IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 7 OF 2021

(C/F Land Appeal No. 65 of 2018 of the District Land and Housing Tribunal at Moshi, Original Application No.1 of 2017 of Shirimatunda Ward Tribunal)

THABITHA ROJAS MBARUKU ..... APPELLANT

VERSUS

JOHN MATATA KILEO.....RESPONDENT

JUDGMENT

29/3/2022 & 9/5/2022

SIMFUKWE, J.

This appeal was preferred by the Appellant herein against the entire judgment and decree of Land Appeal No. 65 of 2018 of Moshi District Land and Housing Tribunal. The Appellant has advanced seven grounds of appeal as reproduced hereunder: -

1. *That Hon. Chairman of the District Land and Housing Tribunal erred in law and facts when held that there is no proof that the Trial Ward tribunal lacked pecuniary jurisdiction to hear determine the matter before it. (sic)*
2. *That the Trial Chairman of the Tribunal erred in law and fact when failed to require assessor present at the conclusion of the hearing and*

before judgment to give their opinion in writing before making his final Judgment as required under Regulation 19(2) of GN No. 174/2003. (sic).

3. *That Hon. Chairman of the District Land and Housing Tribunal erred in law and facts when failing to properly re-evaluate the Evidence. (sic)*
4. *That, Hon. Chairman of the District Land and Housing Tribunal erred in law and facts when failed to note that the judgment of the Ward Tribunal was against the weight of the evidence as a whole;*
5. *That Hon. Chairman of the District Land and Housing Tribunal erred in law and facts when failed to consider that the appellant had made substantial development over the suit land.*
6. *That Hon. Chairman of the District Land and Housing Tribunal erred in law and fact when failed to consider that there was non-joinder of necessary party if could consider that he could have decided in favour of the Appellant. (sic)*
7. *That the Judgment of the District Land and Housing Tribunal lacked legal reasoning in arriving its decision confirming the decision of the Ward Tribunal. (sic)*

The background of this appeal in a nutshell as captured from the record is to the effect that on 17th April, 2013 the appellant and the respondent agreed that the appellant shall build a house of seven (7) rooms for the respondent and upon completion of the said house the respondent shall give the appellant a plot measured 40x28 paces as consideration/payment for the same. It is

alleged that the appellant failed to accomplish constructing the said house. Following such failure of fulfilling the agreement, the dispute was filed before Shirimatunda Ward Tribunal and the appellant in her counter claim claimed full ownership of the suit land. The Ward Tribunal decided that the appellant had failed to fulfill their agreement. However, the Ward Tribunal granted the appellant 20x24 paces out of 48 x 20 paces equivalent to part of the contract she had fulfilled. The appellant being aggrieved she appealed to the District Land and Housing Tribunal (DLHT) which upheld the decision of the trial Ward tribunal hence this appeal.

During the hearing of this appeal which was done by way of filing written submissions, the appellant was represented by the learned advocate Charles Mwanganyi while the respondent was unrepresented.

Submitting in support of the 1st ground of appeal, the learned advocate for the appellant faulted the Ward Tribunal for entertaining the matter without having pecuniary jurisdiction. That, the appellate Tribunal also erred when it upheld the decision of the Trial Ward Tribunal while the pecuniary value exceeded its jurisdiction. The learned advocate submitted further that at the time the matter was instituted before the Ward Tribunal the market price of the suit land exceeded three (3) Million Tshs. (3,000,000/=) which was beyond the pecuniary jurisdiction of the trial Ward Tribunal. He referred to **section 15 of the Land Disputes Courts Act, Cap. 216 R.E. 2002** which provides as follows:

> *"Notwithstanding the provisions of section 10 of the Ward Tribunals Act, the jurisdiction of the Ward Tribunal shall in all*

proceedings of a civil nature relating to land be limited to the disputed land or property valued at three million shillings."

Mr. Mwanganyi commented that the respondent failed to estimate clearly the actual value of the disputed land. Such failure also made the trial ward tribunal to adjudicate the same without satisfying itself that the value of the suit land exceeded its pecuniary jurisdiction. The learned advocate was of the view that since the trial Ward Tribunal adjudicated the matter beyond its limit, the only remedy is to quash the proceedings, judgment and orders made thereof.

On part of the appellate tribunal, the learned advocate for the appellant also faulted the same for failure to find that there was no proof to that effect. It was submitted that each case must be determined on its own circumstances. In that respect Mr. Mwanganyi opined that the court can exercise its discretional powers and estimate the value of the suit land. From the evidence adduced before the tribunal and substantial development made therein, the learned advocate commented that the value of the suit land exceeded three million.

On the 2nd ground of appeal the learned advocate for appellant condemned the appellate Tribunal which decided in favour of the respondent without according an opportunity to assessors to give their opinions and read over the same to the parties before composing his judgment as required under **section 23 (1) and (2) of the Land Disputes Courts Act**, (supra) and **Regulation 19 (1) and (2) of GN No. 174/2003.** Consequently, the same renders the entire judgment and proceedings of the Appellate Tribunal a nullity. To buttress his

point, the learned advocate made reference to the decision of the Court of Appeal in the case of **SIKUZANI SAID MAGAMBO AND ANOTHER vs MOHAMED ROBLE, CIVIL APPEAL NO. 197 OF 2018** (unreported) at page 8 and 9 where it was held that:

> *"Likewise, in **Tobone Mwabeta** (supra) in underscoring the need to require every assessor to give his opinion and the same recorded and be part of the trial proceedings, the court observed that; 'In view of the settled position and law, where the trial has been conducted with the aid of assessors...they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before judgment is composed... since regulation 19(2) of the Regulations requires every assessors present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in final verdict."*

In the instant matter, Mr. Mwanganyi submitted that the trial chairman did not adhere to that legal requirement, which renders the entire proceedings, judgment and decree a nullity. He added that, in the typed proceedings nowhere show that the opinion of the assessors has been incorporated as required under the above cited provision of law. To

substantiate his argument, Mr. Mwanganyi cited the case of **AMEIR MBARAK AND AZANIA BANK CORP. LTD V. EDGAR KAHWI, CIVIL APPEAL No. 154 of 2015,** quoted with approval in the case of **SIKUZANI** (supra) the court observed that:

> *"It's unsafe to assume the opinion of assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the Tribunal Judgment and this was a serious irregularity"*

On the 3rd ground of appeal in respect of failure to evaluate the evidence, it was Mr. Mwanganyi's contention that it is trite law and procedure that the Magistrate, Chairman or Judge shall evaluate properly the evidence adduced before him prior to reaching his verdict. He thus faulted the Chairman for failure to properly evaluate the evidence adduced before him and hence ruled on the respondent's favour.

He argued further that the standard of proof is on the balance of probabilities but essentially, the respondent herein failed to prove his case. However, the appellant had successfully defended her case by adducing watertight evidence compared to the respondent. During the hearing before the trial tribunal, the appellant submitted that, she entered into an agreement with the respondent. The terms and

conditions of the said agreement stipulated that; the appellant shall build a seven roomed house on consideration that the respondent shall give her a piece of land measuring 40x28 paces (herein referred as the suit land). However, the appellant failed to accomplish her obligations by building the said house which is still under construction.

Mr. Mwanganyi submitted further that despite having such evidence, still the Tribunal's Chairman and his members disregarded it and ruled in favour of the respondent. It was decided that the respondent shall give a piece of land to the appellant measuring 24x20 paces instead of 40x28 paces as agreed by the parties. The learned advocate was of the opinion that the trial chairman erred both in law and in fact in failing to properly re- evaluate the evidence adduced before the Ward Tribunal and ruled in favour of the respondent. He cited the case of **Stanslaus R. Kasusura and A.G. vs Phares Kabuye [1982] TLR 335** in which it was held that: -

> *"The trial judge should have evaluated the evidence of each of the witness, assessed their credibility and made a finding on the contested fact in issue."*

Mr. Mwanganyi was of the view that since the tribunal's chairman failed to properly re-evaluate the entire evidence adduced before the Ward Tribunal, the only remedy is to quash the whole proceedings, judgment and all its orders made thereon.

On the 4th ground of appeal Mr. Mwanganyi blamed the 1st appellate tribunal for failure to note that the judgment of the Ward Tribunal was

against the weight of the evidence. He stated that it is on record of the Ward tribunal that the appellant borrowed loan from financial institution namely BRAC TANZANIA LIMITED. To secure the said loan, the appellant mortgaged the suit land as collateral. Mr. Mwanganyi continued to argued that since BRAC TANZANIA LIMITED has an interest over the suit land, then they should have been joined as a necessary party; something which was not done by the respondent. The learned advocate was of the opinion that suing the appellant only, the interest of the said financial institution can be prejudiced. He made reference to **Order I Rule 4 (a) and (b) of the Civil Procedure Code, Cap. 33 R.E. 2019** which provides that:

> *"Judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to and against such one or more of the defendants as may be found to be liable, according to their respective liabilities."*

Mr. Mwanganyi went on to submit that the law is quite clear that the respondent is at liberty to sue any number of people as he deems appropriate. However, the duty of the court under the above cited provision is to examine and to ascertain who is entitled to and against such one or more of the sued parties. He thus concluded that, since the respondent failed to sue a necessary party, Brac Tanzania Ltd then the only remedy shall be to quash the whole proceeding, judgment and orders made thereof and to order the same be tried de novo in a proper

court with competent jurisdiction. To substantiate this point, Mr. Mwanganyi referred the court to the Court of Appeal decision in the case of **Godfrey Nzowa v. Seleman Kova and another, Civil Appeal No. 183 of 2019** at Arusha, in which it was held that: -

> *"For the foregoing, we find that under circumstances non-joinder of permanent Secretary, Ministry of Works rendered the suit subject to the instant appeal unmaintainable and any granted decree ineffective and thus fatal."*

On the 5th ground of appeal in respect of the substantial development over the suit land, the learned advocate submitted that the appellate tribunal failed to essentially evaluate the evidence brought before it and as a result, the judgment of the ward tribunal was consequently against the weight of evidence as a whole. To cement this ground, the appellant's advocate reiterated the submission on the 2nd ground herein above. In that respect he argued that, since the judgment of the Ward Tribunal emanated from failure to evaluate properly the evidence brought before it, the same deserved to be quashed and set aside.

Submitting in respect of the 6th ground of appeal the appellant's advocate argued that on 17/4/2013, the appellant entered into an agreement with the respondent. In the said agreement it was stated that the appellant shall build a house with seven (7) rooms to which four (4) rooms shall be rented and three (3) rooms shall be for business activities. It was agreed further that the appellant shall erect a toilet

and installation of water and electricity on the same on consideration that the respondent shall give the suit land measuring 40x28 paces to the appellant. He stated that as per the proceedings, the appellant has already managed to accomplish his obligation by erecting the said house as agreed which is still under construction.

It was further contended that, the Trial Ward Tribunal's judgment shows that the respondent shall give 24x20 paces plot to the appellant instead of 40x28 paces plot as agreed. He argued further that the said 24x20 paces plot is not equivalent to the costs incurred by the appellant in erecting the said rooms. On that basis, he submitted that the ward tribunal erred both in law and in fact when deciding in favour of the respondent without regarding substantial development made by the appellant. It was Mr. Mwanganyi's prayer that this appeal be allowed with costs and the proceedings, judgment and orders made thereof be quashed and set aside and this court to order the same to be tried de novo before the court/ tribunal of competent jurisdiction.

On the 7th ground of appeal the learned advocate faulted the appellate Tribunal's judgment for lacking legal reasoning in arriving to its decision which uphold the trial tribunal's decision and failed to analyse the grounds of appeal. If it had not erred then the appellate Tribunal could have decided in favour of the Appellant.

In conclusion, it was Mr. Mwanganyi's prayer that this appeal be allowed with costs and the proceedings, judgment and orders of the Ward Tribunal and District Land and Housing Tribunal be quashed and set

aside and this court to order the same to be tried de novo before court/ tribunal of competent jurisdiction.

In reply to the 1st ground of appeal in respect of pecuniary jurisdiction of the trial tribunal it was the respondent's contention that this ground is unfounded because during the trial at Shirimatunda Ward Tribunal there was no evidence showing that the suit land exceeds three (3) million Tshs (3,000,000/=). He argued that there was no dispute on the value of the suit land and the appellant had never given the costs incurred to develop the plot in question.

It was further submitted that the suit land which is disputed is half of the contractual land measured 40 x 28 paces whose value does not exceed three (3) million Tshs (3,000,000/=) which is within the jurisdiction of the trial ward tribunal. He added that there was no evidence showing that the respondent failed to estimate the actual value of the disputed land since the value of the suit land was not disputed.

Responding on the 2nd ground of appeal regarding the opinions of the trial assessors it was the respondent's argument that the typed proceedings of the appellate Tribunal from page no. 1 to 4 show that the Chairman of the Appellate Tribunal sat with two assessors namely T. Temu and J. Mmasi although the proceedings does not show the opinions of the assessors. However, the respondent was of the view that for interest of justice since this omission was done by the Appellate

Tribunal the remedy is to order rehearing of the appeal before the Appellate tribunal.

Regarding the 3rd ground of appeal on evaluation of evidence, it was submitted to the effect that the trial chairman of the trial Tribunal successfully evaluated the evidence adduced by both the appellant and the respondent. He referred to page 3 of the trial Tribunal's judgment and argued that the same shows that the trial chairman evaluated the entire evidence by answering questions or points of determination and finally made a finding on the contested facts in issue which include the opinion of the assessors in favour of the respondent and the decision of the trial Chairman of the trial Tribunal.

Replying on the 4th ground of appeal on non-joinder of party namely BRAC TANZANIA LIMITED who is a lender of the appellant, the respondent stated that no evidence was adduced before the trial Ward Tribunal to show that Brac Tanzania Limited was a necessary party to the case and had interest over the suit land. Also, when the appellant secured a loan from Brac Tanzania Limited she had no ownership over the suit land since the contract between the appellant and the respondent was not yet fulfilled. The respondent was thus of the view that Brac Tanzania Limited could not be added as a necessary part to the case because the mortgage agreement between the appellant and Brac Tanzania Limited was illegal as the appellant had no ownership over the suit land.

Contesting the allegations raised on the 5th ground of appeal that the Chairman of the DLHT failed to consider that the appellant had made substantial development over the suit land, it was the respondent's argument that these allegations were unfounded as 24 x20 paces out of 48 x 20 paces of the disputed land which is equivalent to the construction of the house made by the appellant to the respondent were given to the appellant. This can be observed at page 3 of the judgment of the trial Ward tribunal.

The respondent argued the 6th and 7th grounds of appeal together. He argued that there is no evidence adduced before the trial ward tribunal showing that a piece of land measured 24 x 20 paces which was granted to the appellant is not equivalent to the construction made by the appellant as part of contract. Thus, the trial ward tribunal being a competent tribunal to decide a matter gave a just and fair decision since it considered the construction made by the appellant.

Finally, the respondent prayed for the court to dismiss the appeal with costs and sustain the Judgment and decree in the appeal and Ward Tribunal.

In rejoinder, in respect of the 1st ground of appeal the learned counsel for the appellant reiterated what was submitted in chief. He added that the proof lies in the proceedings and for the sake of location of the suit land it is trite that the pecuniary value of the Ward Tribunal.

In respect of the 2nd ground of appeal it was the appellant's advocate contention that since the respondent conceded on the irregularities in

respect of assessor's opinion, the only option is to allow this appeal and quash and set aside the proceedings of the District Land and Housing Tribunal and Ward Tribunal and allow this appeal.

As far as the 4th ground of appeal is concerned in respect of joinder of the party, Mr. Mwanganyi reiterated what he submitted in chief. He added that it is shown in the ward tribunal's proceedings that the appellant borrowed loan from financial institution with the name BRAC TANZANIA LIMITED. Thus, Brac Tanzania Ltd should have been joined as a necessary party something which was not done by the respondent. He opined that by suing the appellant only the interest of the said financial institution can be prejudiced.

Before determining this appeal, I wish to state that I am aware with the principle that the second appellate court cannot interfere with the concurrent findings of facts of the lower courts unless there is misapprehension of the evidence, miscarriage of justice or violation of principles of law. See the case of **Amratlal D. M. Zanzibar Silk Stores vs A.H Jariwale Zanzibar Hotel [1980] TLR 31.**

Having established as such, I turn to the merit or otherwise of this appeal. Having studied carefully the grounds of appeal and submissions made by both parties and the records of the two tribunals below, I discovered that the grounds of appeal are centred into two issues, first the issue of procedural irregularities and second evaluations of evidence. The procedural irregularities touch the issues of law as raised

in the 1st, 2nd,6th and 7th grounds of appeal while the rest of the grounds of appeal are grounded on evaluation of evidence.

I will thus start with the 2nd ground of appeal since the respondent conceded to the omission and both parties noted such irregularity. That, assessors did not give their opinions as required by the law. In order to satisfy myself, I had to examine the appellate Tribunal's proceedings both typed and handwritten. It is true that assessors did not give their opinions as required under **Section 23 (1) and (2) of the Act** (supra) which provides that:

> *"(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.*
>
> *(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment."*
>
> **Regulation 19 (2) of GN. 174/2003 provides** that:
>
> *"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."*

In the instant matter the Chairman did not require the assessors to give their opinions since the same are not reflected in the appellate

Tribunal's records. Even in his judgment he did not indicate that he had considered the opinions of assessors. This suggests that assessors did not submit their opinions.

This omission is not curable and it vitiates the whole proceedings and judgment. The same was stated in the case of **Zubeda Hussein Kayagali vs Oliva Gaston Luvakuie, Civil Appeal No. 312 of 2017** where the Court of Appeal at Tabora held that: -

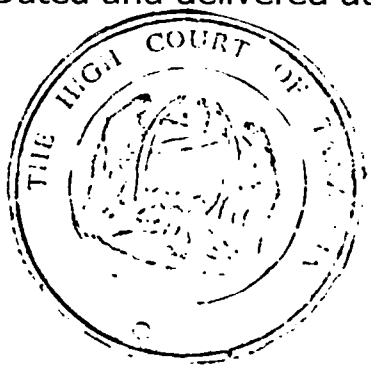
> *"Consequently, on the strength of the law and the cited authorities, we find that the failure by the Tribunal Chairman to involve the assessors in reaching the decision vitiated the proceedings and judgment of the Tribunal and as correctly urged by the learned counsel of the parties, the effect is to nullify the proceedings. In the circumstances, we invoke section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and hereby nullify them and set aside the judgment."*

Guided by the above authority, the prayer by Mr. Mwanganyi for the appellant that such irregularity warrants this appeal to be dismissed cannot stand. The way forward is to nullify the proceedings and Judgment of the District Land and Housing Tribunal.

Since this ground is sufficient to dispose of the appeal, I find no need to address other grounds of appeal. In such circumstances therefore, I order retrial of the appeal before another Chairman sitting with different set of assessors. Since the irregularity was caused by the Tribunal, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 9th day of May, 2022.



S. H. SIMFUKWE

JUDGE

9/5/2022.