IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 7 OF 2018

(*From the decision of the District land and Housing Tribunal of Nzega District at Nzega in Land Application No. 32* OF 2016)

MANOTA KASUBI.....APPELLANT

VERSUS

CHARLES MABULA .....RESPONDENT

JUDGMENT

20/10/2020 & 19/2/2021

BAHATI, J:

The appeal arises from the decision and orders of the District Land and Housing Tribunal for Tabora before Waziri M.H, Chairman in Land Application No.32/2016 in which the appellant, Manota Kasubi (who was the respondent in the tribunal) lost the case and was ordered to vacate the land in dispute and ordered to pay costs. The appellant was aggrieved and filed this appeal to challenge the decision of the District Land and Housing Tribunal (DLHT).

To better appreciate what prompted the filing of this appeal, it is important to depict, albeit brief, some background. This appeal traces from the DLHT Tribunal where the applicant Charles Mabula, sued the respondent Manota Kasubi for stopping him to use his land. The applicant owned the piece of land which they cleared before

independence and used for economic activities and resided there for more than 53 years of which they continue to be in control of those areas. Surprisingly on 15th December, 2016 the applicant, Charles Mabula received a stopping order from the Ward Executive Officer of Wela dated 15th December, 2016 stating that he has to stop any activities upon such land because it belongs to the respondent Manota Kasubi of which he has no jurisdiction to make stop order on the land matters or disputes.

At the end of the trial tribunal, the DLHT disbelieved the respondent's story that his parents used to cultivate over the same during Hitlers' time when he had war against the British then before operation vijiji he moved from his village to Dodoma for about 50 years back until 2013 where he returned to find the applicant and held that the disputed land belonged to the applicant, Charles Mabula.

Aggrieved, the appellants filed memorandum of appeal which contained six grounds that can be summarized into the following;

1. *The chairman of the Tribunal erred in law and fact in his judgment by not giving a brief statement of the Appellant and witness evidence adduced during the hearing.*
2. *The chairman of the Tribunal erred in law and fact by denying the appellant the right to call witnesses who know how and when the respondent began to use the disputed land.*

3. *The chairman of the Tribunal erred in law and in deciding without analyzing the evidence of both sides on the balance of probability.*
4. *The chairman of the tribunal erred in fact by declaring a respondent a lawful owner of the disputed land without sufficient evidence on the part of the Respondent that he stayed undisturbed for such a long time.*
5. *The chairman of the Tribunal erred by not considering the appellants' evidence that his parents and relatives were all dead leaving him the only survivor hence a lawful heir of the estate of his parents.*

The judgment of the District Land and Housing Tribunal was delivered on 16/01/2018 hence this appeal is therefore in time.

The appellant prayed that the appeal is allowed with costs by setting aside the judgment and decree of the District Land and Housing Tribunal and any other relief(s) that this court may deem fit and just to grant.

By an order of the court dated 10/09/2020, when the appeal came for hearing, the appeal was disposed of by way of written submissions. Before this court, the appellant was represented by Agnes Mastajabu Majula, learned counsel while Mr.Ndanga, L.M learned counsel for the respondent.

In his submission, the appellant prayed to abandon the 2nd ground of appeal, then proceeded to submit on the remaining grounds of appeal.

On the first ground of appeal, the learned counsel submitted that the learned trial chairman did not evaluate the evidence on record contrary to regulation 20 (1) of the Land Dispute Courts (The District Land and Housing Tribunal Regulations, 2003, which sets out the essential ingredients of a judgment. It is his submission that it is at this stage when the evaluation of the evidence should be done leading to the finding on the issued, a decision of the Tribunal, and reasons for the decision.

He further submitted that on page 3 of the typed copy of the judgment, the District Land and Housing Tribunal, the trial Chairman simply concluded that:-

> *"As a final point, I proceed to declare the applicant as the lawful owner of the suit shamba."*

To bolster his argument he cited the Court of Appeal of Tanzania in the case of **Stanslaus Rugaba Kasusura and the Attorney General Vs. Phares Kabuye [1982] TLR 338 on page 340 in** a similar scenario held that, such type of judgment that;

> *"It is not a judgment because it decided nothing, in so far as material facts are concerned. It is not a judgment that can be*

up-held or up- self. It can only be rejected. It is a travesty of a judgment. We find ourselves in a dilemma. After due consideration, we think that the only course we can adopt is the unusual one of setting aside the judgment of the High Court and ordering re-trial."

In respect of the third and fourth ground of the memorandum of appeal, since are so interrelated he prayed to argue them collectively. He submitted that as already submitted in respect of ground number one of the memorandum of appeal, the record of proceedings by the District Land and Housing Tribunal show clearly that the trial chairman did not analyze the evidence of each witness on record, such failure amount to a wrong decision.

He further submitted that the appellant testified to the effect that upon the death of his parents he remained the only one in the family who inherited all the properties including the disputed shamba. That being the undisputed position, he submitted in support of ground 5 of a memorandum of appeal that this evidence is of paramount importance as it shows that the appellants are the lawful owner of the land in dispute.

In a similar scenario in the case of **Ali Hassan Vs Daima Shabani and Another, Miscellaneous Land Case Appeal No. 20 of 2018 (unreported)** Mruma, J held that, under the customary Declaration (Order of 1963 the deceased's property pass to his/her heirs upon the

demise of the parents. The same position was taken in the case of **Machota Maro Masese Vs. Birage Maro Birage Land Appeal No. 19 of 2020 (unreported)**, if the trial chairman would have properly directed his mind to the facts of the application and evidence adduced he should have held that the land in dispute is the lawful, property of the Appellant.

Additional, the appellant submitted that since this was not one of the grounds in the memorandum of appeal filed by the Appellant, he sought leave of the court to allow in terms of Order XXXIX Rule 2 to argue this point as an additional ground of appeal because it has a great bearing on the case as a whole and since the Respondent will also have the right to reply on this ground. It is in the interest of justice that the appellant be allowed to argue it as an additional ground that;

The application before the District Land and Housing Tribunal was wrongly heard by two chairpersons in contravention of Order XVIII Rule 10 of the Civil Procedure Code, Cap. 33 [R.E 2019].

He submitted that on page 9 of the proceedings of the District Land and Housing Tribunal it appears that on 14/9/2017 the trial Chairman was honorable M. Nyaruka but on page 10 of the proceedings when the application was called for hearing, the presiding Chairman was one Waziri M. H. taking over the conduct of the application from Nyaruka and there are no reasons on record given for that change of trial by the two chairpersons. In the case of Mariam Samburo **(Legal Personal**

Representative of the late Ramadhan Abas) Vs. Masoud Mohamed Joshi and 2 others Court of Appeal of Tanzania Civil Appeal No. 109 of 2016 (Unreported) the Court of Appeal of Tanzania deliberating on the provisions of Order XIII Rule 10 (1) of the decision of the court in the case of **M/S Georgie's Limited Vs. the Honorable Attorney General and Another Civil Appeal No. 29 of 2016 (Unreported)** thus;

> *"The provision cited above imposes upon a successor's judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are several reasons why is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. The credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, the integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised".*

The Court of Appeal of Tanzania in a recent decision of **Yassin Said Selemba Vs. Rumako Agricultural and Marketing Cooperative Society Civil Appeal No. 92 of 2017 (Unreported)** made a definitive position on the point when it held that:-

"On our part, we indeed, noted that no reasons were assigned for the succession between the two Magistrates contrary to Order XVIII Rule 10 of the Civil Procedure Code. In the circumstances, we are left with no other option than to nullify both the trial proceedings and the High Court Proceedings".

The appellant further submitted that from the above case there is no reason on record as to why the application was held by two chairpersons, hence prayed that the proceedings be nullified as directed by the Court of Appeal of Tanzania in the case cited hereinabove.

In reply, the respondent submitted that it is in records in this court, that, the appellant abandoned 2nd ground and remained with 5 grounds.

The counsel for the respondent submitted that upon scrutinizing the written submission by the appellant with a legal eye the main issue for determination in the case brought by the Appellant is whether the judgment is sound in law.

As regards the first ground in which the Appellant alleged about Regulation 20 (1) of GN. NO. 173/2013 and peruse the record on the proceeding of the DLHT indeed the trial DLHT has not violated Regulation. 20 (1) of GN. 174/2013 as claimed by the appellant. The DLHT complied with the law when it adjudicated the said land matters.

Again if you peruse the judgment of DLHT on record it is too apparent that before the final determination of the case, the trial chairman made a brief statement of facts and raised the issues for determination whereas the key issue was spelled out on page 1, 2, and 3 of the copy of the judgment at the DLHT.

In brief, the judgment of the DLHT complied with Reg. 20 (1) of the GN No. 173/2013, further no judgment/order of the DLHT shall be altered on appeal/ revision on account of any error/omission/irregularity unless occasioned a failure of justice. What is required is substantial justice as provided for in section 45 of the Act, Cap. 216 [R. E 2019] which stipulate that,

"No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has occasioned a failure of justice.

In respect of grounds 3 and 4 it has shown that on the question of the record and proceeding of the DLHT, has clearly shown that the DLHT before reaching their final determination of the case, considered the evidence adduced inter- parties at the trial where the appellant failed to prove his case on the standard balance of probability and as

such the appellant at the trial failed to comply with Section 3 (2) (b) of the Law of Evidence Act, Cap. 6 [R.E. 2019) as well as Section 110 (1) (2), Section 112 and Section 113.

As a matter of law and fact during the trial, the appellant typically failed to prove his case and failed to convince the court to hold its decision in his favor. The evidence of the appellant did not collaborate with other evidence adduced by the Respondent during the hearing of the case. Also, on the same ground No. 3 & 4, the evidence of the appellant was incredible compared with the evidence of the respondent which was credible and believable.

On the other side of the coin, the appellant raised the issue of two chairpersons to hear the matter and alleged that it is improper and not applicable it is not an issue to be discussed in this forum because was neither in the record nor in the court pleadings/ the Appellant was supposed to pray to amend his petition of appeal before he argued the same. It is the settled principle of law that the issue of hearing the matters by two chairpersons could be applicable if the parties of the case were denied on it because it would not arise at the trial, this is a new matter which was supposed to be raised by the appellant before Waziri, M. H. when he was taking over the case from Nyaruka either if parties had complained about it. This could have been appealable if the parties of the case complained of it.

"It is now settled law that as a matter of general principle this court will only look into the matters which came up in the lower court and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal" and this principle was articulated by V.L. Makani, J in the case of **Abbas Kikunile vs. Fahim M. Saad, Land Appeal No. 146/2017 HC, at Dar es Salaam (unreported)** on pages 7 & 8.

He prayed to this court to strike out the appeal with costs.

Having heard from both sides, the issue to be determined is whether the grounds adduced herewith have merits.

On the first ground of appeal, having reviewed the record and judgment of the trial court I proceed to determine this appeal. I have considered the contents of ground number one of the appeal together with submissions in support. It is worth noting that the grievance in this appeal hinges on the ground which may be sufficient to dispose of the appeal.

As submitted by the appellant, on the 1st ground is the Court erred in law as the trial chairman did not evaluate the evidence on record contrary to regulation 20 (1) of the Land Dispute Courts there were no findings on the issues, the reason for the decision stated leading to the judgment pronounced by the District Court. The judgment which was delivered had no reasons or justification to reach its conclusion.

Also in support of that, in the case of **Tanga Cement Co. LTD V Christopher Son Co. LTD, 2005 TLR 190** the Court held that,

> *"Order XX , Rule 4 of the Civil Procedure Code, 1966 provides that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision".*

I had an opportunity of going through the Judgement by the District Land and Housing Tribunal. It is evident that the Chairman has only, made a brief statement of facts and framed two issues, and transcribed his findings on each issue without going further giving the reasons for his decision as stipulated by the law. Therefore, I am persuaded to say that, the decision of the District Land and Housing Tribunal on 26/01/2018 does not contain the reasons for the decision and is therefore not a judgment, the trial Tribunal only concluded that *"as a final point, I proceed to declare the applicant as the lawful owner of the suit shamba."*

It is quite clear that every decision by any court has to come up with legal issues and its findings and this requirement is not practical rather stipulated in our laws. The cited provision has been coached in a mandatory way and failure to adhere to it will render the judgment to be declared as a nullity and that being a case since a judgment delivered by the trial tribunal did not contain the stated matters.

Hence I find merit on this ground.

In respect of the third and fourth ground of the memorandum of appeal, on the issue of analyzing the evidence of each witness on record, the appellant submitted that such failure amount to a wrong decision.

Having perused through the judgment of the trial tribunal I noted that, the trial court in its judgment had narrated the evidence on both parties before reaching their final determination of the case, considered the evidence adduced by the parties at the trial where the appellant failed to prove his case on the standard balance and probability as the second witness had nothing to add since he made hearsay and was told by his grandfather.

As a matter of law and fact during the trial, the appellant typically failed to prove his case and failed to convince the court to hold its decision in his favor. I agree with the respondent that, the evidence of the appellant did not collaborate with other evidence adduced by the Respondent during the hearing of the case. This ground has no merit and is not allowed.

Also when I was going through the submission by the appellant I noted that one of the grounds was not in the memorandum of appeal filed by the Appellant. The appellant sought leave of the court to allow in terms of order XXXIX Rule 2 to argue this point as an additional

ground of appeal because it has a great bearing on the case as a whole and since the Respondent will also have the right to reply on this ground.

Before I allow or not allow this ground to be part of the appeal, it is pertinent to know what the law says in this regard;

> *"The law is now settled that as a matter of general principle this court will only look into the matters which came up in the lower, court and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on Appeal"* and this principle was articulated by V.L. Makani, J in the case of **Abbas Kikunile vs. Fahim M. Saad, Land Appeal No. 146/2017 HC, at Dar es Salaam (unreported) on pages 7 & 8.**

Hence this ground has no merit.

I am also in agreement with the respondent submission that it is improper and not applicable, it is not an issue to be discussed in this forum because was neither in the record nor in the court pleadings. The Appellant was supposed to pray to amend his petition of appeal before he argued the same.

It is the settled principle of law that the issue of hearing the matters by two chairpersons could be applicable if the parties of the case were denied on it because it would not arise at the trial, this is a new matter which was supposed to be raised by the appellant before

Waziri, M. H. when he was taking over the case from Nyaruka either if parties had complained about it. This could have been appealable if the parties of the case complained of it.

Therefore from the above mentioned reasons, the appeal is partly allowed and therefore I order trial de novo. No order as to costs.

Order accordingly.

A.A. BAHATI

JUDGE

19/2/2021

Judgment delivered under my hand and seal of the court in the chamber, this 19th day February, 2020 in the presence of Ms. Joyce Nkwabi for the Appellant.

A. A. BAHATI

JUDGE

19/2/2021

The right of appeal is explained.

A. A. BAHATI

JUDGE

19/2/2021