IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 2 OF 2019

(*Arising from the Land Application No. 127 of 2017 before the District Land and Housing Tribunal of Mara at Musoma*)

SASATI MOREMI ..... APPELANT

VERSUS

SAGI NDEGE ..... RESPONDENT

JUDGEMENT

13th and 26th February, 2020

KISANYA, J.;

The Respondent herein sued the appellant (his uncle) in the District Land and Housing Tribunal for Mara at Musoma (hereinafter referred to as "the Tribunal"). He claimed to be lawful owner a piece of land located in Buchanchari Village within Serengeti District in Mara Region. Upon hearing both parties, the respondent was declared lawful owner of the disputed land by the Tribunal. Further, the appellant was ordered to vacate the disputed land.

Dissatisfied, the appellant has appealed to this Court, on the following grounds:

1. *THAT, the Houorable learned Chairman faulted in his finding to decide the case in favour of the Respondent while the evidence on record proved that the appellant is the legal owner of the disputed land.*

2. *THAT, the Honourabe Learned Chairman faulted in his finding for failure to properly evaluate the evidence on record as a result he wrongly decided the case in favour of the Respondent*
3. *THAT, the trial Chairperson wrongly invoked the doctrine of time limitation and adverse possession to decide in favour of the Respondent.*

On the other hand, the respondent has filed a reply to petition of appeal. He objects the appeal on the grounds that, the Tribunal was correct to decide in his favour basing on the evidence submitted before it; the Tribunal's decision was based on evidence on record while that appellant evidence was hearsay; and the Tribunal was right to hold that the application was time barred because he (respondent) had stayed on the disputed land for more than twelve years after acquiring it by adverse passion.

At the hearing of this appeal, the appellant who appeared in person, was also represented by Mr. Cosmas Tuthuru and Mr. Daud Mahemba, learned counsels. The respondent appeared in person, legally unrepresented.

From the outset, Mr. Tuthuru, prayed for leave to amend the petition of appeal to add another ground that "the application heard by the Tribunal was res judicata because it had been determined by Kisaka Ward Tribunal". The learned counsel submitted that, this fact was pleaded in the Written Statement of Defence (WSD) and testified by the appellant (DW1). The respondent did object to the prayer. Having considered that this ground is on point of law and that the same was pleaded before the Tribunal, I granted the request. Further, the Court, *suo motu*, asked the parties to address the

issue whether the opinion of assessors was issued in accordance with the law.

In his submission in chief, Mr. Tuthuru argued that, the Tribunal erred to determine a matter which had been determined by Kisaka Ward Tribunal in Land Application No. 46/2016. The learned counsel submitted that, the settlement agreement recorded by the Ward Tribunal was tendered and admitted as exhibit. Citing the case of **Kalemela vs Muyeba Rwenjege** (1968) No. 80, Mr. Tuthuru argued that consent judgement cannot be changed by another court.

Mr. Mahemba, learned counsel, amplified that, the settlement agreement was reached following mediation conducted by Kisaka Ward Tribunal under section 14 of the Land Courts Dispute Act, 2002. Thus, the respondent was barred from instituting a fresh application on the same matter, as that amounts to abuse of legal process.

On the issue of assessors' opinion, Mr. Mahemba submitted that, opinion of assessors is required to be issued in open court. The learned counsel argued that since the record does not show that the opinion was given or read in open court before delivering judgement, the proceedings before the trial tribunal are null and void. He cited the case of **Sikuzani Said Magambo and Kirioni Richard vs Mohamed Roble**, Civil Appeal No. 197 of 2018, Court of Appeal at Dodoma (unreported) to support his argument. Therefore, the learned counsels for the appellant urged me to nullify the tribunal proceedings and allow the appeal with costs.

In his submission in reply, the respondent conceded to have appeared before Kisaka Ward Tribunal. However, he argued that, he was forced and that he did not agree to share the disputed land with the appellant. The respondent denied to have signed the settlement agreement. He argued further that the Ward Tribunal was not properly constituted and that, aggrieved by its decision, he decided to file the application before the District Land and Housing Tribunal.

On the issue of opinion of assessors, the respondent submitted that the said opinion was not issued or read in open court. However, he was of the view that such omission did not vitiate the proceedings, because assessors were present. He reiterated that the appellant's evidence was hearsay and that he has been using the disputed land since 2002. For the aforesaid reasons, the respondent urged me to uphold the trial tribunal decision because it was a just decision.

Having gone through the records, petition of appeal, reply to petition and submission made by both parties, I find that this appeal can be disposed of by addressing the two issues namely, whether the District Land and Housing Tribunal was properly constituted in determining for application; and whether the matter before the Tribunal was res judicata.

Starting with the issue whether the application before the District Land and Housing Tribal was res judicata, this doctrine applies where the matter being litigated before the court between the same parties has been at issue in another court with competent jurisdiction and finally decided. This is

pursuant to section 9 of the Civil Procedure Code [Cap. 33, R.E. 2002] which provides that:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."*

Pursuant to explanation provided under the above section, competence of a court which disposed of the former suit must be determined irrespective of any provisions as to a right of appeal from the decision of such court. As rightly argued by Mr. Mahemba, section 14 of the Land Disputes Courts Act, 2002 empowers the Ward Tribunal to record the mediation immediately after settlement of a dispute. Further, the word "court" is defined under section 2 the Village Act [Cap. 114, R.E. 2002] and section 167 of the Land Act [Cap. 113, R.E. 2002] to include the Ward Tribunal. Therefore, the Ward Tribunal has mandate to hear and determine land disputes. Appeals arising thereto are filed in the District Land and Housing Tribunal as provided for under section 19 of the Land Disputes Courts Act, 2002.

In the present appeal, the appellant pleaded and testified that the dispute over the land in dispute was resolved by the Kisaka Ward Tribunal on 15/12/2016 and that "the Applicant freely consented and signed to the Kisaka Ward Tribunal Ward directives." In his submission before this Court, the Respondent did not dispute to have appeared before Kisaka Ward

Tribunal. He disputes to have signed the agreement and that the Ward Tribunal was not properly constituted.

It is in evidence and deduced from Annex WILCA-2 to the Written Statement of Defence (also marked as Exhibit D-2) that Kisaka Ward Tribunal recorded the settlement of dispute between the appellant and the respondent on 15/12/2016. Therefore, I am of the considered opinion that the appellant ought to have challenged the said settlement order by filing an appeal under section 19 of the Land Disputes Courts, 2002. For that reason, I hold that that the District Land and Housing had no original jurisdiction to determine this matter because it had been determined by Kisaka Ward Tribunal.

I now move to the second issue whether the District Land and Housing Tribunal was properly constituted. The relevant provision on this matter is section 23 (1) and (2) of the Land Disputes Courts, 2002 which provides that the Tribunal is properly constituted when it is composed by the Chairman and not less than two assessors. The said assessors are required to give out their opinion before Chairman reached the judgement. Further, regulation 19(1) and (2) of the Land Disputes Court Regulations, 2003 makes it clear that, the Chairman is duty bound to require each assessor to give his opinion in writing.

It is now settled that where a tribunal sits with assessors who are required to give opinion, such opinion should be read or given in the presence of the parties. In order to ensure that the law is complied with accordingly, the proceedings should indicate that the said opinion has been read or given in the presence of the parties. This position was emphasized in **Sikuzani Said**

Magambo (supra) cited by the counsel for the appellant. In that case, the Court cited with approval its decision in **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported), that:

> "In view of the **settled position of the law, where the trial has been conducted with the aid of the assessors...they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composed**...since Regulation 19(2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, **such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict**."[Emphasis supplied]

In the case at hand, the proceedings before the District Land and Housing Tribunal do not show whether the assessors were addressed to give their opinion. It is on record that, when the appellant closed the defence case on 9/11/2018, the Chairman ordered that judgement would be delivered on 31/01/2019. Thereafter, judgement was delivered in the presence of the parties and in absence of the assessors. Although their opinion is reflected in the judgement, and written opinion of each assessor filed, it is not known as to when and how the same formed part of the proceedings.

In the light of the above, I find that the opinion of assessors was not given or read in the presence of parties before Chairman reached the judgement thereby contravening the law. Parties were entitled to know how the

assessors opined after hearing the case. This irregularity occasioned failure of justice. It goes to the root of competency of the Tribunal. As rightly argued by the counsel for the appellant, and guided by the decision of the Court of Appeal in **Sikuzani Said Magambo** (Supra), I hold that the said irregularity vitiated the proceedings before the District Land Housing Tribunal for Mara at Musoma, together with judgement and decree arising thereto.

For the aforesaid reasons, I invoke the revisional power entrusted to this Court by section 43 of the Land Disputes Courts Act to quash the judgement, orders and proceedings of the District Land and Housing Tribunal. I order no trial due to issue of res judicata, as decided herein. Considering that one of the issue which has disposed this appeal was raised by the Court, *suo motu* and that the parties are relatives, costs are not awarded.

It is so ordered.

Dated at **MUSOMA** this **26th** day of **February, 2020**.

E. S. Kisanya
JUDGE
26/2/2020

Court: Judgement delivered this **26th** day of **February, 2020** in the presence of Mr. Daud Mahembe, learned counsel for the appellant and in the absence of the respondent.

E. S. Kisanya
JUDGE
26/2/2020