IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA.

LAND APPEAL NO. 41 OF 2019

(Originating from the decision of the District Land and Housing Tribunal for Arusha, in Application No. 18 of 2013)

ELISA SOLA KAAYA ..... 1ST APPELLANT

MICHAEL MBWANA ..... 2ND APPELLANT

ANNA MOSHI ..... 3RD APPELLANT

Versus

ELIZABETH LUMULIKO MENGELE
(ELIZABETH LUMULIKO NENGELE) ..... RESPONDENT

JUDGMENT

10th December, 2020 and 5th March, 2021

Masara, J.

The Appellants, **Elisa Sola Kaaya**, **Michael Mbwana** and **Anna Moshi**, sued Elizabeth Lumuliko Mengele (the Respondent), in a representative capacity on behalf 60 others known as members of **Kisongo Curio Market** *alias* **Kisongo International Curio Market** (the Organization) in the District Land and Housing Tribunal (the Trial Tribunal). The Appellants' claimed against the Respondent a piece of land measuring about 3 acres bearing Certificate of Title No. 19380 located at Kiseraa Village, Kisongo Ward in the District and Region of Arusha. The Organization was an unregistered Non-Government Organization. The trial Tribunal dismissed the application with costs, declaring the Respondent the lawful owner of the suit land. None of the Applicants testified as they did not appear when the case was adjourned for continuation of the Applicants' case. Two witnesses, however, testified on their behalf; namely, PW1, who witnessed the sales agreement between

the Respondent on behalf of their organization and PW2 who was the middle man. Three witnesses testified on the Respondent side. The Tribunal was of the view that the Defendant's case was stronger compared to that of the Applicants. The Appellants were aggrieved by that decision, they have therefore preferred this appeal on the following grounds:

(a) *That, the trial Tribunal erred in law and fact when it pronounced its judgment without the opinion of the assessors/assessor being on record';*
(b) *That, the trial Tribunal erred in law and fact when it delivered its judgment without reading the opinion of the assessors to the parties;*
(c) *That, on the principle of res-subjudice, the trial Tribunal erred in law and fact when it proceeded with the hearing and determination of Land Application No. 18 of 2013, whereas it was to the Tribunal's knowledge that there was pending Land Appeal No. 20 of 2018 in this Court arising from Land Application No. 223 of 2006 of the same Tribunal, under the same chairperson which had been previously consolidated with Land Application No. 18 of 2013 involving the same subject matter and same parties;*
(d) *That, the trial Tribunal erred in law and in fact by holding that the evidence on the Respondent's side was heavier than that of the Appellants which was contradictory and doubtful; and*
(e) *That, the trial Tribunal erred in law and fact when dismissed the Application by holding that the Appellants had failed to prove their claim against the Respondent.*

The Appellants pray that the appeal be allowed in its entirety with costs by nullifying the proceedings and judgment of the trial Tribunal with a direction that Land Application No. 18 of 2013 be heard afresh before another chairperson or, alternatively, the Court reverses the judgment of the trial Tribunal and enter judgment in favour of the Appellants.

Before delving into the merits of the appeal, it is important to recapitulate facts that led to the dispute and consequently to this appeal, albeit briefly. According to the Plaint, the Appellants and 60 others, including the Respondent, were members of an unregistered organization known as **Kisongo Curio Market** *alias* **Kisongo International Curio Market.** The first Appellant was the chairman of the organization and the Respondent was the Secretary of the same. They indulged themselves with various sculptures for the purpose of selling to foreigners who visit the country for tourism purposes. Formerly, they were conducting their businesses at Baracuda Bar, but they were later evicted from conducting their businesses in that area and the bar was demolished by Arusha Municipal Council. In 2004, in their endeavour to secure another place to conduct their businesses, they organized themselves and contributed money so as to buy a piece of land where they could perform their business freely. They made contributions through the Respondent's account No. 6814027379, NMB Bank, Clock Tower.

Later on, the group secured a piece of land measuring about 3 acres located at Kiseraa Village, Kisongo Ward along Babati - Arusha highway. They vested mandate on the Respondent with the obligation of signing the sales agreement as well as effecting payments for the suit land. The sales agreement was executed on 8/6/2004, as exhibited by exhibit P1 at the trial, and the land was bought at a price of Tshs. 7,500,000/=. The 1st, 2nd Appellants and the Respondent signed on behalf of the organization on the one hand and the seller, Meliyo Saitarie, on the other hand. The land was handed to the organization on 20/12/2004 as exhibited in exhibit P2. Unknown to the other members, the Respondent

registered the land in her own names. When this information was revealed to the group, they resolved to sue the Respondent.

As already stated, only two witnesses testified on the Appellant's side. and These were the public writer who drafted and witnessed the sales agreement (PW1) and the broker (PW2). On 14/2/2018 when the two witnesses completed their testimony, the Appellants' counsel prayed to call other witnesses on a different date whereby the case was fixed for hearing on 6/6/2018. On that date, neither the Appellants nor their advocate entered appearance. It was again fixed for hearing on 8/11/2018, but still neither the Appellants nor their advocate entered appearance. On that date, the Respondent's advocate moved the Tribunal to close the Appellant's evidence and fix for defence hearing. The Appellants' evidence was marked closed, and defence hearing was fixed on 27/3/2019. In her defence, the Respondent denied to know the Appellants, but she stated that she knew the organization. She added that she was also working at Baracuda but she has never been a member of the organization. She testified to have purchased the suit land from the same seller for a price of Tshs 7,500,000/= and tendered the sales agreement as exhibit D1. According to the Respondent and her witnesses, the land was registered in her name and she was issued with a letter of offer and Certificate of Occupancy with Title No. 19380.

Submitting on behalf of the Appellants, Mr. Ezra J. Mwaluko, learned advocate, combined the 1st and 2nd grounds of appeal, the 3rd ground of appeal was argued separately while grounds 4 and 5 were combined. On the 1st and 2nd grounds of appeal, Mr. Mwaluko contended that the trial

Tribunal contravened Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 G.N 174 of 2003 (hereinafter "the Regulations) as it delivered judgment without reading opinion of assessor who presided over the case to the parties. He referred that as a fatal irregularity which vitiates the whole proceedings. He cited the decisions of the Court of Appeal in ***Edina Adam Kibona Vs. Absolom Swebe (Sheli)***, Civil Appeal No. 286 of 2017 and ***Ameir Mbarak and Azania Bankcorp Ltd Vs. Edgar Kahwili***, Civil Appeal No. 154 of 2015 (both unreported) to buttress his argument.

Regarding the 3rd ground of appeal, Mr. Mwaluko submitted that as Land Application No. 18 of 2013 and Land Application No. 223 of 2006 which were based on the same subject matter had been consolidated in order for justice to find its ends, it was therefore wrong for the Tribunal to proceed with the hearing of Application No. 18 of 2013 in the absence of the Appellants while it was aware that there was a pending Land Appeal No. 20 of 2018 in this Court arising from the ruling of the Tribunal in Land Application No. 223 of 2006. He maintained that proceedings in Application No. 18 of 2013 were rendered *res-subjudice* as a result of the appeal and therefore the Tribunal had to stay the hearing of that application pending the determination of the appeal.

Substantiating the 4th and 5th grounds of appeal, Mr. Mwaluko averred that it was not justifiable for the Tribunal to decide the way it did since the Appellants had not closed their case as they were still calling more witnesses to testify in support of their claim. He added that the Tribunal ruined the Appellants' opportunity of calling more witnesses when it

hurriedly decided to close the Appellants' case in their absence and proceeded with hearing of Application No. 18 of 2013 while there was a pending appeal.

Contesting the appeal, Mr. Duncan J. Oola, learned advocate for the Respondent, adopted the course taken by his colleague in encountering the grounds of appeal. On the 1st and 2nd grounds of appeal, Mr. Oola submitted that the opinion of the single assessor who was left after the expiration the contract of one of the assessors was taken into consideration. Mr. Oola added that whether the opinion was not read to the parties it is not an issue, as the party who was to complain for failure to read the opinion of the assessors would be the Respondent, since the Appellants defaulted appearance. He maintained that it was impossible for the Tribunal to write the judgment without having the opinion of the assessors and without having them read to the parties. He further strenuously contended that the requirement to read such opinion apply when parties are present in the proceedings. In the instant appeal, since the Appellants were absent, the Tribunal chairperson was not bound to read the opinion of the assessor to the Respondent.

Submitting on the 3rd ground of appeal, Mr Oola substantiated that there was no consolidation of the said applications. In his view, Application No. 18 of 2013 was not *res subjudice* considering that the applicants in Applications No. 18 of 2013 and 223 of 2006 were not the same. He contended further that Application No. 18 of 2013 was not stayed in any manner after the parties in Application No. 223 of 2006 had appealed to this Court.

Submitting on the 4th and 5th grounds of appeal, Mr. Oola expounded that the Appellants slept over their rights as they were given an opportunity to present more witnesses but neither the Appellants nor their advocate entered appearance on the date the case was fixed for hearing. He cited Regulation 11(1) of the Regulations stating that failure of the Applicant to appear on the hearing date the Tribunal is at liberty to dismiss the Application. Thus, as the Appellants defaulted appearance to defend their case without notice, the Tribunal was justified to close their case and proceed with defence hearing as was done. He made reference to the case of ***Wambura Nungu Vs. Thomas Kisheri (Administrator of the Estate of the late Kisheri Nyango)***, Misc. Civil Application No. 170 of 2019 (unreported) to support his position. Mr. Oola therefore prays that the appeal be dismissed with costs.

In a rejoinder submission, Mr. Mwaluko reiterated that a legal position cannot be altered by wishful thinking of a party to the case. He added that the proceedings do not show anywhere that the opinion of the assessors form part of the record. Further, the contention that there was no consolidation order is, in his view, misconceived and misguided since the two were consolidated by Mungure chairman. The learned advocate maintained that the proceedings of the trial Tribunal were a nullity

I have given deserving weight to the trial Tribunal record, the grounds of appeal and the submissions of the learned counsel for the parties. I will determine the appeal in the course adopted by the advocates.

Starting with the 1st and 2nd grounds of appeal, it is Mr. Mwaluko's contention that the Tribunal judgment is a nullity for contravening Regulation 19(2) of the Regulations, since the opinion of the assessor who presided over the case was not read to the parties prior to composing the judgment. Mr. Oola holds a different opinion. To him, it was impossible for the Tribunal to write the judgment without having the opinion of the assessors and without having them read to the parties and, in any event, such requirement applies to a situation where parties are present in the proceedings.

I have revisited the trial Tribunal record; it shows that the defence evidence was heard on 27/3/2019. At the hearing of the defence, the Tribunal Chairperson sat with one assessor, Mrs Irafay, after the contract of another assessor, Mr. Mchome, had expired. The Tribunal chairperson took that move in accordance with section 23(3) of the Land Disputes Courts Act, Cap. 216 [R.E 2002]. Having heard the defence, the Tribunal fixed the matter for judgment on 20/6/2019, but the same was not read. It was again fixed for judgment on 9/8/2019, when it was delivered. The opinion of the assessor, Mrs. Irafay, is found to be written on 28/3/2019. In the proceedings, there is no record to show that the opinion of Mrs. Irafay was read to the Respondent before judgment was composed by the Chairman. If it was read, then the proceedings were not recorded. The opinion is reflected at page 14 of the Tribunal's handwritten judgment, where the Tribunal Chairperson stated:

> *"Mrs Irafay has opined in favour of the Respondent that she is a lawful owner of the suit land as she purchased it before the Applicants and she has Title Deed over the said land. The said assessor therefore proposed that the Applicant's claim be dismissed"*

As pointed out by Mr. Mwaluko, Regulation 19(2) of the Regulations imposes a duty on the Chairman to require every assessor present at the conclusion of the hearing to give his opinion in writing before making his/her judgment. The relevant provision provides:

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

As stated above, the proceedings in the trial Tribunal do not reflect whether the remaining assessor was required to give her opinion and whether the same was read to the parties before composing judgment. This requirement was reaffirmed by the Court of Appeal in various decisions, including ***Edina Adam Kibona Vs. Absoiom Swebe (Sheli)*** (supra), where it was held:

> *"For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However,* ***in vlew of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose****."* (emphasis added)

Likewise, in the case of ***Sikuzani Saidi Magambo and Another Vs. Mohamed Roble***, Civil Appeal No. 197 of 2018 (unreported), it was held:

> *"In the matter at hand, as we have vividly demonstrated above and also alluded to by both counsel for the parties, when the chairperson of the Tribunal closed the defence case, he did not require the assessors to give their opinion as required by the law. It is also on record that, though, the opinion of the assessors were not solicited and reflected in the Tribunal's proceedings, the chairperson*

purported to refer to them in his judgment. It is therefore our considered view that, since the record of the Tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the Tribunal's judgement It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgement was composed."

See also: ***Amelr Mbarak and Azania Bank Corp. Ltd Vs. Edgar Kahwili*** (supra); ***Tubone Mwambeta Vs. Mbeya City Council***, Civil Appeal No. 287 of 2017; and ***Y.S. Chawalla & Co. Ltd Vs. Dr. Abbas Teherali***, Civil Appeal No. 70 of 2017 (both unreported).

The irregularity committed by the trial Tribunal is fatal. It vitiates the entire proceedings and the decision made thereto. In all the authorities cited above, the proceedings were nullified. I go along with those decisions. Since these grounds alone suffice to dispose the appeal, I do not find reasons to delve on the other grounds of appeal.

Consequently, on powers conferred to me by section 43(1)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] I hereby quash and set aside the judgment and proceedings of the trial Tribunal. I remit back the file to the trial Tribunal for a retrial before another Chairman and a new set of assessors. Considering the fact that the ailment was attributed by neither of the parties, each party shall bear their own costs at this stage.

Order accordingly.

THE HIGH COURT OF TANZANIA

Y. B. Masara
JUDGE
5th March, 2021