IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 13 OF 2022

(Originating from Application No. 139 of 2020 of the District Land and Housing Tribunal for Moshi at Moshi).

WILLIE J.O. E. MREMA..... APPELLANT

VERSUS

ABDILLAHI ALLY MSAKI.....RESPONDENT

16/8/2022 & 06/9/2022

JUDGMENT

SIMFUKWE, J

This appeal emanated from the decision of the District Land and Housing Tribunal of Moshi (trial Tribunal). In a nutshell the respondent herein instituted a land dispute in the trial tribunal against the appellant and two others who were not joined in this appeal. Before the trial tribunal the respondent prayed to be declared the lawful owner of the disputed land; a surveyed Farm with Certificate of Occupancy with a title No.47981, L.O. No. 558127 situated at Sango in Moshi. The respondent alleged to have bought the disputed land from one Eunice Vicent Mrema (2nd respondent and Gerald Luiwana Mrema (3rd respondent before the trial tribunal) since 2015. The respondent successfully registered the disputed land and got the certificate of right of Occupancy.

The respondent alleged further that he had faced with disturbance from the appellant since 2016 to date as the appellant has been instituting multiple suits unsuccessfully purporting to be the administrator of the estate of their deceased father. Such act disturbed the respondent who decided to institute the application before the trial tribunal claiming among other things to be declared the lawful owner of the disputed land and an order of restraining the appellant from interfering his peaceful enjoyment of the suit land. The trial tribunal decided in favour of the respondent herein hence this appeal.

In this appeal the appellant advanced eight grounds of appeal as reproduced hereunder:

1. *The Hon. Chairman erred in law and fact when he decided that the sale of the four acres in dispute to the Respondent was a valid sale when it was not approved by the Village Council where it is located as per section 31(3), 32 and 33 of the Village Land Act Cap 114 R.E 2019. (sic)*
2. *The Hon. Chairman erred in law and fact when he decided that the sale of the four acres in dispute by the then Respondents by (sic) Eunice Vicent Mrema and Gerald Luiwana Mrema was valid sale when the said sale was not approved by the Village Council where it is located as per* ***sections 31(3),32 and 33 of the Village Land Act, Cap 114 R.E 2019****.*
3. *The Hon. Chairman erred in law and fact when he relied on a photocopy sale agreement to decide that the sale of the four acres in dispute by the then Respondents by Eunice Vicent Mrema and Gerald Luiwana Mrema to the*

Respondent in this appeal was a valid sale, contrary to the law.

4. *The Hon. Chairman erred in law and fact when he declined to consider the evidence of the Appellant and the Exhibits which he tendered before his Hon. Tribunal (sic) and were admitted, had he done so he would have found as fact that the four acres in dispute were still part of the Estate of the late ORIGENES LUIWANA MREMA the Genetical father of the Appellant.*
5. *The Hon. Chairman erred in law and fact when he relied very much on the photocopy of the minutes of a meeting held on the 01.07.1989 to divide the six acres of the late ORIGENES LUIWANA MREMA when the said minutes were a valid document, Gerald Luiwana Mrema was not the owner of the six acres, neither the Chairman nor the Secretary of the said meeting. (sic)*
6. *The Hon. Chairman erred in law and fact when he denied the Appellant the right to present before his Hon. Tribunal (sic) all witnesses he wanted to present, in order for him to defend properly the land case the Respondent had instituted against him.*
7. *The Hon. Chairman erred in law and fact when he denied the appellant right to cross examine the other Two Respondents then and their witnesses when the land case in this appeal was proceeding before the Hon. Tribunal.*
8. *The Hon. Chairman erred in law and fact when he spent a page in his judgment discussing my letter requesting him*

to disqualify himself from hearing this case a fact which shows that he was biased against me. (sic)

During the hearing of this appeal, the appellant was unrepresented while the respondent was represented by Mr. Peter Njau, learned counsel. The respondent's advocate prayed the matter to be argued through written submissions and the prayer was granted. I am grateful that the parties filed their respective submissions in time.

Supporting the appeal, in respect of the 1st and 2nd grounds of appeal the appellant faulted the Hon. Chairman for relying on the sale of the disputed land to the respondent by Eunice Vicent Mrema and Gerald Luiwana Mrema to be valid while the same was not approved by the Village Council contrary to **sections 31(3), 32 and 33 of the Village Land Act** (supra). Elaborating these grounds of appeal, the appellant referred to page 6 to 7 of the trial Tribunal's judgment where the trial Chairman decided that:

"Ushahidi unaonyesha kwamba utaratibu wa mauzo ulizingatia sheria ulishuhudiwa na Wakili Paricia (sic) Eric Gemari, Viongozi wa Serikali za Mtaa na Kijiji, Mtendaji wa Kijiji, Balozi wa nyumba kumi kumi na majirani. Yote haya yalifanyika ili kuondoa kufichwa kwa ukweli wa umiliki wa eneo hilo na mauzo yaliyofanyika."

From the above quoted paragraph, the appellant blamed the Chairman for deciding that the sale was valid. He stated that the law which governs the disposition of the land like the one in dispute before and during the sale to the Respondent was a derivative right held or owned under a customary right of occupancy is **sections 31 (1), 31 (2), 31 (3), 32**

and 33 of the Village Land Act (supra). Under **section 31 (2) (a)** of the said Act any disposition of derivative right shall be void if it does not comply with the provisions of **Sections 32 and 33** of the same Act. He also argued that **Section 32 of the Village Land Act** (supra) mandatorily legislates two conditions which must be fulfilled before a derivative right on land held under customary right or derivate right is transferred from one owner to another, whether by reason of being allocated to or sale to or for any other reason. The first condition is that of filing a prescribed form by a party applying for the disposition of such derivate right to him. This condition is found under **Section 32(2) of the Village Land Act** (supra). The appellant argued the second condition to be legislated under **Section 32(2) (a) of the Village Land Act**; that is; presenting the application in prescribed form for approval to a Village Council by a party applying for the derivate right to be transferred to him.

The appellant faulted the respondent for failure to fulfil any of these two conditions. That, during the trial before the trial Tribunal, the respondent never testified that he applied for disposition of the suit land to him through a prescribed form and that his application was approved by the Village Council where this land is located. Due to the said failure, the appellant prayed the court to quash and set aside the findings of the trial Chairman that the sale of the piece of land in dispute was a valid sale.

Under the 3rd ground of appeal, the appellant faulted the trial Chairman for relying on a photocopy of sale agreement and held the same to be valid. He stated that this is contrary to **Section 66 of the Evidence Act CAP 6 R.E. 2019** which requires all documents used as evidence and acted upon by a court of law to be primary evidence, that is original documents. He was of the view that since the sale agreement was not

original document, it was wrong in law for the trial Tribunal to admit it, to use it and to rely on it in concluding that the sale was a valid sale. He prayed the court to allow this ground with costs and consequently quash and set aside the entire judgment of the trial tribunal.

The 4th ground of appeal concerns failure to consider the evidence of the appellant and the Exhibits which he tendered before the trial tribunal. He argued that if the same could have been considered, the trial Chairman would have found that the four acres in dispute were still part of the Estate of the late ORIGENES LUIWANA MREMA the genetical father of the Appellant. He stated that in his oral evidence and the documentary evidence tendered and admitted by the Chairman, he testified that the four acres in dispute were still part of the undistributed Estate of the late ORIGENES LUIWANA MREMA who died in 1998. After his death ownership shifted to his mother who became the occupier and user of the four acres in dispute. She died in 2014 and the Appellant was appointed to be an interim overseer of the Estate of the late ORIGENES LUIWANA MREMA, until he was duly appointed to be the administrator of the Estate of the late ORIGENES LUIWANA MREMA.

The appellant continued to submit that in 2015 that's when the Respondent claimed to have bought the four acres in dispute from Eunice Vicent Mrema and Gerald Luiwana Mrema while the Estate of the late ORIGENES LUIWANA MREMA was still undistributed to its lawful heirs. That, the appellant and his siblings including Eunice Vicent Mrema and Gerald Luiwana Mrema were in court battling who among them should be the Administrator of the Estate of their late father.

Basing on that fact, it was the argument of the appellant that Eunice Vicent Mrema and Gerald Luiwana Mrema had no valid title on the piece of land in dispute which they could validly sale to the Respondent.

The appellant also submitted that through his documentary evidence presented before the trial Tribunal, including court judgments that the appointment of the Administrator of the Estate of the late ORIGENES LUIWANA MREMA was still being contested in courts of law, among those courts was the High Court of Tanzania at Arusha and Arusha Urban Primary Court. That in Arusha Urban Primary Court Probate and Administration Cause No. 239 of 2020 was and is still being contested. He attached three documents which are self-explanatory marked "Al" collectively. The first document was the Decree and the Judgment in the Appeal before the High Court of the United Republic of Tanzania at Arusha in DC Civil Appeal No. 18 of 2016 between Gerald O. Mrema & 3 Others versus Willie J. O. Mrema (as Administrator of the Estate of Origenes Luiwana A. Mrema. In that case it was ruled that fresh proceedings for appointing the Administrator of the Estate of the late ORIGENES LUIWANA MREMA be commenced and the second and third documents which the appellant wish to rely upon are the proceedings of Arusha Urban Primary Court Probate and Administration Cause No. 239 of 2020 which shows contention of the appointment of the Administrator of the Estate of the late ORIGENES LUIWANA MREMA first in the registry of the Resident Magistrate Court of Arusha at Arusha, Probate and Administration Cause No. 06 of 1998, second in the High Court of the United Republic of Tanzania, in the District Registry of Arusha at Arusha in DC Civil Appeal No. 18 of 2016 and thereafter, after the judgment of the High Court, before Arusha Urban Primary Court, Probate and Administration Cause

No. 239 of 2020 is still being contested until now. The appellant was of the view that the same were concrete evidence that Eunice Vicent Mrema and Gerald Luiwana Mrema had no valid title on the piece of land in dispute which they could sale to the Respondent in 2015 or any time between 2014 and 2020.

Basing on such reasons, the appellant prayed the court to allow this ground, quash and set aside the entire judgment of the trial court.

Submitting in respect of the 5th ground of appeal, it was stated that the trial Chairman relied on the photocopy of the minutes of a meeting held on the 01.07.1989 to divide the six acres of the late ORIGENES LUIWANA MREMA when the said minutes were not a valid document. He argued that the said Gerald Luiwana Mrema was not the owner of the six acres, neither the Chairman nor the Secretary of the said meeting. The appellant submitted further that, in the first place the Appellant and his witness Eliwaza Mrema in their evidence in chief, they clearly testified that their late father before he died, he allowed the Appellant to build a residential house adjacent to the piece of land in dispute and the house is still there and whenever the Appellant is in Moshi he sleeps in the said house.

The appellant said that such evidence was neither faulted nor contradicted by the Respondent or any other independent witness. Also, the minutes which the trial Chairman relied to conclude that the piece of land in dispute was distributed to Eunice Vicent Mrema and Gerald Luiwana Mrema by their late father while alive were not authentic because the said meeting was neither held nor chaired by the late ORIGENES LUIWANA MREMA and secondly, they were wrongly admitted by the Hon. Chairman

since the same was photocopy **Contrary to Section 60 of the Evidence Act** (supra).

The appellant formed an opinion that it was the duty of the Hon. Chairman to scrutinize very carefully the said minutes in order to discover if the minutes were authored by the person, they purport to have made it. That the trial court has a duty to inquire and determine whether the documents tendered in court were legally issued as stated in the case of **Mary Agnes Mpelumbe in her capacity as Administratrix of the Estate of Isaya Simon Mpelumbe vs Shekha Nasser Hamud, Civil Appeal No. 136 of 2021** in which at page 10 it was held that:

> *"We think that it is the duty of the court to examine whether the documents produced in court were legally issued."*

On the strength of above cited case, the appellant was of the opinion that the Hon. Chairman acted in controversy to the cited case since he did not carefully examine the authenticity of the minutes but he decided that the piece of land in dispute in this case was distributed to Eunice Vicent Mrema and Gerald Luiwana Mrema. He thus prayed the court to allow this ground.

On the 6th ground of appeal; it was stated that the Hon. Chairman denied the Appellant right to call all the witnesses he wanted to call, in order for him to defend properly the land case the Respondent had instituted against him. The appellant submitted to the effect that the proceedings of the trial Tribunal at page 33 reveals that the appellant stated that he had four more witnesses to call. Thus, he was to be given ample time to prepare his witnesses and be availed with the Tribunal summons to call

his witnesses. However, no order was given by the Trial Tribunal in response to his requests. Also, at the bottom of page 36 of the proceedings of the trial tribunal he stated that he had three more witnesses to call and he needed a week to be able to call his witnesses. That, the appellant's prayers were denied as seen at page 37 of the same proceedings while the prayers of the Advocate for the Respondent were allowed as prayed. It was the opinion of the appellant that he was denied a chance to call and present all the witnesses he wanted to call before the trial Tribunal. Thus, he was denied right to be heard contrary to **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania**, which guarantees unlimited right to be heard to any citizen of this country when a decision is made concerning his rights. That, the act of denying the appellant such right occasioned miscarriage of justice to the Appellant. The appellant was of the view that the entire proceedings and judgment of the trial tribunal are tainted with illegality and it ought to be declared null and void ab initio with no legal effect at all.

The appellant's grievances under the 7th ground of appeal were that he was denied the right to cross-examine the other two Respondents and their witnesses. That, from page 39 to 42 of the proceedings, after Eunice V. Mrema and Gerald Luiwana Mrema had given their evidence in chief, cross-examined by the Tribunal Assessors, the Appellant was not given the opportunity to cross-examine them. He argued that procedurally after a defence witness gives his evidence in chief, the other defendant or respondent if any must be allowed to cross examine that witness. That, the trial tribunal had the legal duty of allowing Co-defendants or Co-respondents to cross-examine; his Co-defendant or Co-respondent. He faulted the Hon. Chairman for denying him chance to cross examine

Eunice Vicent Mrema and Gerald Luiwana Mrema who were the ones who illegally sold the piece of land in dispute to the Respondent. That, through the pleadings of the Respondent, the Trial Chairman knew such fact and so the law and equity demanded the Appellant to have been given the chance to cross- examine the two Co-respondents Eunice Vicent Mrema and Gerald Luiwana Mrema. Failure to give him chance to cross examine the co-defendants the trial Tribunal occasioned miscarriage of justice to the Appellant. Thus, the entire proceedings and judgment of the trial tribunal are tainted with illegality, the same ought to be declared null and void ab initio with no legal effect at all.

Under the last ground of appeal, the appellant faulted the trial chairman for spending a page in his judgment discussing his letter of 20/10/2021 requesting him to disqualify himself from hearing this case. The appellant was of the view that such fact showed that the Chairman was biased against him. He referred the court to page 5 of the judgment to substantiate his argument

The appellant continued to state that it is a well-known legal procedure that, in dealing with a letter concerning a judicial officer, once he receives such a letter, he should conduct an immediate hearing to resolve the issue raised by the complaining litigant. In the said hearing, the complainant will state the reasons for that request and the other side are given the chance to respond to the submission made by the complainant and the complainant will be given a final chance to re-join the reply by the other side. Finally, the Judicial Officer should write his ruling either deciding to recuse or not. Depending on the ruling of such Judicial Officer, the trial will either proceed for hearing before the same Judicial Officer or before another Judicial Officer.

The appellant contended that the procedure adopted by the trial chairman in dealing with his request letter to recuse was wrong for three reasons. **First,** he did not conduct a fair hearing of the complaint of the appellant that he was biased against the appellant since immediately after he had received the complaint letter on 20/10/2020, the trial chairman was silent until on 7/2/2022. Thus, he aimed to decide the case against him and that is what he did. ***Second,*** the trial chairman was biased since he did not conduct an opening hearing of the complaint sitting with the assessors and allow him to submit and reply and finally the assessors to give their opinions. **Third;** his complaint required evidence from each side. Then, assessors should have been given chance to give their opinions, and the Chairman should have delivered his ruling as required under **section 23(2) of the Land Disputes Courts Act [CAP 216 R.E. 2019]** and **Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003**.

He argued that in the judgment of the trial tribunal especially at page 5, there is no evidence of the Appellant and the Respondent and no legal opinions of assessors present were sought. The appellant insisted that lack of his evidence reveals that the Appellant's complaint was decided basing on the thinking of the trial Chairman. He stated that the Chairman acted contrary to the law and case law. Thus, since his decision is part and parcel of the entire judgment of the trial Tribunal, the appellant urged the court to declare the same null and void as stated in the case of **Sikuzani Saidi Magambo & Kirioni Richard versus Mohamed Roble, Civil Appeal No. 197 of 2018 (unreported) which the Court of Appeal** after noting that the Chairman did not seek the opinions of assessors had this to say:

"In the event, we are constrained to invoke our revlsional jurisdiction under section 4(2) of the AJA and we hereby nullify the entire proceedings and quash the judgements of both lower courts and subsequent orders thereto. If parties are still interested are at liberty to institute a fresh suit before the Tribunal, subject to the law of limitation."

On the strength of his submission, the appellant urged the court to allow all the eight grounds of appeal with costs and nullify the entire proceedings of the trial court, quash and set aside the entire judgment of trial court and allow the appeal with costs.

Replying the appellant's submission, the learned advocate for the respondent adopted the Respondent's Reply to the Petition of Appeal to form part of his submission.

Replying the 1st and 2nd grounds of appeal on the allegations that the said sale was not approved by Village Council, Mr. Njau submitted that this was not an issue before the trial tribunal since at the time of filing this case the suit land was already a registered land with certificate of occupancy thus the Village Land Act is not into play. Mr. Njau stated that even if it is assumed that the alleged issue of approval of Disposition by the Village Council was an issue before the trial tribunal still the same lacks merit since the disputed land has been registered in accordance with the Land Act as well as Land Registration Act after obtaining an approval of the Land Commissioner which resulted to the title deed under the Respondent's name to that effect. That, the said title deed was tendered as Exhibit during the trial. Hence, it's illogical to argue about the village approval of the disputed land while the same was dully approved by the

Land Commissioner who has got supervisory powers compared to that of the Village Council. Therefore, since the land in dispute belonged to the then two Respondents (Eunice Vincent Mrema and Gerald Luiwana Mrema) and not the village, then the trial Chairman acted correctly to hold that the sale of the disputed land was a valid sale. In that regard Mr. Njau prayed for the two grounds of appeal to be dismissed.

Responding to the 3rd ground of appeal in respect of relying on a photocopy of sale agreement to decide the validity of the sale of the land in dispute; it was submitted that nowhere the Respondent the then Applicant tendered the photocopy of the sale agreement. It was the opinion of Mr. Njau that the appellant is trying to eat his cake and have it again, since it is the appellant who tendered the sale agreement which he complained about as seen at page 27, 12th line of the typed proceedings where he stated:

"Naomba kutoa mkataba wa mauziano.'

Wakili Silayo: Sina pingamizi...

Mkataba wa mauziano ni kieleiezo namba 7"

Mr. Njau averred that since the appellant is the one who tendered the said exhibit, and after the same went without objection, the Appellant cannot complain or appeal against his own document.

As far as the 4th ground of appeal is concerned that the Chairman did not consider evidence of the appellant; the learned advocate submitted that the Hon. Chairman correctly reached the justifiable findings after thorough consideration of both oral and documentary evidence from both parties and found out that the disputed land was long ago allocated to

the then 2nd and 3rd Respondents and later on it was sold to the Respondent by the respective owners.

The learned advocate continued to argue that during the trial, the appellant never disputed the said land to be the property of the 2nd and 3rd respondents after being allocated to them by their late father. The appellant also never disputed that the 2nd and 3rd respondents were his siblings. Thus, according to the evidence tendered, it is undisputed that the three respondents are siblings and the Late Origenes Mrema (their father) allocated to them his 6 acres of land which were already equally distributed to his three sons, namely Gerald, Willie and Vincent (Father to Eunice) before his demise on 01/07/1989 as per exhibit D1O as seen on the 8th line at Page 42 of the typed proceedings of the trial tribunal.

The learned advocate stated that the exhibits which were tendered by the appellant before the trial tribunal, show that the appellant had long time clashes with his relatives/family members due to multiplicity of suits regarding the Estate of his late father Origenes Mrema. Mr. Njau was of the view that considering the Appellant's evidence and that of the 2nd and 3rd respondent which were legally tendered, the trial Chairman was correct to hold that the disputed land was allocated long time ago to the sons of the Late Origenes Luiwana Mrema including the appellant and later on the two respondents sold their portion to the Respondent herein.

Basing on the argument above the learned advocate submitted that the fourth ground of appeal lacks merit and he prayed for the same to be dismissed with costs since the Chairman properly analysed evidence tendered and testified by each witness and proceeded to involve it in his judgment before he came to a conclusion.

Regarding the 5th ground of appeal that the trial Tribunal relied on photocopy of the minutes of the meeting, it was stated that the said document was admitted in accordance to the Laws governing admissibility of evidence since it was original document and the same was not objected by the Respondent herein. That, the said evidence was corroborated by DW6. Thus, the appellant is estopped from objecting the evidence which was also tendered on Respondent's favour. It was the comment of the learned advocate that the document tendered was not objected and it was genuine for it was seen by the Chairman who returned the original to the owner of the same and proceeded to remain with what was in the file. Concerning the allegations that the appellant was given the land adjacent to the disputed land and built the house on it, the learned advocate did not dispute the same because the appellant built the house on the land allocated to him by his late father just the way his brothers were allocated too. In that respect Mr. Njau formed a conclusive opinion that the 5th ground has no merit.

In respect of the 6th ground of appeal that the trial tribunal denied the Appellant right to call his witnesses, the learned advocate for the respondent submitted that the same has no value since at page 33-38 of the typed proceedings the records show that the appellant was given ample time to bring his witnesses more than three times but he failed to bring them regardless of summons which were issued to him to summon them. That, the appellant never brought the witnesses apart from his wife, one Eliwaza Mrema and one Samwel Ibrahim who later on told the truth to support the Respondent's case against the Appellant. Therefore, the allegations that he was denied constitutional right of fair trial as per **article 13(6) of the Constitution** (supra) remains as a mere lie since

the records are very clear as to the chances given to him whereby after failure to bring his witnesses on 21/09/2021, 05/10/2021 and 05/10/2021 respectively, then on 12th October 2021 (at page 38 4th line) he was wilfully recorded saying *"Mdaiwa wa 1: Sina mashahidi wengine."*

The learned advocate emphasized that the arguments by the appellant at this stage are mere lies which do not deserve the attention of this court. In addition, the learned advocate stated that it is an established principle that in each case there must be an end to litigation. The trial chairman acted correctly as he accorded the Appellant right to call his witnesses and the appellant closed the case when he failed to bring them. Thus, he prayed the 6th ground to be dismissed with costs as the same is devoid of merit.

Responding to the 7th ground of appeal that the appellant was denied right to cross examine the other two defendants; Mr. Njau submitted to the effect that, it is the established principle under the Law of Evidence that co-respondents/co-defendants cannot cross examine each other during the trial. The learned counsel referred to **Section 147(1) of the Evidence Act, Cap 6 R.E. 2019** which provides that:

> *147(1) "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined."*

Mr. Njau argued that the above cited section is the guiding law when it comes to the issue of cross-examination of witnesses and the same is very clear that "if the adverse party so desires can cross examine" that is, it is only the opposing or opposite party who can cross examine the other party.

Explaining more on what happened before the trial tribunal, Mr. Njau stated that the records of the tribunal reveals that even the Appellant who was the 1st Respondent before the trial tribunal, while tendering his evidence was not cross examined by the 2nd and 3rd respondents. However, before the trial tribunal, the appellant did not ask for the opportunity to cross examine his co-respondents and denied such opportunity. Thus, he is estopped from raising it at this stage. Mr. Njau averred that the 7th ground of appeal has no merit as the legal procedures governing evidence were dully adhered to by the trial Chairman.

Contesting the last ground of appeal that the Chairman spent a page in his judgment discussing the Appellant's letter requesting him to recuse from the trial, the learned advocate argued that the appellant is misleading the Court because throughout the trial the Appellant never raised any complaint against the trial Chairman. That, he raised the same during the preparation of judgment which is contrary to the laws and procedures.

Further to that, the learned advocate submitted that after the trial Chairman had received the said complaint at that stage, he correctly addressed the same in his decision since there was no any other room through which he could address it as the same was brought lately contrary to the procedures for recusing the Magistrate/Chairman. That, the trial Chairman ruled out after analysing the same and discovered that it was devoid of merit as no genuine reason/ground for recusal was established.

Concerning the allegations that the trial chairman did not give out assessors' opinions as required by the law, it was stated that such contention is unfounded as the tribunal's records are crystal clear that on

9/9/2021 at page 44-45 of the typed proceedings, Assessors' opinions were read by the trial Chairman in the presence of the appellant in person. Also, the same were reflected by the trial chairman in the last paragraph of page 4 and page 5 first paragraph of the typed judgment. Thus, the said contention is devoid of merit. The learned advocate also argued that the case law cited to that effect cannot work.

Concluding his submission, the learned advocate submitted that this appeal lacks merit since the grounds of appeal submitted by the Appellant are unfounded. He prayed the court to dismiss the entire appeal with costs.

In rejoinder, the appellant reiterated his submission in chief. In respect of the 1st and 2nd grounds of appeal, the appellant added that since the disputed land was still held under the Chagga customary land law, then the alleged disposition should have complied with the mandatory provisions of **sections 31 (1), 31 (2), 31 (3), 32 and 33 of the Village Land Act** (supra). In so far as other grounds of appeal are concerned the appellant reiterated what he submitted in chief.

After going through the parties' rival submissions and the trial tribunal's records, the only issue for determination is ***whether this appeal has merit***. This issue will resolve all the grounds of appeal.

On the 1st and 2nd grounds of appeal, the appellant condemned the trial chairman for deciding that the sale of the disputed land was valid while the same was not approved by the Village Council. The learned counsel for the respondents was of different opinion, that this was not an issue before the trial tribunal as at the time of filing the case the suit land was already registered and it was registered after obtaining approval from the

Land Commissioner who has supervisory powers over the alleged Village Council.

In the instant case, the disputed land has been registered under the name of the respondent. DW3 Samwel Ibrahim Fungavyema, assistant Land Officer stated that in registration of title, they are guided by the laws. Since the Land Commissioner approved the registration, the assumptions are that the process of registering the disputed land has been complied with including the availability of the village council meeting which was held on 23/4/2015. Moreover, evidence of the respondent before the tribunal to prove that he was the owner of the disputed land was the Certificate of Occupancy which was offered by the Land Commissioner who has supervisory powers over the Village Land Council. Having stated as such, I find the 1st and 2nd grounds of appeal to have no merit.

In respect of the 3rd ground of appeal that the Chairman relied on the photocopy of the sale agreement; this ground reminds me one of the principles of equity that ***no one should benefit from his own wrong***. That, a man cannot be permitted to take unfair advantages of his own wrong to gain favourable interpretation of the law. The appellant herein implored this court to allow this ground of appeal while he was the one who tendered the said photocopy of the sale agreement on 02/9/2021 (page 28 of the typed proceedings of the trial tribunal). As rightly submitted by the learned counsel for the respondent, since the appellant is the one who tendered the said sale agreement then, he cannot question the same at the appellate stage.

The 4th ground of appeal is that the chairman did not consider evidence of the appellant. The learned advocate for the respondent stated that the appellant's evidence was well considered.

I am aware that failure to consider the party's evidence is fatal. Where there is such failure to consider the evidence then the appellate court has to step into the shoes of the trial court and consider the same. See the case of **Hassan Singano @ Kang'ombe vs Republic, Criminal Appeal No. 57 of 2022**. (CAT)

Therefore, in the instant matter, in case the trial tribunal did not discharge its duty of considering the evidence of the appellant, then this court will consider it and see if the same is heavier to render this court to decide otherwise.

I keenly examined the trial Tribunal's judgment; indeed, I found that the appellant's evidence was considered by the Hon. trial Chairman at page 7 of the judgment. In considering the appellant's evidence *vis a vis* that of the respondent herein, the learned Chairman had this to say:

> *"Madai ya Mdaiwa wa kwanza kwamba eneo lenye mgogoro ni mali ya baba yake ambaye ushahidi unaonyesha aliligawa na yeye alipewa eneo lake. Lakini Ushahidi unaonyesha Mdaiwa wa kwanza si msimamizi wa Mirathi ya baba yake limeonyesha Mdaiwa wa kwanza ni muongo. Ushahidi unaonyesha aliyeteuliwa ni Verynice Mrema dada yao. Vijana watatu waliogawiwa eneo la mgogoro na baba yao akiwa hai. Mwisho, hata hivyo ieleweke marehemu alikwisha gawa eneo lake kwa vijana wake watatu na hivyo msimamizi wa Mirathi*

hakuwa na jukumu la kuingilia mali hizi na kuanza kuzigawa tena."

From the above quoted paragraph, I am of settled opinion that evidence of the appellant was considered. At this juncture, I wish to state that, considering the party's evidence is not necessarily that the decision maker should repeat word by word of the party's evidence since such work has to be done during summarization of the parties' evidence. In the premises, I find no merit in respect of the 4th ground of appeal.

On the 5th ground of appeal, the appellant's grievances were that the Hon. trial Chairman relied upon the photocopy of the minutes of the meeting held on 01.7.1989 which divided the six acres among the respondents. The learned advocate of the respondent contended that such document was admitted in accordance with the law governing admissibility of documentary evidence.

I have gone through the judgment and the impugned document; I found that the said document is not original and the Hon. Chairman relied upon it particularly at page 7. However, there is evidence of one Estomihi John Mchaki who was then a ten-cell leader who testified that he was present when the disputed land was handled over to the respondents. Thus, evidence of the ten-cell leader corroborates the said minutes.

On the 6th ground of appeal, the appellant alleged that he was denied right to call his witnesses. Mr. Peter Njau argued that the appellant was given ample time to call his witnesses more than three times in vain.

It is trite law that curtailing a party right to call his witnesses amounts to denying him right to be heard and fair trial. However, in this case, the appellant was not denied right to call his witnesses. As correctly submitted

by Mr. Njau, the appellant was accorded with an opportunity to call his witnesses three times. Also, the tribunal gave him summons to call his witnesses but he did not do so. At page 38 of the typed proceedings of the trial tribunal, the appellant was quoted to have said that: ***"Sina mashahidi wengine"*** meaning that he had no other witnesses to call. Therefore, the contention by the appellant that he was denied right to call his witnesses has no basis.

Concerning the 7th grounds of appeal, the appellant claimed that he was curtailed right to cross examine the two co-defendants. In reply the learned advocate for the respondent submitted that co-respondents cannot cross examine each other during the trial. He backed up his argument by **section 147(1) of the Evidence Act,** (supra).

I concur with the learned advocate's views. The law which governs examination of witnesses is **section 147(1) of the Evidence Act** (supra) which provides that:

> *"Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined."*

In the ***Oxford law dictionary, at page 17*** the term *'adverse witness'* has been defined as follows:

> ***"A witness who gives evidence unfavourable to the party who called him. If the witness's evidence is merely unfavourable, he may not be impeached (i.e., his credibility may not be attacked)*** *by the party calling him, but contradictory evidence may be called. If, however, the witness is *hostile he may be impeached by*

introducing evidence that shows his untruthfulness."
[Emphasis added].

On the strength of above definition of the adverse witness, it goes without saying that the two defendants were not the adverse party just because they had given evidence unfavourable to the appellant. Also, the appellant was not the one who called the said respondents as witnesses. As per **section 147(1)** (supra) the appellant herein did not desire/ask for such opportunity to cross examine the two respondents and denied with such opportunity. Having established as such, I am of a firm opinion that the 7th ground of appeal is unfounded. I have noted that the 2nd and 3rd respondents before the tribunal did admit the application as seen at page 11 of the typed proceedings of the trial tribunal. Thus, there was no need for the trial Chairman to receive their evidence.

Lastly, the appellant faulted the trial Chairman for spending a page discussing the letter of recusal. The appellant was of the view that such act shows that the Chairman was bias. Mr. Njau was of the stated that since the Chairman received the said complaint at the stage of composing judgment, then he was right to address the same in the due course of writing judgment.

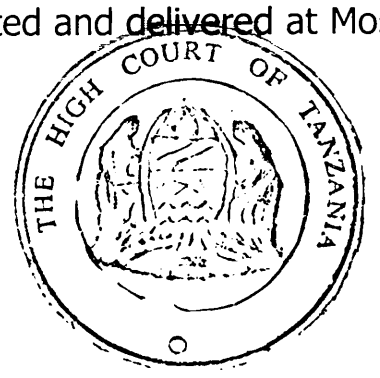
This ground will not detain much of my time. Right to recusal is equal to right not to recusal. As a matter of practice, what is required to be done by the decision maker is to give the reasons for not recusing from hearing the case. In the instant matter the appellant raised the said complaint after the parties had presented their evidence. Thus, it was correct for the Hon. Chairman to address the issue in the due course of writing judgment. However, there is no law/ precedent and the appellant failed to cite any,

which prohibits the Chairman to write the reasons for not recusing from hearing the matter.

Having established as such, in short, I am of considered opinion that the advanced grounds of appeal have no merit. On that basis, I dismiss this appeal with costs.

It is so ordered.

Dated and delivered at Moshi, this 6th day of September, 2022.



S. H. SIMFUKWE

JUDGE