IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL No. 13 OF 2020

(C/f Land Appeal No. 46 of 2019 District Land and Housing Tribunal for Moshi at Moshi, Original Land Case No. 6 of 2018 Shighatini Ward Tribunal)

ELISARIA ELIA ..... APPELLANT

Versus

ABDALLA KALOKO ..... RESPONDENT

19th May & 16th June, 2021

JUDGMENT

MKAPA, J.

The instant appeal by Elisaria Elia the appellant, is against the decision of the District Land and Housing Tribunal for Moshi at Moshi (the District Tribunal) in **Land Appeal No. 46 of 2019** delivered on 5th August, 2020.

The brief facts leading to this appeal is that, the respondent filed his application at Shighatini Ward Tribunal (the trial tribunal) in **Shauri la Madai ya Ardhi Namba. 6 la 2018** claiming that the appellant had unlawfully sold his land located at Jiungeni Area, Mfinga villlage Shighatini ward in Mwanga District (the suit land) to Baraza la Wadhamini Kanisa la Kiinjili la Kilutheri Dayosisi ya Mwanga, Shighatini Parish (KKKT - Shighatini Parish). The respondent claimed to have invited the appellant's

father one Elia Amos and allocated him the suit land part of which he built a house while the remaining part left it for his son one Othieli Elia. After the death of Elia Amos the said Othieli was not interested in occupying the said land instead opted to live in Mererani Simanjiro area until his death. After his death the appellant unlawfully tresspassed into the suit land and attempted to sell the same to KKKT Shighatini - Parish claiming that the same belonged to his late father, Elia Amos.

Records of the trial tribunal revealed that KKKT - Shighatini Parish did not enter appearance as they settled the matter prior to the proceedings at the tribunal. However, as the appellant still claimed ownership over the suit land, the trial tribunal adjudicated upon the dispute and decided in favour of the respondent. The appellant appealed to the district land tribunal and lost hence the current appeal advancing six grounds that;

1. The District Tribunal erred in law and in fact for failure to fault the decision of the trial tribunal which lacked pecuniary jurisdiction to entertain the disputed land.
2. The District Tribunal erred in law and fact in failing to note that that the trial tribunal presided over the land dispute in question without proper identification of the suit land.
3. The District Tribunal erred in law and in fact in failing to appreciate that, the trial tribunal's decision touched on

pieces of land which were not subject of the dispute thus reached an erroneous decision.

4. The District Tribunal erred in law and in fact in failing to sum up assessor's opinion.
5. The District Tribunal erred in law and in fact in confirming the decision of the trial tribunal without sufficient evidence on the existence of land allocation practices through payment of customary dues *'mbuta'.*
6. The District Tribunal erred in law and in fact in failing to analyse the evidence and testimony of the respondent in the trial tribunal which was not as per the required standard.

When the appeal was called for hearing, parties consented and the Court ordered the same be disposed of by way of filing written submissions. The appellant was represented by Dr. Laurean Mussa, learned advocate while the respondent had the services of Mr. Rashid Miraji Shabani also learned advocate.

Submitting in support of the 1st ground of appeal Dr. Musa submitted that the district tribunal erred in failing to faulty the trial tribunal's decision as the same lacked pecuniary jurisdiction to adjudicate upon the matter. He added that, the issue of jurisdiction was raised during appeal at the district tribunal but the same was dismissed while the law is settled to the effect that

it can be raised at any stage even at appellate stage. To support of his contention he relied on the decision of this Court at Dar es Salaam, in **Commercial Appeal No. 1 of 2006, Zanzibar Insurance Corporation Ltd Versus Rudolf Temba** (unreported). Dr. Musa went on submitting that according to section 15 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] the pecuniary jurisdiction of Ward Tribunal in proceedings of a civil nature related to land disputes is limited to three million shillings (Tshs. 3,000,000/=). That, when the trial tribunal visited the *locus in quo* estimated that since the suit land comprised of five houses and a toilet its total estimated value was worth more than three million shillings. To support his argument, the learned counsel referred this Court's decision in the case of **Ndekeja Kashije V Mboje Masunga, Land Appeal No. 11 of 2018,** HC at Tabora, (unreported).

Submitting jointly on ground number 2 and 3 Dr. Musa challenged the district tribunal for failure to note that the trial tribunal adjudicated upon a land dispute without sufficiently identified the disputed land as to its actual acreage, location boundaries and other physical features. He relied his contention in the decision in the case of **Agast Green Mwamanda (as administrator of the Estate of the late Abel Mwamanda) V Jena Martin, Misc. Land Appeal No. 40 of 2019**, HC at Mbeya where the Court underscored the fact that;

"sufficient identification of the disputed land is not an option"

On the 4th ground, Dr. Musa averred that, the district tribunal erred in failing to sum up assessor's opinion contrary to the requirement of Regulation 19 (2) of the land Disputes Courts (District Land and Housing Tribunal) Regulations, G.N No. 174 of 2003 (Land Disputes Regulations). The said provision requires the chairman to obtain assessors' opinion in writing. It was Dr. Musa's argument that neither in the proceedings nor judgment of the district tribunal recorded that the assessor's opinion was read to the parties or their advocates.

As regards the 5th ground Dr. Musa argued that, the district tribunal erred in confirming the trial tribunal decision which lacked sufficient evidence to establish the existence of land allocation practices through payment of customary dues, *"mbuta"* according to Pare's customary practices. He added that, at the trial tribunal, the appellant made reference to the **Local Customary Law (Declaration) Order, 1963** as the enabling legislation for him to own land under Pare customary laws but neither the trial tribunal nor the district tribunal bothered to verify whether the cited legislation applied to the respondent.

Dr. Musa submitted on the last ground that, the district tribunal erred in failing to analyse the evidence and testimony of the respondent to the required standard as adduced at the trial

tribunal. He argued that according to the respondent's testimony himself and his brother, one Ileswa Kaloko were the ones who allocated the disputed land to the appellant's father, Elia Amos. However, this was not proven as required under **section 110 (2) of the Evidence Act**, Cap 6, R.E. 2019 (the Evidence Act) which requires that he who alleges must prove.

The learned counsel finally prayed for this Court to allow the appeal with costs, quash and set aside both lower tribunals' proceedings, judgment and decree and declare the appellant as the rightful owner of the suit land.

In reply, Mr. Miraji firstly challenged the trial tribunal for non-joinder of KKKT Shighatini Parish since the same was a necessary party to the land dispute. He referred the court to the decision in the case of **Juma Kadala V Lawrence Mnkande** (1983) T.L.R. 103 in which the court observed that;

> *"In a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant. Non-joinder will be fatal to the proceedings."*

He added that, KKKT-Shighatini Parish opted not to contest respondent's claims at the trial tribunal and settled the matter amicably. That, since the appellant had purportedly sold the suit land to KKKT-Shinghatini Parish and the later having realised the

sale was contrary to the laws and customs decided not to contest respondent's claims, the appellant cannot turn around and claim the same interest which had already been passed to a third party.

On the 1st ground Mr. Miraji submitted that, the trial tribunal had pecuniary jurisdiction to entertain the land dispute since the suit land was located at Mfinga village in Shighatini ward. He argued that since the issue of jurisdiction was not an issue at the trial tribunal it cannot be raised at the appellate level. He placed reliance in the case of **Maigu E. M. Magenda V Arobogast Maugo Magenda Civil Appeal No. 2018 of 2017** where Hon. Juma C.J. while confronted with similar situation like the one at hand had this to say;

> *"... we all the same agree with the learned second appellate judge's statement of the law and findings on the application of section 15 of the Land Disputes Courts Act, Cap 216 to this dispute, to the effect that pecuniary jurisdiction was not an issue at the Ward Tribunal and should not be raised as a point of law...".*

On the 2nd and 3rd ground the learned counsel argued that although both grounds were centred on identity of the suit land, the same were contradictory. That, the appellant claimed the suit land was not properly identified while at the same time

claimed that the trial tribunal's decision involved pieces of land which were not subject of the dispute. It was Mr. Miraji's view that this is as good as the appellant acknowledging the existence of a piece of land in dispute that was identified even by himself. He argued that the **Agast Green** case (*supra*) which was cited by the appellant's counsel is distinguishable from the present case since in the said case the respondent did not identify the location of the disputed land contrary to the instant appeal where the respondent explicitly identified the suit land to have been located at Jiungeni Area Mfinga village in Shighatini Ward Mwanga District thus within the jurisdiction of the trial tribunal. More so, in his testimony, the respondent even disclosed the names of his neighbours whom he shared boundaries with, thus no doubt the suit land was properly identified.

Arguing further on the issue of identification of the suit land Mr. Miraji argued that the trial tribunal is governed by Ward Tribunals Act, Cap 206 [R.E. 2019] where disputes are commenced by making an oral complaint to the secretary. He relied on section 17 (3) of the law which provides that a complaint may be received orally or in writing thus suggests the simplicity of the intended law in proceedings in order to avoid legal technicalities at the ward tribunal. Furthering his argument He vehemently argued that there is no provision under the Act

which requires description of the suit land namely, address, size and value.

The 4th ground of appeal was also challenged by Mr. Miraji to the effect that summing up to assessor's opinion and reading aloud the assessors opinion to the parties are two different legal procedures. That, there is no law which requires the district tribunal to sum up assessors' opinion. More so, since the district tribunal was sitting as the appellate body, there was no new evidence which required review from assessors. He cited Regulation 19 (2) of the Land Disputes Regulations which requires the assessors present at the district tribunal's proceeding to give their opinion in writing and the same was complied with.

On the 5th ground, Mr. Miraji argued that, the trial tribunal applied Pare customary law as per section 50 of the Land Disputes Courts Act since it was undisputed the fact that the parties have been in possession of the suit land for over 30 years according to the Pare tribe customs. Mr. Miraji was of the view that, the trial tribunal did not error in relying on Pare customs and the district tribunal did not error in confirming the decision. He further argued that, at the trial the appellant did not challenge the witnesses or assessors' opinion on the evidence relating to the payment of customary dues *'mbuta'* nor did he

raise the issue in his first appeal. Thus raising the issue at this second appeal for the first time is legally unacceptable. To support his argument, learned counsel cited the cases of **Lista Chalo V R, Criminal Appeal No. 447 of 2016** and **Godfrey Wilson V. Republic, Criminal Appeal No. 168 of 2018**.

On the last ground Mr. Miraji argued that, land cases are civil in nature thus at the trial tribunal the respondent was required to prove his case on the balance of probability in which he did whereby two witnesses among them a village chairman were summoned and testified on his status as a rightful owner. His testimony corroborated the fact that the appellant's father was an invitee to the suit land hence had no legal right to transfer ownership of the same. On the other hand, the appellant failed to substantiate how he came into possession of the suit land which warranted him to sell it to the third party. He argued further that an invitee cannot acquire ownership of the land regardless of how long he has been in possession.

Mr. Miraji finally prayed for the Court to declare the respondent the rightful owner of the suit land and dismiss the appeal for want of merit.

In his brief rejoinder submission Mr. Mussa basically reiterated what he submitted earlier in his submission in chief and

maintained his prayer for the appeal to be allowed and the appellant be declared the rightful owner of the suit land.

Having considered both parties arguments for and against the appeal together with both tribunal's records I think the question for consideration is whether the appeal is meritorious.

It is well settled that where there are concurrent findings of facts by two courts below, the court of appeal as a wise rule of practice should not disturb them. The decision in the case of the Amrathlar **Damadar and Another V. A.H. Jariwal [1980] TLR 31** is instructive on the fact, where the court emphatically held;

> *"Where there are concurrent findings of the facts by the two courts, the court of appeal as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

Guided by the above principle I will now proceed in determining the merits and demerits of the appeal.

As to the 1st ground the appellant had raised the issue of pecuniary of jurisdiction of the suit land. I am alive to the position that the issue of jurisdiction is of paramount importance that any trial of proceeding by a court lacking jurisdiction to seize

and try the matter will be adjudged a nullity on appeal or revision. In the present appeal however, as rightly submitted by the respondent's counsel the issue of pecuniary jurisdiction was not at issue at the trial tribunal and should not be raised at the appellate level. I would not put it better than the Court of Appeal's approval in the case of **Maigu E.M. Magenda** (*supra*) where the Court elaborated that;

> *"... since it is the Appellant who is alleging that the value of the property exceeds TZS 3,000,000/= it is on him the burden of proving lies, and not the Respondent. This court being a second appeal court, even if the Appellant was to bring such evidence, unfortunately this court would not have been in better position than the trial tribunal to receive such evidence more so because* ***such issue didn't form a disputed fact at the trial stage"*** *[Emphasis added]*

The above authority clearly lays down the said legal position. As I mentioned earlier, since the issue of pecuniary jurisdiction was not an issue at the trial tribunal the same cannot be raised at the appellate stage as the same would require additional evidence and also in my view it is as good as an afterthought. [**See**] also **Sospeter Kahindi V. Mbeshi Mashini**, **Civil**

Appeal No. 56 of 2017, CAT at Mwanza. This ground of appeal therefore is meritless.

Turning to the 2nd and the 3rd ground, which should not detain me much the appellant claimed that the suit land was not properly identified. However, a perusal of the trial tribunal's proceedings, has revealed that the respondent had identified his area that the same is located at Jiungeni Area in Mfinga village within shighatini ward in Mwanga District with the following boundaries; to the North – Hamisi Mghanga, and to the South - Rajabu Omary, while to the East – Wakwizu Road and west Badi Mruma. In my view, this is sufficient identification of the area in dispute which the respondent claimed to have invited the appellant's father for residential purposes as per the Pare customs. Additionally, it is on record of the trial tribunal proceedings that, when the trial tribunal visited the *locus in quo* guided by the aforementioned identification, made their observations and finally arrived at a just decision. It is worth noting at this juncture that unlike in the District Land Tribunals where Land Disputes Regulations require the dispute to commence with the filing of a complaint stating proper address, size and value, this is not the case with the Ward Tribunal. I find these two grounds lacking merit and are hereby disallowed.

Regarding the 4th ground, the appellant challenged the district tribunal for not summing up assessor's opinion and read out the same to parties and their advocates. To support his contention he cited Regulation 19 (2) of the Land Disputes Regulation. The relevant paragraph is reproduced hereunder;

> *"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"*

A thorough perusal of the district tribunal's records, page 5 of typed the proceedings, revealed the coram dated 11th June, 2020 in which the following did transpire;

> *"**TRIBUNAL***
>
> *The matter is for reading assessor opinion today and the same is ready*
>
> ***TRIBUNAL***
>
> *After reading assessors opinion the matter is now scheduled for judgment.*
>
> ***ORDER***
>
> *Judgment on 8/7/2020"*

The above excerpt sufficiently establish that assessor's opinion was prepared and the same was read aloud before the appellant's advocate, respondent and respondent's advocate. I find this ground meritless and the same crumbles.

As regards the 5th ground the appellant challenged the district tribunal for confirming the trial tribunal's decision which acknowledged land allocation practices through payment of customary dues, *'mbuta'.* In determining this ground I will also deal with the last ground which centres on analysis of evidence at the trial tribunal. It is undisputed fact that, the appellant was not aware on how his father came into possession of the suit land. He so admitted while being cross examined at the trial tribunal where he testified the fact that, it was his father who allocated him and his brother the land in dispute prior to his demise.

It is on record the fact that neither the appellant nor his witnesses testified on how the appellant or his father came into possession of the suit land which I found it rather doubtful. When cross examined at the trial tribunal, they all prayed ignorance and denied to have known the initial owner as well as whether the suit land was an open space, clan land, or otherwise. To the contrary, the respondent managed to establish the fact that, he was the rightful owner of the land in dispute situated in his clan

land. That, he was the one who invited the appellant's father to the suit land for residential purposes and was effected after payment of *'Mbuta'* a traditional consideration for the allocation. This fact was never objected by the appellant at the trial tribunal.

It is worth noting the fact that different tribes in the country have diverse customs and traditions inherited from our fore fathers. The Constitution of the United Republic of Tanzania, 1977 also acknowledges customary laws as among the source of laws of the land. In the instant appeal the fact that the appellant's father was invited to the suit land in a customary way and allocated a piece of it to his sons before his death, the appellant had no legal authority to dispose of the same. Since the appellant's father had a status of an invitee, it does not matter how long he or his family had been in possession of the suit land the status would remain as such. No title could pass on from such occupation be it by himself or his family members. This is well established in the cases of **Mkakofia Merianangа V Asha Ndisia (1969) HCD 204, Swalehe V Salim (1972) HCD 140** and the case of **Musa Hassani V Barnabas Yohanna Shedafa & Another** Civil Appeal No. 101 of 2018 (unreported) in which Court of Appeal held, *inter alia* at page 5 that;

> *"As far as we are aware no invitee can exclude his host whatever the length of time the invitation takes*

place and whatever the unexhausted improvements made to the land on which he was invited"

A reading of the above authority suggests that it does not matter how long a person has stayed in a disputed land, as long as he is an invitee and refused to vacate the disputed land when so demanded by the host, then the host can claim it and time limitation does not apply in a host-invitee relationship. The appellant therefore has no right whatsoever of claiming ownership to the suit land let alone pass it on to a third party. These two grounds also fail and are hereby dismissed.

For the reasons discussed above, the appeal is hereby dismissed with costs. Consequently, the District Land and Housing Tribunal's decision is upheld.

It is so ordered.

Dated and Delivered at Moshi this 16th day of June, 2021.

S. B. MKAPA
JUDGE
16/06/2021