IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND CASE APPEAL NO. 6 OF 2019

(From District Land and Housing Tribunal of Arusha Application No.38 of 2013)

AMANDI MATEI .....1st APPELLANT

ABDULMARIK MUHAWIYA

***(As a Guardian of Farhiya Abdul Marik Muhawiya)*.....2nd APPELLANT**

Versus

ZAINABU MAULID JUMBE

***(The Administratrix of the Estate of the late Romana P. Saiekio)* .....RESPONDENT**

JUDGMENT

21th September & 12th November, 2021

MZUNA, J.:

In this appeal, Amandi Matei and Abdumalik Mahawiya (who is suing as a guardian of Farhiya Abdulmalik Muhawiya) are challenging the judgment entered by the District Land and Housing Tribunal of Arusha (the trial tribunal) which allowed the application which was lodged by Zalnabu Maulid Jumbe (Administratrix of the Estate of the late Romana P. Salekio), the respondent herein.

The dispute centres on ownership of a suit land measuring '28 paces x 18 paces' located at Njia ya Ng'ombe area, Sombetini Ward, Arusha, registered as *CT No. 33902.* The present applicants said that it was lawfully sold to the second appellant from the first appellant whereas the respondent said it was part of the estate of her late mother Romana P. Salekio who had left a will granting her children same. As a matter of fact, the 1st appellant and the late Romana P. Selekio lived as married couples or as the case may be. They rented a living house in Matejoo area in the city of Arusha. The misunderstanding ensured after the death of Roman P. Selekio. The late Romana P. Selekio left behind two issues namely Zainabu Maulid Jumbe who is the respondent herein and her brother Innocent Amandi. In the meantime, there was the 8 rooms house located at *Njia ya Ng'ombe street* in Sombetini suburb area in the city of Arusha. The said house, after the death of the late Romana P. Selekio was sold to Farhiya Abdulmalik Muhawiya whom the second respondent represents in this appeal.

The respondent was not comfortable with such land business as she contended that the house in dispute belonged to the late Romana P. Selekio alone and therefore it was forming part of the deceased's estate. As opposed to that view, the 1st appellant claimed to be the sole owner

of the suit land. He opted to sale it, leading to the institution of the application.

The trial tribunal found that the plot in dispute formed part of the deceased's estate. It found as well that the alleged sale was dubious and proceeded to find that even the transfer and subsequent registration were illegally made. The respondent won. Being aggrieved, the appellants preferred this appeal based on the following grounds:-

1. *That, the trial tribunal erred in law and in fact in declaring that CT No. 33902- land registry which is in the name of the 2nd respondent be registered in the name of the applicant by operation of the law while it has no jurisdiction.*
2. *That, the trial tribunal erred in fact and in law when it concluded the trial with two different sets of assessors.*
3. *That, the trial tribunal erred in fact and in law when it received assessors(sic) opinion while the former trial chairman (sic) had proceeded without assessors.*
4. *That, the trial tribunal erred in law and in fact for expunging the assessors (sic) opinion from the record.*
5. *That, the trial tribunal erred in law and in fact by saying that the property in dispute belongs to the applicant just because the 1st respondent did not shift in the house since 1980.*
6. *That, the trial tribunal erred in law and in fact for not considering issue number two which was among the issues framed by the tribunal.*

7. *That, the trial tribunal erred in law and in fact when said that the 1st respondent and Romana Selekio were girlfriend and or boy friend while there is a marriage certificate.*
8. *That, the trial tribunal erred in law and in fact when said there is no proof of sale of disputed plot while there is a said contract.*

During hearing of this appeal which proceeded by way of written submissions, the appellants jointly submitted for the appeal, unrepresented whereas Leserian Nelson, the learned counsel was engaged by the respondent for preparation of documents only. I propose to deal with this appeal on issues of procedural aspects as well as substantive issues.

The first issue is whether the Chairperson was correct both in law and fact to expunge the record in which the assessors had given their opinion relevant for grounds No. 2,3 and 4.

Arguing for these grounds, the appellants submitted that the fact that the learned Chairperson invited assessors while knowing that the procedure does not require them was a gross violation of law. That, such violation could not be cured by expunging their opinion from the record as the learned trial tribunal did during writing of the judgment. They emphatically believe that, the learned trial tribunal was obliged to disregard all the proceedings and order it to start afresh from where the predecessor chairperson ended.

On her part, the respondent submitted that the trial tribunal was right in expunging the opinion of assessors. That after realising that his predecessor gave an order of continuing without assessors due to their lapse of time in according to Section 23(3) of the Land Disputes Courts Act, Cap 216 RE 2019, had no option than what he did. Also, that the trial tribunal was justifiable to disregard the questions put by the assessors in the proceedings. In so doing, she further said, it was for the ends of justice, more so, that the appellants were not prejudiced thereby as there was no failure of justice which had been occasioned.

The record clearly shows, the Chairperson took over from another Chairperson who had been transferred to Tanga. At page 4 of the typed judgment the trial tribunal is quoted to have written as follows;

> *"It is noteworthy also to state here that on 13th Match 2018 when the matter was called to continue with hearing of evidence of Amandi Mtei, DW1. I mistakenly sat with a different set of assessors who are Mr. Calyst Sirikwa and Ms. Emily Undule and allowed them to put some questions on the witness. From the same mistake I also after conclusion of the hearing asked them to write to me their opinions before I could compose this judgment. They actually wrote to me such opinions and the same are on record.*
>
> *But I think it was not correct in law for the said two other assessors to participate in the hearing of this case and later to give their opinions on the same case. That is so because they never had an opportunity of*

hearing prosecution evidence. Also, it was already on record that hearing would proceed in absence of the assessors pursuant to the said section 23(3) cited supra (sic). With this I will not therefore consider answers given by DW1 in response to questions asked by the said assessors. I will not also consider opinions written to me by the same assessors. Instead, I will, as I hereby do, expunge the same opinions from the record."

Reading from that passage, it is apparent that upon noticing the legal mistake, the trial tribunal chairperson proceeded to disregard the answers by the DW1 upon being asked questions by the said assessors. He also went further to expunge the opinions of assessors from the tribunal's records.

The question is whether it was proper for the trial tribunal chairperson to disregard the DW1 as it was put by the assessors and then expunge their opinions from the court records at the time of composing the judgment. To be more precise, I know no law in our jurisdiction which addresses on this matter. But in my considered reasoning I think the trial magistrate was so justified and the exercise was not fatal for the following reasons:- First, there was no decision which conclusively determined the matter such that he could be *functus officio.* It was held in the case of **Tanzania Telecommunications Co.**

LTD and 3 others vs TRI Telecommunications Tanzania LTD, Civil Revision No. 62 of 2006 (Unreported) that;

> *"In the case before us, we think the order of the Court of 10.3.2004 in Civil Revision No. 112 of 2003 dismissing the application finally disposed of the application for revision of the High Court proceedings. At this, to bring back the same proceedings seeking revision, could, we think, render the Court functus officio".*

I am of a firm view that so long as the trial tribunal chairperson discovered the procedural irregularity before pronouncing the judgment to the parties, he was justified to expunge the opinion and disregard the answers by DW1 grounded on the questions of assessors. It cannot vitiate the proceedings.

I say so because the law says, in case of absence of the assessors, the law gives the following directions as specified under section 23(3) of the Land Disputes Courts Act [CAP 216 RE.2002] which states:

> *"Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence"*

The trial tribunal noted that he was not required to continue with another set of assessors in accordance to section 23(3) of Land Disputes Courts Act at the time of composing the judgment and therefore

proceeded to expunge the opinion of assessors and disregard their questions at the judgment writing stage. It was the correct approach in my view. No injustice which had been occasioned in so doing as neither the appellants nor the respondent did benefit from that move. That said, grounds 2,3 and 4 of the appeal fails. I dismiss it.

This takes me to the second point on validity of the Chairperson to declare the land title CT No. 33902 of no legal effect which is relevant for ground No1 as well as failure to consider issue No. 2 relevant for ground No.6.

The appellants faulted the decision and decree of the trial tribunal that the learned chairperson had no jurisdiction declaring the land title CT No. 33902 of no legal effect. They say, that mandate which is within section 45(1) and (2) of the Land Act, [Cap. 113 R.E 2019] is solely vested to the President. To fortify the argument, they referred this Court to the case of **Sarjit Singh vs Sebastian Christom** [1988] T.L.R 24.

On ground six, the appellants lamented that, it was wrong for the trial tribunal to disregard the framed issue number 2 which was about the validity of the Will of the deceased Romana P. Salekio. That, it was against cardinal principle which requires that any raised issue must be answered. To such argument the appellants cited Order XX rule 5 of the Civil Procedure Code, [Cap. 33 R.E 2019]. Also, they referred this Court to the case of **Leah Nsabi Ludigija vs Chato District Council,** Civil

Appeal No. 03 of 2019 (Unreported) which held that failure to consider material issues in a judgment is not a mere slip.

On the part of the respondent she said that the trial tribunal did not rule that the certificate of occupancy with title No. 33902 has no legal effects and therefore he did not revoke the same but was simply inquiring on the genuineness of the procedure for obtaining it. To fortify her argument, she cited Section 33(1)(a) of the Land Disputes Courts Act, [Cap. 216 R.E 2019] that it includes the power of the trial tribunal to determine the legality of the process of obtaining Right of occupancy as per the Land Act.

On ground 6 it was argued that, it is an afterthought because it would have been argued at the time when it was struck out by the trial tribunal under Order XIV rule 5(2) of the CPC. In the alternative, it was contended that the trial tribunal was justified to struck off that issue of the validity of Will because the Land and Housing tribunal has no jurisdiction over the probate matters. That the jurisdiction is exclusively vested to the Courts.

I now turn to ground number ground 1. I am quite alive that the DLHT has no jurisdiction to declare the title deed null and void. This jurisdiction is conferred upon to the High Court and the Registrar of

Titles by the law. Section 99 of the Land Registration Act, [Cap. R.E 2019] provides as follows;

> *99(1) Subject to any express provisions of this Act, the land register may be rectified pursuant to an order of the High Court or by the Registrar subject to an appeal to the High Court, in any of the following cases-*
>
> *(d) where the High Court or the Registrar is satisfied that any memorial in the land register, has been obtained by fraud;*

Also see the case of **Parin A.A. Jaffer and Another vs. Abdulrasul Ahmed Jaffer and Two others** [1966] T.L.R 110 where the Court held that:

> *"Section 99(1) of Cap. 334 offers a choice of forum for rectification between the High Court and the Registrar of Titles: one can either make a requisition to the Registrar, or to institute a legal action in the High Court"*

I have taken time to read the impugned judgment. The complained order that it declared the exhibit D5 of no legal effect is written at page 13 of the typed proceedings which reads;

> *"The observation made herein above satisfies me to doubt about credibility of Godfrey Fidelis Kimtomari, DW5, (sic) who identified himself as former member of the Ward Development committee of Sombetini ward which permitted for issuance of exhibit D5 to the said Abdumalik Muhawiya and issued to him minutes of its meeting (Exhibit D4) which discussed about that permission. In the circumstance of this*

case the only measure which I can appropriately take which I hereby do ***is declaring exhibit D5 as of no legal effect****". (Emphasis added).*

Upon literally construing the provision of section 99(1)(d) of the Land Registration Act (supra) it very apparent that the learned trial tribunal chairperson used his mandate in *ultra vires.* This ground is hereby sustained and left to stand.

Another ground which this court is tasked to determine is ground 6. The appellants faulted the trial chairperson for not considering issue number two which is about validity of the Will of the deceased Romana P. Selekio. The appellants have quoted the passage by the chairperson at page 11 of the impugned judgment as follows;

> *"I wish I should not consider materials presented before me (supra). In my considered opinion issue number 2 was wrongly introduced. ~~According to my understanding of the law as couched under order(sic)~~ XIV rule 1(1) of the civil procedure code cap 216 R.E 2002(sic) issue (sic) cannot be framed from annexure attached to the pleadings. Rather it should arise from material proposition of facts or law alleged by one party and denied by the other"*

The emphasis was on the clause *"...in my considered opinion issue number 2 was wrongly introduced."*

With due respect to the appellants, the quoted passage of the impugned judgment dealt with issue number two which he found was

not as issue in the meaning of Order XIV rule 1(1) of the Civil Procedure Code, [Cap. 33 R.E 2019]. If the appellants had the impression that it could have been decided in their favour, that need not be necessarily so. This ground is also bound to fail.

Now I revert to the substantive part of the decision relevant for grounds No.5,7 and 8. The question is on ownership. Was there a valid sale? Did the property change hands from the deceased?

On ground seven, the appellants contended that the trial tribunal erred in concluding that the marriage between the 1st respondent and deceased Romana P. Selekio was one of a concubinage life than being legal marriage while there was tendered an exhibit which is a certificate of marriage justifying their union.

Grounds 5 and 8 were jointly argued together. That the 1st appellant managed to produce evidence to justify his ownership over the suit land. They considered the land title (Exhibit D.5). That the 1st appellant legally sold the land to the 2nd appellant in accordance with Exhibit D-2 (the contract of sale). To buttress their argument, they cited the case of **Amina Maulid Ambali and 2 Others vs Ramadhan Juma**, Civil Application No. 173/08 of 2020 (Unreported) where it was

held that in land disputes a party with title will be considered to take precedence. Lastly, they prayed for the appeal to be allowed with costs.

On ground seven, the respondent argued that there is nowhere in the impugned judgment upon which the trial tribunal has concluded to the effect of the relationship of the 1st respondent and the deceased Romana P. Selekio to have that of girlfriend and boyfriend. That the quoted passage by the appellants has been misconceived.

For grounds 5 and 8, the respondent contended that non shifting of the respondent in the suit land since 1980 is not the sole reason the trial tribunal considered to reach to its finding. That it is coupled with other reasons like failure by the 1st appellant to produce written agreement which brought into his possession the suit land, the difficult circumstance to the respondent to secure the sale contract after the death of her mother. Also, that the 1st respondent failed to justifiably prove that the sale agreement was stollen and he reported the matter to police station which the alleged RB was also said by the 1st appellant to have been eaten by the rats. That the law required the 1st appellant to obtain the loss report instead of RB.

Lastly that the evidence of the 1st respondent that he purchased the suit land from Mama Catarina was contradicted by DW4 who

testified that the land in dispute was bought by the 1st appellant from one Maganga Kiambwa. And that Exhibit D2 and D5 were illegally procured. The respondent further submitted that the alleged hearsay evidence by the appellants of AW2 was only to corroborate the evidence of AW1 who testified that the late mother had never shifted into the suit land. That, it was exclusively owned by the deceased Romana and therefore prayed for this Court to dismiss the appeal with costs. The appellants reiterated their submission in chief without much modifications in rejoinder.

My close reading of the record shows, nowhere in the impugned judgment did the learned trial tribunal rule that the 1st appellant and the deceased Romana P. Selekio were not married couples. Instead, it was written at page 7 as hereunder;

> *"There is evidence on record common to both parties showing that before her death the late Romana P. Salekio was living together with DW1 as wife and husband or girlfriend and boyfriend as the case may be, in a rented house at Matejoo".*

This passage literally does not connote that the chairperson ruled that there was no marriage between the late Romana P. Selekio and DW1 (the 1st appellant). It is an independent clause which probes uncertainty. Be it as it may, it cannot be said to have been determined

that they had no legal marriage as argued by the appellants. This ground is also baseless. It is hereby dismissed.

In grounds 5 and 8 which are on ownership, the appellants are submitting that the 1st appellant managed to adduce evidence to the satisfaction of the trial tribunal, which if considered would have been in their favour. They rely on exhibits D2 which is the sale agreement between the 1st appellant and the 2nd appellant and D5 which is the title deed No. 33902.

The trial chairperson ruled that the land was owned by the deceased to the exclusion of all others because of the following evidence on record. That despite the fact that neither party was able to produce the sale agreement as an exhibit to satisfy the Court on whose the land in dispute belongs, still the 1st appellant had a better chance of having the sale agreement than the respondent. The reasons were, the respondent had no overwhelming chance of having it as it was not in her custody but in the possession of the deceased. He also considered the evidence by the 1st respondent that the sale agreement was lost and upon reporting the matter to the police station and issued with the RB which was latter eaten by the rats as a fabricated story. The chairperson went on concluding that had the 1st appellant reported the matter to

police station he would have been issued with the loss report instead of RB.

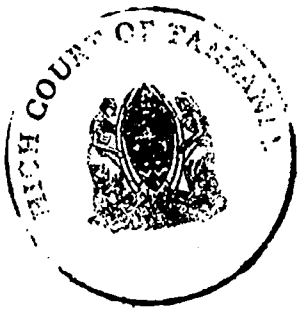
He did not end there, but that it is also unbecoming for the husband with a house living with his wife in a rented one at Matejoo. He also believed the testimony by AW2, the blood related brother with the respondent that in her life time the deceased told him that they do not go and live in the suit land because it was easy for the 1st appellant to claim ownership over the suit land, the facts which were found to be hearsay by the respondents. Also, that it was awkward for the 1st appellant to claim ownership over the suit land while he had been living in the rented house since 1980 leaving the suit land unutilized. The trial chairperson also concluded so considering the variation of evidence between the 1st appellant and the 2nd appellant on whose the suit land belonged before it was bought by the 1st appellant. That the 1st appellant testified the land to have been owned by one Mama Catarina whereas the 2nd appellant said it was bought from Maganga Kiambwa.

My finding is that the sale agreement (Exhibit D2) between the 1st appellant and the 2nd appellant could not in any way be relied upon to prove the fact that the land ownership belonged either to the 1st appellant or second appellant to the exclusion of the deceased Romana

P. Selekio. I say so because, there is no dispute as to whether the 1st appellant sold the suit land to the 2nd appellant, the dispute is whether the land belonged to the Deceased Romana P. Selekio and therefore forms part of her estate or belongs to the 1st appellant.

The available evidence would lead any prudent person to come to the same conclusion as was so decided by the trial tribunal. The available evidence clearly proved that the land belonged to the deceased. The 1st appellant failed to convince the trial tribunal on the ownership of the land in dispute. The argument that once there is a registered land title, a person in whose name it is registered acquires title to land or exclusive ownership, does not in my view cover where fraud had been alleged and proved beyond a normal civil case as the respondent did. This ultimately make grounds 5 and 8 to have no legal basis. They are equally dismissed.

That said and done, the Registrar should make necessary rectification on the ownership of title under consideration under section 99 (1) of the Land Registration Act. Appeal dismissed with costs.



M. G. MZUNA,
JUDGE.
12/11/2021