IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 64 OF 2019

(Originates from the District Land and Housing Tribunal of Arusha in Application No. 98 of 2016)

DEO KAZENI MBWAMBO ..... APPELLANT

VERSUS

GODSON KAIZER MOLLEL ..... RESPONDENT

JUDGMENT

ROBERT, J:-

This is an appeal against the Judgment and Decree of the District Land and Housing Tribunal of Arusha in Application No. 98 of 2016 dated 18th March, 2019. The Appellant, Deo Kazeni Mbwambo was the fourth Respondent in the original suit filed by the Respondent herein against five individuals at the District Land and Housing Tribunal of Arusha claiming lawful ownership and vacant possession of a property situated at Unga Limited, Soko Mjinga, Makao Mapya Street, Sokoni Ward in the city of Arusha. After a full trial, the Tribunal gave judgment in favour of the

Respondent herein. Dissatisfied, the Appellant filed this appeal against the decision of the trial Tribunal.

Facts relevant to this appeal indicates that, the Respondent purchased the suit property, a house with seven rooms, on 6th June, 2012 for consideration of TZS 17,500,000/= from one Sekunda Pius Mbwambo who was the administratrix of the estate of her erstwhile husband, the late Kazeni Hamis Mbwambo. The Appellant is the seller's first son and one of the Respondents in the original case.

The sale agreement was put in writing and the seller was required to vacate and handover the house to the buyer after conclusion of the sale. However, the seller and her children, including the Appellant, refused to vacate and handover the house. The Respondent's efforts to obtain ownership of the suit property ended in vain hence he decided to file a suit at the trial tribunal against the seller and her four children.

All Respondents in the original case, including the Appellant, were dully served and they filed written statement of defence to contest the claims filed against them. However, at the hearing of the case only the Appellant defended his case. The case proceeded ex-parte against the rest of the

Respondents as they failed to enter appearance. The Hon. Chairman entered judgment in favour of the Respondent herein and ordered the Respondents in the original case, including the Appellant herein, to vacate the suit property. He further restrained the Respondents from doing anything in the suit property permanently and ordered them to pay general damages at a tune of TZS 5,000,000/=.

Aggrieved, the Appellant filed this appeal armed with six grounds of appeal which reads as follows:

1. *That, the Honourable District Land and Housing Tribunal erred in law and in fact in ordering closure of the defence case in the Appellant's absence despite the fact that the later had already notified the Tribunal of his absence on the day and the reason thereof. Copies of the Judgment and Decree are annexed hereto and marked collectively as "ANNEX DKM - 1". A copy of the said notification letter to the Tribunal is annexed hereto and marked as "ANNEX DKM – 2".*

2. *That, the honourable District Land and Housing Tribunal erred in law and in fact in curtailing the Appellant's right to be heard such that he could not bring forth his witnesses.*

3. *That, the honourable District Land and Housing Tribunal erred in law and in fact in failing to hold that the seller made a sale in which she had sold of the suit property which formed the estate of a deceased person, sold the same based on an illegal contract, one in which she was not the Administratrix of the estate.*

4. *That, the honourable District Land and Housing Tribunal erred in law and in fact in deciding in favour of the Respondent herein because both the Respondent herein and the 1st Respondent at the trial, failed to bring to the attention of the Tribunal that at the time of the sale, the suit property had been under a pledge to M/S Akiba Commercial Bank Plc as collateral for a loan which was still under service so the 1st Respondent at the trial could not lawfully sell the property.*

5. *That, the honourable District Land and Housing Tribunal erred in law and in fact in not holding that the Respondent included in his evidence forged and unauthentic documents.*

6. *That, the honourable District Land and Housing Tribunal erred in law and in fact in deciding in favour of the Respondent despite his failure to prove his case on the balance of probabilities."*

When the matter came up for hearing the Court ordered parties to argue the appeal by way of written submissions as prayed by the Appellant who had no legal representation.

Amplifying his first ground of appeal, the Appellant submitted that when the suit came up for continuation of defence hearing on 17th December, 2018 the trial Tribunal closed the Appellant's case due to the absence of the Appellant despite the fact that he had already written to the Tribunal on 13th December, 2018 to give notice of his absence on the date of hearing and prayed for adjournment of the case. He maintained that, the letter was received, dully stamped and filed. However, the Tribunal noted that the

Appellant was absent without notice and none of his witnesses were present. He argued that the Tribunal's omission from addressing his notice of absence and reasons therein prejudiced his case as it caused his case to be closed before he could bring witnesses to furnish further evidence in support of his case.

Coming to the second ground of appeal, he submitted that by closing the Appellant's case before it could proceed to finalization the Appellant's right to bring forth witnesses to continue his case was curtailed as he had only been heard partly. He submitted that the Appellant's constitutional right to be heard as enshrined in Article 13(6)(a) of the United Republic of Tanzania Constitution, 1977 was violated. He made reference to the case of Mbeya – Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma (2003) TLR 251 to buttress his argument.

Submitting on the third ground of appeal, the Appellant argued that the alleged seller of the suit property sold the property in her personal capacity and not as Administratrix of the Estate of the late Kazeni Hamis Mbwambo. He submitted that the legal principle **Nemo dat quod non habeat** is to the effect that he who does not have a legal title to land cannot pass a good title over the same to another. He argued that, as Administratrix of Estate the

seller had not yet divided the estate of the late Kazeni Hamis Mbwambo and had not distributed the estate to any of the beneficiaries. As such, the property could not belong to her in her personal capacity as she had not yet assigned the suit property to herself as a beneficiary such that she could then sell it in her own personal capacity.

Submitting on the fourth and fifth grounds jointly, he argued that at the time of the alleged sale the suit property was under mortgage and the title document was then in the possession of the bank after being pledged as collateral by the seller for a loan taken by one Nancy Kazeni Mbwambo who was the second Respondent at the trial. He argued that the seller could not transfer a title which she had already transferred to the bank.

Coming to the sixth ground, the Appellant submitted that, the Respondent did not prove his case in the original suit as required under section 110 and 111 of the Law of Evidence Act, 1967. Further to this he argued that the Respondent sued the seller of the suit property in her personal capacity and not as the Administratrix of Estate of the late Kazeni Hamis Mbwambo which means even if the Respondent proved his case to the required standard, which he did not, the proof did not mean anything against the Administratrix of estate of the deceased.

The Respondent started his reply submissions by asking the court to note that the grounds stated in the Appellant's written submissions are completely different from the grounds stated in the Memorandum of appeal and further that, the said submissions contains annextures which is against what he referred to as rules of writing written submissions. He therefore prayed for the annextures to be expunged from the written submissions and referred the court to the case of TUICO at Mbeya Cement Company Ltd vs Mbeya Cement Company Ltd and Another (2005) TLR 41 in support of his argument.

Responding to the first ground of appeal, he argued that the letter referred to by the Appellant and attached to the memorandum of appeal as annex DKM -2 was never in Tribunal records nor disregarded by the Tribunal as alleged by the Appellant. He submitted further that on 15th February, 2019 when the matter was fixed for Judgment the Appellant was present before the Tribunal and he never informed or complained to the Tribunal on the said letter. He argued further that, having gone through the said letter in detail he noted that the letter was not served to the opposite party or his advocate; it doesn't show the name, position and signature of the Tribunal officer who received and stamped the same; it doesn't show the name of

parties or case number; and it was not addressed to the chairman in-charge of the Tribunal or the trial chairman.

Countering the second ground of appeal on the alleged violation of the Appellant's right to be heard, he submitted that the Appellant was absent in the Trial Tribunal on the date of hearing without any notice or representative and none of his witnesses went to the Tribunal as ordered by the Tribunal Tribunal. He referred the court to page 23 paragraphs 1 and 2 of the typed proceedings to support his argument.

Replying to the third ground of appeal that the sale of the suit property was illegal since the Administratrix of estate sold the property in her personal capacity, he argued that the Appellant did not mention the provision of law which requires the sale agreement done by the Administratrix of estate to mention the seller's capacity. He argued further that this issue did not arise in the trial records although the testimony of PW3 at page 16 of the proceedings clearly shows that the seller sold the property as the Administratrix of estate.

Responding to the fourth and fifth grounds of appeal which alleged that the suit property was pledged as collateral for loan and further that the

Respondent used forged and unauthentic documents in his evidence before the trial tribunal he argued that, there is no evidence in the trial proceedings indicating that the suit property was mortgaged or that the documentary evidence used by the Respondent was forged. He maintained that this issue was well addressed at page 20 and 21 of the trial tribunal proceedings.

On the sixth ground he responded that, the Respondent proved his case at the trial tribunal as required by section 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2019. He argued that the Respondent was only required to prove his case within the balance of probabilities which he did. On what constitutes the meaning of balance of probabilities, he referred the court to the case of **BARELIA KARANGIRANGI V. ASTERIA NYALAMBWA, Civil Appeal No. 237 of 2017 (unreported)**.

Based on the reasons stated in his submissions, he prayed for this appeal to be dismissed with costs.

In rejoinder submissions, he argued on the first ground of appeal that his notice of absence was registered with the Tribunal. He stated that he has evidence to establish that his letter was received by the trial tribunal and he

believes that the letter was duly put into the case file and it is still in the court file.

On the third ground he reiterated that since the Sekunda Pius Mwambo sold the suit property in her personal capacity and not as Administratrix of estate, it cannot be said that she passed a legal title or ownership to another person because she had no title to the property unless she used her capacity as Administratrix of Estate.

Submitting on the fourth and fifth grounds, the Appellant argued that had he not been denied his right to be heard by the trial tribunal which refused his notice of absence he would be able to prove fraud and illegality by showing that the purported original documents of title of the suit property tendered as evidence were not the real documents of title because the genuine documents were in the hands of the bank.

Submitting on the sixth ground, he argued that the Respondent as the one who sued was required to prove their case to the required standard. Specifically, he argued that the sale agreement did not mention the Administratrix of estate as the one selling the suit property. He maintained that since the deceased's wife, Sekunda Pius Mbwambo is one mentioned as

the lawful owner of the suit property and the Respondent sued her in her personal capacity on a property belonging to an estate under probate it is inevitable to conclude that the Respondent did not prove his case to the required standard.

On the basis of the stated reasons, he prayed for the appeal to be allowed with costs.

This court finds it convenient to address itself first to the Appellant's complaint on the alleged denial of his right to be heard by the trial tribunal as stated in his first and second grounds of appeal.

The proceedings of the trial tribunal at page 23 indicates that the Appellant who was the 4th Respondent during trial did not enter appearance on 17th December, 2018 which was the date fixed for continued hearing of his case. The trial Chairman decided to close the defence case and proceeded to fix the date of judgment on the reasons that the Appellant was absent without notice and there was no any other witnesses on his side.

The concern raised by the Appellant is that, by closing his case before it could proceed to finalization his right to bring forth witnesses to continue

his case was curtailed as he had only been heard partly and therefore his constitutional right to be heard was violated.

Without prejudice to the discretionary powers vested upon the Tribunal to make orders as it deems appropriate, where a party in a suit does not appear on the date fixed for hearing, such a discretion is dependent upon various circumstances which the Tribunal has to consider in order to achieve substantial justice to the parties. The past conduct of a party in the conduct of proceedings is one of the circumstances which a Court or Tribunal need to consider before making any adverse decision affecting the right of a party to be heard due to non-appearance on the date fixed for hearing.

Upon perusal of the records, I have noted that, unlike the other four Respondents at the trial against whom an ex parte hearing was ordered at the beginning of the case, the Appellant who was the fourth Respondent during trial had an unimpeachable attendance during the hearing before the trial tribunal. On 31/10/2018 when he addressed the Tribunal for the last time, he informed the Tribunal of his intention to bring other witnesses and prayed for adjournment of the case. It is therefore clear that the Appellant still had the intention of calling other witnesses to prove his case. Although the Tribunal faulted the Appellant for being absent without notice on the day

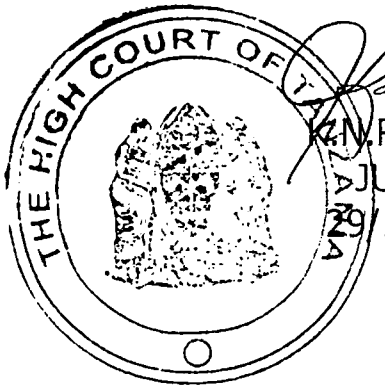
in question, nevertheless, this court is of the firm view that there was an inherent need of reasonableness and judiciousness in the decision of the Tribunal in order to safeguard the basic rights of parties and achieve substantial justice by taking into consideration the good attendance of the Appellant throughout the hearing of the case.

Further to that, I have noted that a copy of the notice of absence dated 13/12/2018 which is attached in the Appellant's Memorandum of Appeal do not appear in the records of the trial tribunal which means there 's no proof that the said notice was seen and considered by the trial chairman in his decision. However, the fact that the attached copy of notice bears a stamp of the Tribunal, which is not disputed by the Respondent, implies that the notice of absence was received by the Tribunal on 13/12/2018 as indicated in the attached copy of notice and the Appellant cannot be faulted for any failure by the Tribunal to take it into consideration.

In the circumstances, I find the two grounds of appeal contending that the Appellant was denied his right to be heard sufficient to dispose of this appeal. I shall not in the instant appeal consider other grounds of appeal.

In the end, I set aside the orders of the trial Tribunal of closing the defence case dated 17/12/2018 and quash the judgment of the District Land and Housing Tribunal and its subsequent orders. I remit the record to the trial Tribunal with a direction to continue with the conduct of the case/proceedings as from where it ended on 17/12/2018 before a different Chairman. I order that the matter should be heard and determined expeditiously taking into account that it is a long pending matter.

In the event, this appeal has merit and I allow it with no order as to cost.



K.N.ROBERT
JUDGE
29/1/2021