THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND APPEAL NO. 23 OF 2020.

(Originating from the District Land and Housing Tribunal for Njombe, at Njombe, in Application No. 47 of 2019).

LUCY NYAGAWA .....APPELLANT

VERSUS

1. **NELSON MHOKA.....1ST RESPONDENT**
2. **ANA MHOKA.....2ND RESPONDENT**
3. **PETRO MHOKA.....3RD RESPONDENT**
4. **MARY MHOKA.....4TH RESPONDENT**
5. **JAIROS MHOKA.....5TH RESPONDENT**
6. **SHUKRANI MWINAMI.....6TH RESPONDENT**
7. **ZAKAYO MWINAMI.....7TH RESPONDENT**
8. **CHRISTOPHER MWANI.....8TH RESPONDENT**
9. **ISALE IDDI KABWASHA.....9TH RESPONDENT**
10. **ZAKARIA MHOKA.....10TH RESPONDENT**

JUDGMENT

13th Sept & 14th November, 2022.

UTAMWA, J:

The appellant, LUCY NYAGAWA was aggrieved by the decision (impugned judgment) of the District Land and Housing Tribunal for Njombe, at Njombe (The DLHT). She is thus, appealed to this court.

Before the DLHT, the appellant sued the respondents, NELSON MHOKA, ANA MHOKA, PETRO MHOKA, MARY MHOKA, JAIROS MHOKA, SHUKRAN MWINAMI, ZAKAYO MWINAMI, CHRISTOPHER MWANI, ISALE IDDI KABWASHA and ZAKARIA MHOKA (The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents respectively). She claimed against them for among others, a declaration order that she (appellant) is the lawful owner of the suit land, a vacant possession and demolition order and any other reliefs that the DLHT could deem fit to grant. The DLHT decided in favour of the respondents, especially the sixth respondent (Shukrani) and declared him the lawful owner of the suit premises. It also awarded costs to the respondents, hence the present appeal.

The appellants' appeal is based on the following four grounds of appeal which I reproduce verbatim for ease of reference:

1. That, the Trial Tribunal erred both in law and facts by deciding the matter in favour of the 6th Respondent herein basing on the sale agreement which I was not given a right to examine before tendering not even attached with the written statement of defence when served to me.
2. That, the Trial Tribunal erred both in law and facts by deciding in favour of the 6th Respondent when it denied me a right to produce documentary evidence proving how I came into ownership of the said land.
3. That, the Trial Tribunal erred both in law and fact by deciding in favour of the Respondent basing on weak and contradictory evidence adduced by RW.1 one ANNA EMMANUEL MHOKA and RW.2 one SHUKRANI MWINAMI regarding the date for purchasing the land in dispute.

4. That, the Trial Tribunal erred in law and facts by not considering the weight of evidence adduced by the Appellant here in and the fact that the Appellant built a house in the disputed land and banana trees therein.

The appellant thus, prayed for this court to allow the appeal and quash the impugned judgment with costs. The respondents resisted the appeal.

In this appeal all the parties appeared in person and unrepresented. They agreed to argue the appeal by way of written submissions and the court made an order to that effect. It must also be noted at this juncture that, the eighth respondent (Christopher) died before the appeal was heard. The administratrix of his estate one Grace Levy Lulambo therefore, represented him in this appeal.

In deciding this appeal, I will firstly consider and determine the first ground of appeal and if need will arise, I will also test the rest of the grounds. This adjudication plan is based on the fact that, according to the nature of the first ground, in case it will be upheld, the same will be capable of disposing of the entire appeal without testing the other grounds.

Now, regarding the first ground of appeal, the appellant argued briefly in her written submissions that, the sale agreement in favour of the sixth respondent (exhibit D.1) was improperly admitted in evidence. This is because, no copy of the same had been attached to the respondent's joint written statement of defence (WSD) before the trial was conducted by the DLHT. Again, she (the appellant) was not given by the DLHT any opportunity during the production of the document in court, to examine its authenticity and react against the tendering of the same.

On their part, in their joint written submissions, the respondents claimed that, the DLHT correctly admitted the sale agreement which was between one Atuzelye Mhoka and the 6th respondent (Shukuru) dated 14th June, 2014. The same was executed in the presence of the other respondents as witnesses. The failure by the appellant to cross-examine the 6th respondent on the document thus, amounted to an admission of the same.

The issues in relation to the first ground of appeal are therefore, three as follows:

i. Whether the impugned judgment of the DLHT was based on the sale agreement at issue (the Exhibit D.1).

ii. If the answer to the first issue will be affirmative, then whether the sale agreement was properly admitted in evidence.

iii. In case the answer to the second issue will be negative, then what is the effect of the irregularities on the impugned judgment and the proceedings before the DLHT?

Concerning the first issue, it is not disputed by the parties that the DLHT based its impugned judgment on the sale agreement. This fact is also evident at the third page of the typed version of the impugned judgment. From the sixth paragraph of that page (counting from the top), it is clearly shown that, the DLHT found that the 6th respondent had bought the suit land from the said Atuzelye Mhoka and he produced the sale agreement to prove his ownership of the suit premises. The DLHT further found that, the other respondents witnessed the sale and their name feature in the sale

agreement. It then held that the sixth respondent was the lawful owner of the suit land.

I consequently answer the first issue affirmatively that, the DLHT in fact, based its decision on the sale agreement. This finding thus, attracts the testing of the second issue.

In relation to the second issue, I am of the view that, the appellant's complaint is supported by the record and the law. In the first place, production of documentary evidence in cases of this nature is guided by rule 10 of the Land Disputes Courts Act (The District Land and Housing Tribunal) Regulations, 2003 (GN. No. 174 of 2003), henceforth the GN. Regulation 10(1) of the GN guides that, a DLHT may at the first hearing, receive documents which were not annexed to the pleadings without necessarily following the practice and procedure under the Civil Procedure Code, 1966 or the Evidence Act, 1967 as regards documents. Regulation 10(2) of the same GN further provides that, notwithstanding sub-regulation (1) the DLHT may, at any stage of proceedings before the conclusion of hearing, allow any party to the proceedings to produce any material documents which were not annexed or produced earlier at the first hearing. It is also the guidance of the law under Regulation 10(3)(a) and (b) of the GN that, the DLHT shall, before admitting any document under sub-regulation (2) ensure that a copy of the document is served to the other party and shall have regard to the authenticity of the document.

The generality of Regulations 10(1)-(3) of the GN is that, normally a copy of the document intended by a party to be tendered in evidence

before a DLHT has to be attached to the pleadings. In case that condition is not met, a party can still produce that document in court and the DLHT can still admit it in evidence. Nonetheless, this option can be exercised only under the following two conditions: firstly, if the copy of the document had been served to the adverse party, and secondly, the same is authentic.

The record of the matter at hand clearly shows that, the joint WSD of the respondents (dated 28th August, 2018) did not suggest anything about the sale agreement. It did not also show that the same was attached to it as rightly contended by the appellant.

Furthermore, the proceedings of the DLHT (dated 21st January, 2020) admittedly show that, the sixth respondent tendered the sale agreement before the DLHT and the same was admitted in evidence. Nevertheless, that process was performed in a very strange manner. In the first place, the sixth respondent did not tender it during his examination in chief when he testified as defence witness No. 2 (DW.2). He only did so when he was being cross-examined by the appellant. The contention by the respondents that the appellant failed to cross-examine the sixth respondent on the sale agreement is thus, untenable. The document was thus, produced suddenly in court as an afterthought, hence improperly tendered.

The record does not also show that the document was shown to the appellant so that she could react against its authenticity. In fact, the chairman of the DLHT recorded the reply by the sixth respondent in such proceedings and he also recorded his act of admitting the document as follows:

> "I have the evidence to testify that I bought the land from Atuzelye, he produced the contract of purchased the land which entered in 14/06/2014 at the Matiganjola village between shukran and Atuzelye and admitted exhibit D.1."

In my view therefore, it cannot be argued that the provisions of Regulation 10(1)-(3) of the GN were complied with by the DLHT in admitting the sale agreement in evidence.

Due to the above reasons, I answer the second issue negatively that, the sale agreement at issue was indeed, improperly admitted in evidence. This answer calls for the examination of the third issue according to the adjudication plan I set earlier.

In relation to the third issue (on the effect of the irregularities discussed above), I am of the view that, the legislative purposes of Regulation 10 of the GN discussed previously was none other than promoting fair trial to parties. It was particularly intended to *inter alia*, avoid a party taking the other party by surprise in court throught producing a document in evidence during the trial, which said document was not served to the adverse party prior to its production. In other words, the intention was to do away with what is commonly known as *ambush-justice* to parties. Those provisions were also intended to ensure that, the court admits authentic documents only upon the adverse party being given chance to react to the document so produced.

In the present case therefore, since the requirements of Regulation 10 of the GN were not observed as found earlier, the appellant was denied the opportunity of seeing and examining the document at issue before it was produced in evidence. She was also deprived of her right to react to

the authenticity of the document before it was admitted in evidence against her. Yet, the trial DLHT relied upon the same document and decide against her.

Owing to the reasons shown above, it is my settled opinion that, the appellant was denied her right to fair trial. The DLHT also violated the Principles of Natural Justice by not affording the appellant the right to be heard as far as the production of the sale agreement was concerned. It is more so considering the fact that the sale agreement at issue was a vital document upon which the DLHT pegged the impugned judgment.

The above mentioned right to fair trial/hearing is a fundamental right and is well enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1077, Cap. 2 RE. 2022. This right has been ranked as one of the corner stones of the process of adjudication in any just society like ours, and in both civil and criminal proceedings: see the decision by the Court of Appeal of Tanzania (The CAT) in the case of **Kabula d/o Luhende v. Republic, CAT Criminal Appeal No. 281 of 2014, at Tabora** (unreported). No court of this land can therefore, easily temper with such right.

Again, it is trite and settled law that, any decision reached in violation of the Principles of Natural Justice mentioned above cannot stand. The law further guides that, it is immaterial whether the same decision would have been arrived at in the absence of the violation; see the case of **General Medical Council v. Spackman [1943] AC 627** followed in **De Souza v. Tanga Town Council [1961] EA. 377** (at p. 388), and **Abbas Sherally**

and another v. Abdul Sultan Haji Mohamed Fazalboy, CAT Civil Application No. 133 of 2002, at Dar es Salaam (unreported). See further the case of **Alex Maganga v. Awadhi Mohamed Gessan and another, HCT Civil Appeal No. 13 of 2009, at Dar es Salaam** (unreported).

In my further view, the irregularities discussed above cannot be cured by the principle of overriding objective. This is because, they go to the root of the case and prejudiced the appellant. Admittedly, the principle of overriding objective has been underscored in our written laws including section 45 of the Land Disputes Courts Act, Cap. 216. It essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities. The principle was underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many others. In fact, in that precedent, the CAT made its decision in construing the provisions of the same section 45 of Cap. 216.

Nevertheless, it cannot be considered that the principle of overriding objective suppresses other important principles that were also intended to promote justice like the provisions of Regulation 10 of the GN discussed above. The holding by the same CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view that. Indeed, this precedent is an authority that, the principle of overriding objective does not operate mechanically to save

each and every blunder committed by parties to court proceedings or by courts of law themselves.

Now, due to the above reasons, I find that the irregularities in admitting the sale agreement at issue was fatal to the proceedings before the DLHT and to the resultant impugned judgment. This is because, they caused injustice to the appellant as demonstrated above. This finding therefore, serves as an answer to the third issue posed earlier.

Having held as above, I find that, the proceedings of the DLHT and its impugned judgment cannot stand. I therefore, uphold the first ground of appeal.

Like I hinted before, the first ground of appeal is capable enough to dispose of the entire appeal if upheld. Now, having upheld it, I will not examine the rest of the grounds of appeal. Otherwise, that will amount to performing a superfluous or academic exercise which is not the core function of courts of this land. I accordingly make the following orders: I nullify the proceedings of the DLHT, quash them and set aside the impugned judgement and its consequent orders. Each party shall bear its own costs since the DLHT was also instrumental in causing the irregularities which have led to the above results. If parties still wish, the matter shall be filed afresh and tried by another chairman of the DLHT with competent jurisdiction together with another set of assessors. It is so ordered.

JHK UTAMWA
JUDGE
14/11/2022

14/11/2022.
CORAM; JHK. Utamwa, J.
Appellant: present in person.
Respondents: present all and the administratrix of 8th respondent's estate.
BC; Gloria, M.

Court: Judgement delivered in the presence of all the parties (except the 8th respondent whose administratrix of his estate, Grace L. Lulambo is present), in court, this 14th November, 2022.

JHK UTAMWA
JUDGE
14/11/2022.