IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY OF MOSHI
AT MOSHI

LAND APPEAL NO. 9 OF 2022

(Appeal from Land Application No 27 of 2021 of Moshi District Land and Housing Tribunal at Moshi)

ELIMKIRA NDESAMBURO SAMBO..... APPELLANT

Versus

AMINIEL NDESAMBURO SAMBO ..... RESPONDENT

18/8/2022, 12/9/2022

JUDGEMENT

T. M. MWENAMPAZI, J.

The appellant, herein approached the District Land and Housing Tribunal praying to be declared lawful owner of Plot No. 78 Farm 125 having been purchased the same from Elizabeth Michael Masawe on the 2nd February, 1982. The application was filed on the 17th March, 2021 against the Respondent herein. Upon hearing of the application in the trial Tribunal, the District Land and Housing Tribunal, Hon. P. J. Makwandi, chairman made the findings in favour of the applicant (appellant herein) whereby the appellant was declared to be the lawful owner of the dispute land. The Respondent was also found to be entitled to compensation at the rate of 30% of the value of land in dispute. Due to the nature of the dispute, no order for costs was issued.

Both parties were aggrieved by the decision. The appellant filed Land Appeal No. 9 of 2022 to this Court and the Respondent filed Land Appeal

No. 11 of 2022. On the 15th June, 2022 both appeals were scheduled for hearing on the 13th July, 2022. On the date, counsels for the appellant Mr. Gaston Shundo Garubindi and Mr. Julius Semali, Advocate for the Respondent had a discussion on how to proceed. When they came in for the hearing session, Mr. Gaston Shundo Garubindi, Advocate made a prayer based on their agreement and or consensus on how to proceed. He prayed that the two appeals, Land Appeal No. 9 and 11 both of 2022 be consolidated. The appellant maintained the status as an appellant and the Respondent remain that way as in Land Appeal No. 9 of 2022. The appeal be cited as Land Appeal No. 9 of 2022 and the suggested grounds were as follows:-

1. The Honourable trial tribunal failed to evaluate the evidence tendered before it hence arrived at an erroneous decision.
2. That the Judgement of Honourable trial tribunal lacked clear legal reasoning.
3. That the trial tribunal erred in law and fact for not awarding cost of the suit.

The counsel prayed that the grounds which were filed in Land Appeal No. 9 of 2022 and Land Appeal No. 11 of 2022 be dropped. Hearing was then prayed to proceed by written submission which prayer was confirmed by Mr. Julius Semali, Advocate for the Respondent. An order was issued to that effect as prayed by the parties. Parties complied with scheduling order and filed their written submissions in time. I appreciate their spirit and commend them accordingly.

The Land Appeal No 11 of 2022 has thus been struck out of record as a result of the prayers made.

The counsel for the appellant Mr. Gaston Shundo Garubindi learned advocate invited this court as the first appellate court to step into the shoes of the trial court and evaluate, re-asses and analyse the evidence on record and determine whether the conclusion reached by the trial tribunal holds water or otherwise and give reason either way. He has cited the case of **Solomoni Thomas Mmari (As the Administrator of the estate of the Late Thomas Mmari) Versus Reuben Joshua Mollel,** Land Appeal No. 31 of 2020, High Court Moshi District Registry (unreported) and **Hosea Francis @ Ngala & Maria Hosea @Ulanga Vs. Republic,** Criminal Appeal No. 408 of 2015 (unreported) wherein the Case of **Demetrius John@ Kajuli and 3 others Versus Republic,** Criminal Appeal No. 155 of 2013 (unreported) pronounced the role of the first appellant Court as follows:-

> *"As a first court of Appeal like we are with regard to the instant appeal, is entitled to have a fresh look at the entire evidence and arrive at its own finding and conclusion"*

On the ground of appeal as consolidated the counsel commenced with the ground that the Honorable Tribunal failed to evaluate the evidence placed before it as a result it arrived at erroneous decision.

The counsel for the appellant submitted that the Honourable Tribunal erred in law and fact to order for compensation to the respondent at the

rate of 30% of the value of the property in dispute. The relevant part in the Judgement is at page 6; It reads:-

> *"Hata hivyo hakuna ubishi kwamba ni mdaiwa aliyekuwa anafanya shughuli kwenye eneo hilo takribani miaka 40. Ni muda mrefu sana hivyo ni kweli ameshiriki kuendeleza eneo la mgogoro.....*
>
> *Hata hivyo Baraza linaona anastahili fidia kutokana na utunzaji wa eneo hilo na maendelezo yoyote atakayo kuwa ameyafanya kwenye eneo hilo na tunayakadiria kuwa asilimia 30% ya thamani ya eneo hilo.....*
>
> *Kwa kuwa nia ya mdai kwa sasa alivyoeleza kwenye aya ya 6(a) (viii) ya Fomu ya madai yake ni kuuza eneo lake ana haki ya kuuza eneo lake isipokuwa ampatie mdaiwa fidia hiyo ya 30%"*

The counsel for the appellant is disputing the decision on the following reasons. One, that the tribunal granted relief of 30% compensation which was not claimed, Secondly, the maintenance and development claimed by the chairman of the tribunal at the time of composing Judgement over plot No. 78 Farm 125 was not proved and Lastly, the tribunal erred by making reference to paragraph 6(a) (viii) of the application.

In the submission, Mr. Gaston has submitted that it is a principle of law that parties are bound up by their pleadings. The trial tribunal is supposed to act upon and basing on the pleadings which among other things include the reliefs sought by the parties who bring the disputes before the tribunal for determination. The only way to raise issues before the court for

consideration and determination is through pleadings. The principle require parties to be bound by their own pleadings. He cited the case of **Jordan University College Vs. Flavia Joseph,** Revision No. 23 of 2019, High Court of Tanzania (Labour Division) at Morogoro (unreported) wherein at page 9 the Case of **Fatma Idha Salum Vs. Khalifa Khamis Said,** Civil Appeal No. 28 of 2002, at Zanzibar (unreported) where Nsekela, J held that:-

> *"With all due respect to both the District Court and the Regional Court, these issues were not pleaded and should not have been considered. It is now settled law that the only way to raise issues before the court for consideration and determination is through pleadings and as far as we are aware of this is the only way".*

A similar view was pronounced in the case of **James Funke Ngwagilo Vs. Attorney General,** [2004] T.L.R 161 where it was held:-

> *"In order for an issue to be decided it ought to be brought on record and appears from the conduct of the suit to have been left to the court for decision".*

Applying the principle to the present case, the appellant has argued that the order 30% compensation of the value of the property in dispute given to the Respondent herein was never prayed before the trial Tribunal. In this case the dispute was over ownership. The issue of compensation was new only known to the trial chairman framed during composition of the Judgement. Since it was never prayed for by the Respondent, it is bad in law. He has cited the case of **Abel Maligis Versus Paul Fungameza,** P.C Civil Appeal No. 10 of 2018. High Court at Shinyanga.

The order for compensation was made basing on the wishes of the Tribunal not evidence. The tribunal was not availed with evidence to prove that the respondent had contributed to develop the area. To the trial chairman observed that the respondent deserved compensation for maintenance of the dispute area no evidence was tendered. The only words suggesting there was contribution are *"1982 nimejenga eneo hilo na ramani ninazo"*

The Respondent had a bur
and that is according to S
Act, Cap. 6 R.E 2002, whic

> *"(1) whoever desires*
> *right or liability depe*
> *asserts must prove t*
>
> *(2)When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"*

He also cited the Case of **Geita Gold Mining Ltd & Managing Director GGM Versus Ignas Athamas,** Civil Appeal No. 227 of 2017, Court of Appeal of Tanzania at Mwanza (Unreported). He concluded that the Respondent had the burden of proving maintenance and development. The Respondent did not prove before the trial Tribunal that he built the house on the disputed land nor did he tender any exhibit to prove the same. The trial tribunal misdirected itself and made a decision on assumptions.

On the last limb on the 1st ground, the same is based on reference made by trial tribunal as a basis of its decision. It erred when it made reference to paragraph 6 (a) (viii) of the appellant application. At page 7 of the Judgment it is said.

> *"Kwa kuwa nia ya mdai kwa sasa kama alivyoelekeza kwenye aya 6(a) (viii) ya fomu ya madai, yake ni kuuza eneo lake ana hela ya kuuza eneo isipokuwa ampatie mdaiwa fidia hiyo ya 30%"*

The counsel for the appellant has submitted that as per record the appellant herein filed application No. 27 of 2021 on 17th March, 2021 as far as this application is concerned there was no paragraph 6 (a) (viii). The paragraph cited did not exist.

Therefore the trial tribunal was responsible to ensure that its decision was on what pleaded by the parties, to the contrary it granted a reliefs which was not prayed by the parties, and it decided an issue not before it. He prayed the appeal be allowed with costs.

On the Second ground, the appellant complaint that the Judgement of the trial tribunal lack clear legal reasoning of the decision. My reading of the submission I have failed to understand the argument by the counsel for the appellant. He is faulting the Judgement of the trial tribunal for lack of legal reasoning but again he has submitted at paragraph 33 as follows:-

> *"It is our submission that the trial (Tribunal), analyzed evidence, exhibits tendered and gave reasons for the decisions. We don't see as to why this court can interfere with*

the decision that, the appellant herein is the lawful owner of the property in dispute".

However, he seems to argue the Lack of Legal reasoning with reference to an order for compensation at the rate of 30% of the value of the property. On that basis he argues and prays to allow the appeal with costs.

On the third ground of appeal the appellant complains that the trial tribunal erred in law and fact for not awarding cost of the suits. The counsel for the appellant has argued that it was wrong not to award costs to the appellant who won the case. No reasons were given. He submitted that the law is well settled that the power for any court to award or not to award costs is discretionary depending on the circumstances of the case and that where any court withholds costs the reasons for not awarding costs must be adduced in writing. He submitted that the position is provided for Under Section 30(2) of the Civil Procedure Code, Cap 33 R.E 2019

"30(2) where the court directs that any costs shall not follow the event, the court shall state its reasons in writing"

Also regulation 21(1) of the Land Disputes Courts (District Land and Housing Tribunal Regulations, 2003) reads:-

"The Tribunal may make such orders as to costs in respect of the case as it deems just".

The appellant's counsel has submitted that although power to award cost or otherwise is discretional, the court in exercising such discretionary powers must do so judiciously taking into account the circumstances of

each Case. It is the appellant's counsel argument that it is unfair not to award costs as the case was not filed under *forma pauperis*.

In the counsel's views, the record is clear that the appellant had engaged an advocate to prosecute the case, in both Land Application No. 27 of 2021 and Misc. Land Application No 208 of 2021, there were transportation costs, incurred from Dar es Salaam to Moshi for all attendances there are witness transport, meal and allowances, Secretarial Costs and related costs; there was no reasons denying him costs, since the appellant has to be refunded all the costs incurred during the trial of the case. The award of cost puts the winning party at his financial position prior to the institution of the case. He submitted that normally costs follow events. He cited the case of **Mohamed Salmini Vs. Jumanne Omary Mapesa,** Civil Application No. 4 of 2014, Court of Appeal of Tanzania at Dodoma (unreported) wherein a case of **Andrew E. Ndakidemi Vs. Nassoro Lwila, Anyesi N. Lwila & Majembe Auction Mart,** Land Appeal No 41 of 2020 where it was held that:-

> *"As a general rule, costs are awarded at the discretion of the Court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that cost could usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause, or by misconduct of the party or his advocate".*

A similar view was also stated in the case of **Registered Trustee of the Roman Catholic Archdiocese of Dar es Salaam Versu Sophia Kamani,** Civil Appeal No. (58 of 2015, Court of Appeal of Dar es Salaam (unreported) which has also been cited by the counsel for the appellant.

Since no good reasons were given by the trial chairperson, the appellant's counsel prayed that this court finds that the appellant was entitled to costs before the trial tribunal and that the order of the tribunal that "no orders to costs" be set aside.

He therefore prayed the appeal be allowed by setting aside the order for compensation at the 30% rate of the value of the property and grant cost at the trial tribunal and in this court.

In the reply submission by Mr. Julius Samali representing the Respondent has submitted that the appellant did not discharge his duty to prove ownership of the dispute land in the standard required by law.

The counsel for the respondent has submitted that the chairman failed to evaluate properly the evidence placed before him, because the trial chairman declared the Appellant as a lawful owner of the suit land based on the sale agreement (Exhibit P1) executed on 2/2/1982 between the Appellant and Elizabeth Michael Massawe, while the said agreement was forged. Furthermore, the appellant was declared a lawful owner of the suit land despite of existence of inconsistencies and contradictory evidence on his part, as testimonies of SM2 (Richard

Michael Massawe) and SM3 differ with the testimony of SM1 the appellant herein:

On the first point regarding the forgery of exhibit P1, the counsel for the respondent has submitted that they say it was forged because at the time of executing the purported sale agreement (Exhibit P1) there was no Moshi Municipal (Manispaa ya Moshi) but there was Moshi Town Council (Halmashauri ya Mji wa Moshi). This is indicated in exchequer receipt for payment of land rents Exhibit P4 Collectively and the website of Moshi Municipal.

In the year 1982 there was no Moshi Municipal Council (Halmashauri ya Manispaa ya Moshi) but there was Moshi Town Council (Halmashauri ya Mji wa Moshi). Moshi Town Council changed into Moshi Municial Council in the year 1988 through the Local Government (Urban Authorities) (Grading of Councils) G.N No. 309 of 1988.

Even the history of Moshi Municipal Council available in the website [https://moshimc.go.tz] of Moshi Municipal Council reveal the same, it is written:

> *"Halmashauri ya Manispaa ya Moshi ni miongoni mwa Halmashauri saba za Mkoa wa Kilimanjaro. Mji wa Moshi ulianzishwa 1892, ukahamishiwa mahali ulipo sasa toka Kolila Old Moshi (Moshi Vijijini) mwaka 1911. Mwaka 1926 ulipewa hadhi ya mji mdogo na mwaka 1956 ukapewa hadhi ya mji kamili. Ulipewa hadhi ya kuwa Manispaa mwaka 1988".*

Moshi Town Council and later on Moshi Municipal Council were established in accordance with the Local Government (Urban Authorities) Act No. 8 of 1982. The said G.N. No. 309 of 1988 was published in the Government Gazette subject to Section 12(2) (3) of the Local Government (Urban Authorities) Act, No. 8 of 1982, Cap 288. In 1982 until 1987 Kiboriloni was still under Moshi Town Council and not otherwise.

The counsel for the Respondent apart from the history of the Municipal Council, referred to the exchequer receipt. He argued that even the exchequer receipt for payment of the land rent (Exhibit P4 Collectively) dated 3/8/1984 still bears the name of Moshi Town Council. While the subsidiary receipt dated 28/2/2012 and 27/3/2013 for payment of rent bears the name of Moshi Municipal Council. This the exchequer receipt for payment of land rent dated 3/8/1984 stand a proof that in the year 1982 Moshi. Urban was not graded into Moshi Municipal but it was still a Moshi Town Council. Therefore Exhibit P1 is forged document.

It is the argument of the counsel for the Respondent that the rubber stamp of ward secretary of Kiboriloni was forged into such sale agreement (Exhibit P1) as the said rubber stamp bears the name of Moshi Municipal while at the time (in the year 1982) Moshi Municipal Council did not exist. Therefore exhibit P1 is a forged document and it is unworthy to be relied upon.

Referring to the proceedings, the counsel for Respondent pointed at page 33 of the typed proceedings of the trial tribunal particularly during

cross examination when the issue of forged document was touched. The appellant's testimony reads:-

> *"Siwezi jua nani amegushi nyaraka zake. Sijaona kama amegushi hivyo alete karatasi zake barazani".*

Also, at page 34 the appellant testified.

> *"Yeye anayesema kuwa mimi nimegushi angekwenda mahakamni".*

The allegation of forgery is also found at page 40 of the typed proceedings.

> *"Hizi nyaraka nyingine zimegushiwa".*

The counsel submitted that Exhibit P1 was forged document and not a genuine and reliable evidence. He invited this court to look at it that way. Hence the appellant did not prove ownership of the suit land. He prayed that the Judgment of the tribunal be quashed and a decree set aside for want of proof.

The counsel for the Respondent also has alleged presence of contradictions in the evidence by the appellant in the trial tribunal. He has submitted that Exhibit P1 was forged by the appellant in order to deprive the Respondent his right of ownership over the suit land. The testimony of Appellant's witness SM2 (Page 19) reveal that at the time of executing Exhibit P1 was witnessed by SM2 and his brother only. And the local government leader did not participate in the Sale of the suit land. However, exhibit P1 indicates that it was witnessed by Richard S.

Massawe, Dastan M. Massawe, William E. Ulotu and Abdul AKida (Ward Executive officer of Kiboriloni.

Again, Exhibit P1 was not shown to SM2 to ascertain if he can really identify such sale agreement and if it was him who signed the sale agreement. The counsel has submitted that the inconsistencies and contradictory features raise reasonable doubt on the genuineness of the said Exhibit P1 and the appellant's evidence as a whole. Therefore the appellant did not discharge his duty of proving his ownership for the suit land in the balance of probability.

The counsel for the respondent went further to demonstrate how the appellant has failed to prove his ownership of the dispute property. This time he attacked the credibility and weight to be accorded to the witness who testified for the Respondent.

The witness SM2 at page 19 of the typed proceedings revealed that Elizabeth Michael Massawe sold Plot No. 74 at Kiboriloni, while the suit land is located at Plot No. 78 Farm 125 at Kiboriloni. Therefore, SM2 came to the tribunal to testify on sale of different plot other than the suit land. Thus, the testimony of SM2 does not carry any weight in proving the appellant's ownership of the suit land.

SM3 at page 21 of the typed proceedings of the trial Tribunal testified that he did not witness the sale agreement. His testimony is based on hearsay. SM3 saw Exhibit P1 and it was in form of **hand written**. In court Exhibit P1 tendered is in a typed form. His evidence in the opinion of the counsel for the respondent is not reliable as it is hearsay

evidence, and it contradicted with the testimony of SM1 and Exhibit P1. Therefore, the trial Tribunal Chairman relied on such evidence of SM3 improperly.

On the testimony and evidence of SM4 at Page 24 of the proceeding clearly reveal that he did not know the owner of suit land, because at the time of the sale of the suit land he was a child. He did not know the history of the suit land but he confessed that he saw the Respondent conducting his business at the suit land for a long time. Therefore the testimony was not in favour of the appellant. Thus the trial tribunal erred in relying on such evidence.

In the bid to show that the evidence by the appellant is not worthy to prove his ownership the Respondent's counsel alluded to the testimony by the appellant. While he testified that he bought the dispute plot on the 2/2/1982 as per exhibit P1, he produced evidence that he borrowed money, which he used to pay for the purchase price, on the 27/2/1982. The money was borrowed from Mr. Alex Tarimo it was Tshs. 20,000/=.

The counsel has submitted that the appellant created a confusing story on how he received the monies because the testimony of SM1 at page 13 and page 25 of the typed proceedings of the trial tribunal differed with the contents of paragraph 5 (a) (iii) of the application filed by the appellant in the trial Tribunal. In the application he averred that the purchase money was borrowed from Alex Tarimo. But in the testimony he said he got from Samweli Mshiu. Thus, the testimony tendered is different and in contradiction to the pleadings.

It has further been argued that the dispute has been boiling for a long time since when the appellant's Mother was alive as per SM3. Since their mother passed away in 2000 then the claims are time barred.

The counsel has invited this court to look at the evidence afresh, re-evaluate the same and come up will the correct conclusion. He cited the case of **Martha Weijja Vs. AG and Another** [1982] TLR 35.

On the Second ground of appeal that the Judgement of the trial Tribunal lacked clear legal reasoning of the decisions. In the Judgement of the trial tribunal, the appellant was declared a lawful owner of the suit land on the reasons that:-

1. The sale agreement of the suit land between the appellant and Elizabeth Michael Massawe was executed prior to the sale agreement of the suit land executed between the Respondent and Elizabeth Michael Massawe.
2. Appellant's sale agreement of the suit land contained a stamp of the ward secretary and witnessed by the relative and vendor's son; and,
3. Possession of the document of title of the suit land by the appellant.

The counsel has submitted to challenge the reasons as follows:-

1. Exhibit P1 was a forged document as described. Thus it does not override and or supersede Exhibit D2 (sale agreement executed between the Respondent and the original owner late Elizabeth Michael Massawe)

The Judgement lacked clear reasons because the whole decision was based only on exhibit P1 despite of the fact that the testimonies regarding the exhibit P1 being inconsistent and contradictory. This is because; One, SM1 tendered exhibit P1 which is typed document and witnessed by four witnesses including ward secretary of Kiboriloni; SM2 testified that the sale agreement was only witnessed by him and his brother and not government leader or other witness and also; the testimony of SM3 revealed that he saw the sale agreement executed between the appellant and Elizabeth Michael Massawe, was in the handwritten form and not otherwise.

Second, the tribunal chairman declared the appellant as the lawful owner of the suit land because the Appellant's Sale agreement of the suit land was sufficient to prove his claim as it was signed by witnesses and it contained the stamp of the ward secretary and that Exhibit P1 was corroborated by the testimony of the relative and vendor's soon.

The Respondent submit that the appellant's witnesses did not corroborate or support exhibit P1 as the testimony of SM2 and SM3 contradicted with testimony of SM1 and differed with format and contents of Exhibit P1 as described herein above. Thus the reason given by the trial Tribunal Chairman was not clear.

The third reason, that the appellant possessed the document of title of the Suitland. The respondent's counsel has submitted that mere possession of the Title deed by the appellant does not imply that he was the owner of the suit land because one may obtain the document

by stealing or other unlawful means, as clearly testified by Respondents herein that the appellant's son stole the Exhibit P3 from him.

Exhibit P3 bears the name of Elizabeth Michael Massawe and not appellant. Therefore the presumption made by the trial tribunal chairman was not proper.

As to the third ground on not awarding cost to the appellant the respondent's counsel has submitted that, it was proper due to the nature of the case as according to the verdict both parties won. So the decision was correct. The counsel submitted that the cases cited by the counsel for the appellant are distinguishable with circumstances and material facts, except for the cases for the principle for re-evaluation of evidence by the appellant court.

In rejoinder the counsel for the appellant has complained that the respondent has raised a new issue that the document Exhibit P1 was forged. That is a new issue, as well as the fact that of Moshi Municipality and Moshi Township Council. That was also not raised at the hearing stage. It cannot be raised now as the appeal stage. In the submission by the counsel for the appellant, the counsel for the Respondent ought to have cross examined on the point during trial. Since he was silent, he cannot raise it now. He has cited the case of **George Mail Kemboge Vs. Republic,** Criminal Appeal No. 327 of 2013, Court of Appeal of Tanzania, Mwanza Registry (Unreported) where it was held:-

"It is a trite law that failure to cross examine a witness on an important matter ordinarily implies acceptance of the truth of the witness evidence".

The counsel for the appellant has also referred to the case of **Solomon Thomas Mmari (As administrator of the estate of the late Thomas Mmari) Vs. Reuben Joshua Mollel,** Land Appeal No 31 of 2020, HC-Moshi for the observation that:-

"It is trite law that an issue not raised during hearing cannot be raised at the appeal stage".

As to the signing of the sale agreement SM2 did witness as he testified together with his brother from their family. That does not exclude other witnesses.

That the plot in dispute is Plot No. 78 Farm 125. The other No 74 Kiboriloni it was an error in recording.

The counsel has insisted the standard of proof in civil cases is to the balance of probabilities unlike in criminal cases where proof must be beyond reasonable doubt.

The appellant's counsel has also insisted that the Respondent was an invitee to the dispute plot which is owned by the appellant. He referred the case of **Yediko Mgege Vs. Joseph Amos Mhiche,** Civil Case No. 137 of 2012, Court of Appeal of Tanzania at Iringa where it was observed that:-

"The law is settled in this jurisdiction that 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".

The counsel has invited this court to see the respondent as an invitee based on the evidence of SM1 and SM3.

I must admit that the appellant's counsel has submitted in lengthy in the rejoinder and basically he has reiterated the contents of submission in chief and added some details to explain the position favoring the appellant. The parties having submitted, they have thrown the matter to the court for consideration.

I am now required to respond to the grounds in resolve of the dispute registered herein court between the two brothers. I say so because they are blood related from the same biological parents. I believe this case is a bit tricky and had it been it is a practice to advice parties before they file their case, and that once you advise them it is compulsory for them to comply, I would have advised them to sit down and settle their differences at home. For no matter what happens they remain to be relatives and they must work together as they did forty years when the dispute property was acquired.

This case is peculiar in that brothers are fighting for what was intended to be for helping the family out of economic hardship. The truth however is best known to the parties. Herein court they have laid down the questions to be resolved. At the trial tribunal the main question

was, who is the lawful owner of the property at Plot No 78 Farm 125 at Kiboriloni, Moshi Municipal Council and to what reliefs are the parties entitled to. The decision was made in favour of the appellant as the lawful owner. However the tribunal went farther to order for compensation to the respondent at the rate of 30% of the value of the property. That was made in belief that the owner is the appellant and the respondent was just occupying the premises and worked to earn daily bread at the area by the permission of the brother, Appellant.

In this court and as explained herein above the ground of appeal is whether the trial tribunal in its determination of the dispute made proper evaluation and analysis of the evidence on record before reaching as the decision he made. Both counsels in their submission have suggested a negative answer to the question. The counsel for the appellant agrees on the first arm of the decision that it was proper and analysis was properly made that is why the appellant was made a winner. Owner of the dispute property. The appellant however is aggrieved to the order for compensating the respondent at 30% rate of the property value. In this respect no proper analysis and or evaluation of evidence was made. According to the counsel, the order was just assumed by the trial Tribunal Chairman as it was never asked for by the respondent. Another reason is that the respondent never proved the extent he maintained and developed the dispute property so that he is granted the right to be compensated. According to the counsel for the appellant. The trial Tribunal Chairman based the decision on the paragraph which was never pleaded in the application

in the trial Tribunal. That he has mentioned to be paragraph 6 (a) (viii) of the application filed in the tribunal.

This last reason of challenging the order for compensation that the paragraph does not exist is a misleading statement as I have perused the Tribunal file, Specifically paragraph 5 (a) (viii) it reads:-

> *"That, the applicant then notified the Respondent of his intention to dispose Plot No. 78 Farm 125 on 24th day of December, 2018, but the Respondent who is an invitee to Plot No. 78 replayed (sic) orally that the Applicant was not a lawfully (sic) owner of the suit premises. Moreover, the Respondent who is an invitee is now claiming ownership of the Land in dispute".*

In my view, it was a typographical error to record paragraph 6 (a) (viii) instead of paragraph 5 (a) (viii). Therefore, we remain with the two reasons above as the last one is unfounded as shown by the quote above.

The Respondent's counsel however has attacked the 1st ground of appeal that the Judgement lacks proper analysis of the evidence as to rely on untrue evidence to be the basis of the decision. The respondent has utilized the work forged document. The counsel has analyses the document in three instances as points to challenge the veracity of the claim as evidenced by the appellant. If I may be allowed to refer while refraining from repeating the details the counsel for the respondent has invited this court to see that the sale agreement Exhibit P1 was forged.

On this he gave the reasoning that the dispute plot is at Plot No. 78 Farm 125 at Kiboriloni, Moshi Municipal Council. However, the Exhibit P1 which is shown that it was signed on the 2/2/1982 it has a stamp of the Ward Secretary dated 2/2/1982. The same shows the Kiboriloni Ward is located in Moshi Municipal Council. But in 1982 the area was in Moshi Township Council. For the reasons, the counsel for the Respondent believe and has convinced this court to believe that the document was forged to deprive the respondent of his property. The other evidence he has referred to is the exchequer receipt dated 3/8/1984. It bears the name of Moshi Town Council. In order to make it strong he compared to the exchequer receipt issued on the 27/2/2013. The same beared the name of Moshi Municipal Council. In his argument he stated that exchequer for payment of land rent dated 3/8/1984 is a proof to the veracity of argument that Exhibit P1 was forget.

The learned counsel for the appellant also went further to analyse evidence by the appellant and his witnesses. He argued that the same has contradictions and it does not support each other. For the reasons he argued, the Trial Tribunal Chairman did not analyse properly the evidence to arrive at the decision made. The counsel for the appellant has also referred to the way purchase money was acquired. While the plot was purchased on 2/2/1982, the money was testified to have been borrowed on 27/2/1982. It was borrowed from Mr. Alex Tarimo it was Tshs. 20,000/= in the testimony it was shown that money was borrowed from Samweli Mshiu.

The counsel for the appellant has tried to explain out the contradiction but it does not sink in my mind to see that there was proof of ownership as claimed.

Under the circumstances of the case at hand, I am in one thought with the respondent's counsel on the scarcity of proof of ownership. The appellant did not succeed to convince me that truly he owns the place it may be he assisted in the process of acquisition, but upon reading the defence evidence, it is clear the defendant and or respondent has adduced the evidence in support to his claim. At page 41 he testifies that his brother came to annoy him after retiring. But he has been there for a long time.

I have the opinion that appellant did not prove the case and it was an error on the part of the tribunal chairman to declare him to be a lawful owner. This ground is thus allowed in favour of the Respondent who has substantiated his case against the appellant.

On the second ground the complaint is that the Judgement lacked legal reasoning. The counsel for the appellant however seemed to support the decision and had the opinion at paragraph 33 that there was no reason to interfere with the same.

The counsel for the appellant however, has submitted that lack of reasoning is displayed on reliance on Exhibit P1. However, the evidence is inconsistent because the agreement which was executed was in typed and witnessed by four witnesses. However, SM2 said they were witnesses himself and his brother, and SM3 said Exhibit P1 it was not

typed. Secondly, witnesses did not corroborate or support the testimony by SM1 and that the appellant possessed a title deed. He argues that the same can come into possession of the appellant in various ways. Thus the trial Chairman did not reason properly when he decided in favour of the appellant.

These arguments mad the counsel for appellant to come up. His argument was that the tribunal did analyse properly the evidence when it came up with the decision. According to the counsel, forgery has not been proved to the standard required in criminal cases and that the tribunal satisfied itself to the balance of probability that the appellant tendered cogent evidence. The chairman did analyse by making comparison to the evidence tendered. In his view that was done properly as the available evidence was considered.

On this issue I have the view that what was done in the first ground of appeal is analysis in order to arrive at the decision. However, the fact that analysis was done is not an issue. But whether it was done properly according to the legal reasoning is. In my opinion, the trial chairman mad analysis and reasoned and that cannot be underrated. The question of adopting a stand is that which is the concern of parties and I believe turned as lack of clear legal reasoning.

In this case the trial chairman did reason though parties may not be happy with it. The ground fails.

On the last ground, the appellant wanted to be awarded cost. I think, the honourable trial chairman was right to do so. I would also decide in

the same way due to one reason. Both parties are old men and relatives. Prudence would require any one to take consideration of those factors.

On the issue of time, the counsel for appellant has challenged that it is a new issue. I do not agree as it is a legal point which touches the Jurisdiction of the Court. It may be raised at any time. Also one may argue that indeed occupation of the land for 40 years is long time and coming with this case in 2018 was way out of time. On the balance of probabilities it is safe to leave the property in the hand of the respondent and the evidence supports the position.

Under the circumstances, this appeal is allowed to the extent explained in the Judgment.

It is ordered accordingly.

Dated and Signed this 13th September, 2022

T. M. MWENEMPAZI
JUDGE

Judgement delivered in the presence of parties in court this 13th September, 2022

T. M. MWENEMPAZI
JUDGE