 2017. The appellant

successfully sued the respondent claiming ownership of the disputed land and he was finally declared a lawful owner of the disputed land.

The respondent was dissatisfied with the decision of the trial tribunal, appealed to the District Land and Housing Tribunal of Kyela in Land Appeal No. 49 of 2017 as result the appellate tribunal overturned the decision of the trial tribunal on the ground that the appellant was time barred to redeem the clan land sold 11 years ago.

Being aggrieved with the findings and decision of the appellate tribunal knock the door of this Court challenged the decision of the said appellate tribunal. The appellant has brought six grounds of appeal in the petition of appeal presented:

1. That, the trial tribunal was erred in law and fact when decided this matter in favour of the respondent before it was time barred in law.
2. That, the appellate tribunal was erred in law and fact when it determine this matter in favour of the respondent despite of discovering that, the appellant was having no locus stand in respect of the suit land.
3. That, the appellate was erred in law and fact when it based on sale agreement of the respondent which was defective and not admissible in law.

4. That, the appellate tribunal was erred in law and fact when it decided in favour of the respondent despite of discovering that, the village council of Mpunguti ought to be joined as necessary party in this matter.
5. That, the appellate tribunal was erred in law and fact when it based on weightless evidence of the respondent compared on the credible evidence addressed by the appellant.
6. That, the appellate tribunal was erred in law and fact when it failed to evaluate the evidence produced by the parties before the Ward Tribunal.

When the appeal was called on for hearing, the appellant appeared in person without legal representation whereas Mr. Anthony Mbogo learned advocate for the respondent. The Court was ordered the parties to dispose the appeal by the way of the written submission in order to save the interest of the both parties.

In support of his appeal, the appellant submitted that, he was not time barred because the time limitation is 12 years and not 11 years. He added that when counting from 2006 when the land was sold to the respondent up to 2017 when the appellant filed a suit before the trial tribunal it is only 11 years pass. He cited the case of **Dima Dominic**

Poro vs. Inyani Godfrey and Another, Civil Appeal No. 17 of 2016, High Court of Uganda (unreported) to support his submission.

On the second ground of appeal, the appellant contended that he has locus stand. He added that the issue of locus stand is an issue of law hence it is supposed to be challenged by raising a preliminary objection in the lower Court.

Regarding the third ground of appeal, the appellant submitted that, the appellate tribunal erred in law and fact when it decided in favour of the respondent despite discovering that the village council of Mpunguti ought to be joined as a necessary party in this matter hence the appellate tribunal was wrong to declare the respondent to be lawful owner of the disputed land.

On the fourth ground of appeal, the appellant argued that the appellate tribunal to rely on weightless evidence of the respondent compared to the credible evidence adduced by the appellant.

Coming to the fifth and sixth ground of appeal, the appellant submitted that the evidence of the appellant carried more weight than the evidence adduced by the respondent. He went on to submit that the appellate tribunal fails to see the balance of weight between the

appellant and respondent. In conclusion, the appellant prays for the Court that the appeal be allowed.

In rebuttal of the first ground of appeal, the learned counsel for the respondent contended that the appellant was time barred because the suit land was sold in 1991 then no family or himself either used the land or claimed interest on it until 2015.

Responding the second ground of appeal, Mr. Mbogo submitted that they agreed with the appellant's submission that he had no locus stand on the matter at hand. He cited the case of **Roza Mwanjege vs. Haidari Mwaipaja**, Land Appeal No. 8 of 2017, High Court at Mbeya (unreported) to cement his argument.

Coming to the third ground of appeal, Mr. Mbogo submitted that the one who claim must know who is to be claimed and before opening case he must have made a search overthe owner of it hence, the appellate tribunal was right deciding the appeal in favour of the respondent.

Regarding fifth and sixth ground of appeal, the learned counsel for the respondent replied that, it is averred by the appellant that the suit land was given to Jent Lwiba by his father; however this was not proved by any piece of evidence from the appellant. Finally, he prayed this

Court to dismiss the appeal with costs and declare the respondent to be lawful owner of the suit land.

Having carefully gone through the records of the both lower tribunals and written submission made by the parties.

At the outset At the outset, I wish to restate that, composition of the appellate tribunal and the role of assessors is the creature of the law. Section 23 (1) of the Land Disputes Courts Act (Cap 216 R.E. 2002) provides as follows:

> "(1) *The District Land and Housing Tribunal established under Section 22* ***shall be composed of one chairman and not less than two assessors.***"

Also Section 34 (1) of the Land Disputes Courts Act (Cap 216 R.E. 2002) provides as follows:

> *"(1) The District Land and Housing Tribunal shall, in hearing an appeal against any decision of the Ward Tribunal sit with not less than two assessors."*

As per the provision cited, it is a mandatory for the District Land and Housing Tribunal in the exercise of its appellate jurisdiction required to seat with not less than two assessors.

Further Section 23 (2) of the same Act provides that:

> "(2) *The District Land and Housing Tribunal* ***shall duly be Constituted when held by a chairman and two***

assessors who shall be required to give out their opinion before the Chairman reaches the judgment."

Therefore, it is the law which gives the assessors mandate to give opinion on the verdict before the chairman composes the decision. In other words it is mandatory for the chairman of the tribunal to consult the assessors before he reaches the judgment.

Moreover the Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003 provides that:

> *"Notwithstanding sub- regulation (1) the chairman shall, before making judgment, require every assessors present at the conclusion of the hearing to give his opinion in writing and the assessors may give his opinion in Kiswahili."*

However, the record of the appellate Tribunal at page 3 of the typed proceedings provides that:

ORDER

- *The appeal to be determined by way of written submissions*
- *Appellant to submit by 02/02/2018*
- *Respondent by 09/2/2018*
- *Mention on 09/02/2018*

Sgd.

T. MUNZERERE

CHAIRMAN

26/01/2018

The record does not reveal if the assessors were given opportunity to give their opinion as required by the law. The record reveals that the parties were ordered to file written submissions as per schedule and mentioned on 09/02/2018 but it is silent as to whether the chairman invited the assessors to give their opinion as required by the law. The record does not indicate on how the assessors were availed with the submission of the parties, further the submission being in English language, it is uncertain on whether the assessors comprehended the submissions to the extent of giving their opinion. What is in the record is their written opinion. It is doubtful as to how and when they found the way in the court record they are to be taken circumspectly.

In my understanding, the same being filed in the absence of the parties therefore it is not easy for the parties to know the nature of the opinion given by the assessors and whether such opinion has been considered by the chairman in his judgment. The same position is well articulated by the Court of Appeal of Tanzania in the case of **Edina Adam Kibona vs. Absolom Swebe (Shell)**, Civil Appeal No. 286 of 2017 (Unreported) and the case of **Tubone Mwambete vs. Mbeya City Council**, Civil Appeal No. 287 of 2017.

Since the proceedings of the appellate tribunal does not show that the tribunal was composed in accordance to the law and the assessors fully participated at the trial, that is an irregularity which is fatal and cannot be cured at this stage. It is therefore not safe to rule out that, justice was done. Under the circumstance, the proceedings and judgment of the appellate tribunal are nullified.

In that event, I find no reason to deal with the grounds of appeal. It is further ordered that the case must be remitted back to the appellate tribunal for trial de novo. The matter be heard by another chairman with a new set of assessors. I make no order as to the costs on account that the irregularity is done by the tribunal chairman the parties have no hand to that effect.

It is so ordered

D. B. NDUNGURU
JUDGE
17/03/2020

Date: 17/03/2020

Coram: D. B. Ndunguru, J

Appellant: Present

Respondent: Present

For the Respondent:

B/C: M. Mihayo

Court: Judgment is delivered in the presence of the appellant and respondent in persons.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
17/03/2020

Right of Appeal explained.