IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND APPEAL NO. 71 OF 2019

(From the proceedings, Judgment and Decree of the District Land and Housing Tribunal for KARATU at Karatu in Land Application No. 7 of 2016)

YORAM NIIMA.....APPELLANT

VERSUS

ZAKARIA NIIMA.....RESPONDENT

JUDGMENT

09/02/2021 & 15/04/2021

GWAE, J

On the 26th January 2016 the respondent, **Zacharia Niima** duly filed a land dispute in the Karatu District Land and Housing Tribunal (hereinafter "the trial tribunal") against the appellant, **Yoram Niima** claiming that the appellant had trespassed into a piece of land measuring ten (10) acres by erecting a house without his consent. Therefore, he prayed for being declared a rightful owner of the suit land.

In its verdict, the trial tribunal found that the respondent had been in possession of the suit land since 1970s whereas the appellant had been in possession of the same since 1980. Thus, the appellant is trespasser and consequently declared the respondent a lawful owner of the suit land.

Aggrieved by the decision of the trial tribunal dated 8th November 2019, the appellant is now appealing being armed with four grounds of appeal, to wit;

1. That, the chairperson of the trial tribunal erred in law and fact by failing to properly evaluate the evidence on the record as a whole thereby arriving at erroneous decision.
2. That, the chairperson of the trial tribunal erred in law and fact by failing to record what has been transpired during visiting locus in quo
3. That, the chairperson of the trial tribunal erred in law and fact by failing to comply with Regulation 12 of the Land Disputes Courts (District Land and Housing Tribunals) Regulations, 2002 G. N. 174 PUBLISHED ON 27/3/2003
4. That, the chairperson of the trial tribunal erred in law and fact for being imprecisely recorded proceedings of that tribunal

On the 31st December 2020, the parties' advocates namely; Mr. Ipanga and Mr. Daud sought and obtained to leave to dispose of this appeal by way of written submission. However, the appellant added one ground of appeal notably; that, the opinion of the assessors was not well recorded after he obtained a leave of the court.

The parties' written submissions were filed in conformity with the court order. However, in his written submission, the appellant abandoned 3rd ground and 4th ground indicated above. More so, the respondent, while filing his reply to the appellant's written submission, raised a preliminary objection on point of law that

this appeal is incompetent since it is titled "Memorandum of Appeal" instead of "Petition of Appeal". I shall consider the parties' written submissions in the course of composing a ruling or judgment as the case will be.

Stating with respondent's PO, I am alive of the provision of the law under section 38 (1) of the Land Disputes Courts Act, Cap 216 Revised Edition, 2019 (Act) that any appeal originating from District Land and Housing Tribunal when exercising its either appellate or revisional jurisdiction must be filed by way of a petition. Perhaps it is pertinent to quote provision of section 38 (2) of the Act

> "Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought".

In view of the above quoted provision of the law, the respondent's counsel is now asking this court to dismiss the appellant's appeal on the ground that it was not presented by way of petition whereas the appellant's advocate is of the opinion that applicable provision of the law governing an appeal origination from a decision of the District Land and Housing Tribunal are those in conformity with Order XXX of the Civil Procedure Code, Cap 33 Revised Edition, 2019. Having considered the parties arguments and the wording of section 38 (2) of the Act, it is my firm view as correctly submitted by the appellant's advocate that for an appeal originating from District Land and Housing Tribunal when exercising its

original jurisdiction, the provisions applicable are in the CPC (Order xxxix of the CPC and not order xxx of the CPC as wrongly cited and argued by the respondent's advocate) unlike to an appeal for a matter originating from a ward tribunal which must be filed by a way of petition as required under section 38 (2) of the Act.

More so, even if the Act provides to that effect, it my considered view that substantive justice does not demand courts to dismiss cases merely relying on difference on a title of an appeal file in the court between the words "Petition" and "Memorandum of Appeal" as the same does not go to the root of the matter (See section 45 of the Act and principle of overriding objective). My holding is guided by a judicial decision in **Basil Masare v. Petro Michael** (1996) TLR 227 where it was judicially stated;

> "If an appellant used the word `memorandum' instead of `petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent since that would be `making a mountain out of a mouse mound".

Equally, in this appeal the use of memorandum of appeal in the appeal even if the law would have provided that an appeal must be by way of petition yet that alone could not justify this court to dismiss this appeal. Hence this objection is overruled accordingly.

Coming to the additional ground, that, the opinion of the trial tribunal members was not well recorded. I agree with both parties' advocates in their submission that sitting with not less two assessors and subsequent giving of their opinion by assessors before pronouncement of judgment by a District Land and Housing Tribunal's chairperson is procedurally mandatory as required under section 23 (2) of the Act and Regulation 19 (1) and (2) of the Regulations, 2003 (supra) and that in our present case the opinion of members was endeavoredly recorded by the learned chairperson however as rightly argued by the appellant's advocate there was no reason that was recorded by the trial tribunal chairperson in respect of each assessor as the 1st assessor and 2nd assessor are merely found to have opined in favour of the respondent and appellant respectively without assigning any reason of their opinion.

I am not made to hold that mere opining in favour of a certain party in a proceeding amount to giving opinion in the eye of the law. An opinion of the assessor must pertain with a brief reason so that parties in proceeding may be able to know nature of the opinion as provided under Regulation 19 of the Regulations, 2003. I am thus bound to adhere to the decision of the Court of Appeal sitting at Dodoma in **Sikuzani Saidi and another v. Mohamed Roble**, Civil Appeal No. 197 of 2018 (unreported) with its approval of the decision in **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (uneprorted) where it was authoritatively held 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 opinion before the judgment is composed. Since Regulation 19 (2) of the Regulations requires every assessor present at the trial and at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so that 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".

See also a decision of the Court of Appeal in **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 and **The Genaral Manager Kiwengwa Stand Hotel v. Abdallah Said Musa**, Civil Appeal No. 13 of 2012 (unreported).

In our instant case, the learned chairperson of the tribunal did not briefly record any reason for the assessors' opinion. This is legally wrong in law as the parties were required to at least know reasons for their opinion. A judicial officer or quasi-judicial officer or members cannot give a decision or opinion without giving reason as why he or she has arrived at such decision or opinion. This ground is thus found meritorious.

evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries.

Presently, the learned tribunal chairperson merely drew a rough sketch map but he neither took any addition evidence or brief as to the visitation of locus quo taking into account that the dispute land was not well prescribed or defined since the respondent is found testifying that it is about seven (7) acres while in his application it is indicated that the suit land is measuring ten (10) acres. In my view, there were doubts as to size of the land in dispute which needed to be cleared by vising the locus in quo and brief notice by the tribunal to that effect was necessary.

On the strength of the decisions and nature of the evidence on record, I am constrained to find that the complained irregularities are fatal and therefore, capable of vitiating the proceedings and the entire trial conducted by the trial tribunal. Consequently,

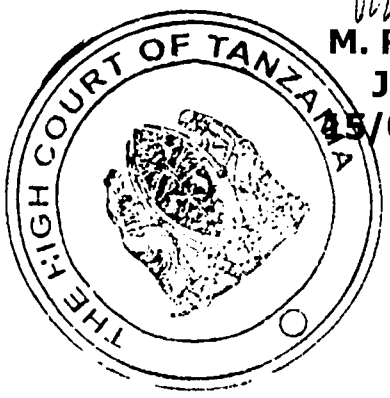
I am not therefore supposed proceed dwelling with other grounds of appeal.

That said and done, the proceedings and decision of the trial tribunal are hereby nullified and set aside. Parties are at liberty to file a fresh a dispute if they so desire. Considering the parties' relationship, sons of the same father but different mothers, I shall not order costs of this appeal

As to the 2nd ground, 'that chairperson of the trial tribunal erred in law and fact by failing to record what has been transpired during visiting locus in quo'. Despite the fact that no law that requires courts and parties together with their advocates if any yet the courts and quasi-judicial bodies used to regularly visit locus quo due to nature of disputes. In our case, the trial tribunal together with the parties did go to the locus quo however nothing like brief notes or additional evidence regarding visitation was not recorded as was judicially stressed in **William Mukasa v. Uganda** (1) ([1964] E.A. at page 700

> "a magistrate is perfectly entitled to a view of a locus in quo so long as the view takes place in the presence of an accused person who is being tried and his advocate, if he has one, and of the prosecution and witnesses, if necessary, and proper notes are taken of observations and demonstrations by witnesses on the spot, and so long as it is appreciated that in law a view of a locus in quo, coupled with ocular demonstrations by witnesses, forms part of the evidence in the case as well as of the trial".

See also the decision in **Sikuzani Saidi and another v. Mohamed Roble** (supra) and **Akosile vs. Adeye** (2011) 17 NWLR (Pt. 1276) p. 263 where a visit to locus in quo in land matters was said to include; location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land and the essence being to enable the Court see objects and places referred to in



M. R. GWAE
JUDGE
15/04/2021