IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 33 OF 2022

(C/F the decision of Karatu District Land and Housing Tribunal, Land Application No. 44 of 2019)

SEVERINE WAREE TLATLAA..... APPELLANT

VERSUS

WEMA WAREE TLATLAA..... RESPONDENT

JUDGMENT

12/09/2022 & 15/11/2022

MWASEBA, J.

In the District Land and Housing Tribunal of Karatu at Karatu (herein will be referred to as DLHT), the appellant herein sued the respondent claiming that he invaded his land measuring at 3 ¼ acres located at Duuon Street within K/Faru Village with ill motive without having any justifiable cause. He submitted further that, the disputed land was previously belonging to his late father who acquired it during Operation Vijiji in 1974. He prayed to be declared the lawful owner of the disputed

land and respondent be restrained from entering the disputed land and to pay all the costs incurred by the respondent.

On his side, the respondent alleged that, the disputed land was the property of the late Waree Tlatlaa who died on 22/05/2019. It is now the property of the family of the late Waree Tlatlaa who selected him to be the administrator of the estate of the late Waree Tlatlaa by the Clan Meeting. He added that, the late Waree Tlatlaa inherited the disputed land from his late Father Tlatlaa Magasi and it was not allocated during Operation Vijiji.

After a full trial, the DLHT declared that since the respondent was an administrator of the estate of the late Waree Tlatlaa, and on 25/03/2020 he filed an inventory after collecting the deceased's property and divided the same to the heirs. Thus, it was wrong for him to be sued in the capacity of an administrator of the estate. The tribunal advised the appellant to refer his claim to the primary Court where the inventory was filed if he is dissatisfied with the distribution of the property done by the administrator of the estate and proceeded to dismiss the application.

The said decision aggrieved the appellant who is now before this court seeking to challenge the decision of the DLHT. He filed eight (8) grounds of appeal as follows:

1. That, the District land and Housing Tribunal erred in law and fact for finding that the respondent who was the administrator of the estate of the late WAREE TLATLAA was correct to divide the disputed land to the heirs while the land case was pending before the tribunal.
2. That, the District land and Housing Tribunal erred in law and fact for delivering the judgment against the respondent in his own capacity rather than as an administrator of the estate of the late WAREE TLATLAA.
3. That, the District land and Housing Tribunal erred in law and fact by making its decision in favour of the respondent without taking into consideration that the said division of deceased estate was wastage of subject matter in the land case number 44 of 2019.
4. That, the District Land and Housing Tribunal erred in law and fact by failing to give sufficient consideration and weight to the evidence adduced by AW2 and AW3.
5. That, the District Land and Housing Tribunal erred in law and fact for failure to concur with the opinion of the tribunal assessors henceforth failure of justice on part of the appellant herein.

6. That, the District Land and Housing Tribunal erred in law and fact for failure to properly scrutinize and analyse evidence of both parties to the case.
7. That, the District Land and Housing Tribunal erred in law and fact for admitting the defence exhibit regarding division of the estate of the deceased with intent to rob the appellant's land for the reasons of non-inclusion of the appellant in the division.
8. That, the chairman of the District Land and Housing Tribunal erred in law and fact from reaching the misconceived judgment in which its reason based on wrong facts that the respondent was ordered by the primary court to close the probate an administration cause No. 54 of 2019 on 04/03/2020 while the probate cause was instituted by the respondent on 25/03/2020.

On 2/08/2022 when the appeal came for mention, both parties agreed to dispose of the appeal by way of written submission. While the appellant was present in person, unrepresented, the respondent enjoyed the legal service from the learned counsel Mr Simon Shirima. I commend both parties for adhering to the schedule.

Supporting the appeal, on the 1st ground the appellant is faulting the decision of the DLHT to admit exhibit D-2 (Form No. 5 and 6) which shows

the properties were already divided between the heirs while his name was not on the list. He added that, the Primary Court accepted the inventory forms and closed the probate case while this case was still pending before DLHT and they were served with a summons regarding this case. More to that, he filed Misc. Application for the status quo to be maintained but the same was dismissed by the tribunal, thus, it was wrong for the Hon. Chairman to rule out that beneficiaries were supposed to be sued since the administrator has already discharged his duties while departing from the decision of his assessors.

Responding to this ground, the respondent's counsel submitted that the respondent was appointed as administrator on 04/11/2019 prior to the filling of this case and if the appellant had any claim regarding the division of the properties he could complain before the primary court prior to his appointment. He argued further that, to sue the respondent in his own capacity at this stage is contrary to the law and to support his argument he cited the case of **Rashid Qambo vs Odila Ingi Mefurda**, Land Appeal No. 81 of 2022 (HC-reported at Tanzlii).

On the second ground of appeal, the appellant complained that it was wrong for the trial tribunal to deliver a judgment against the respondent

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in his personal capacity rather than an administrator of the deceased's estate and failed to make a reasonable judgment which leads to miscarriage of justice. He added that the disputed property was given to him by his late father as a deed of gift on 23/12/2016.

On this ground, it was the counsel for the respondent's reply that, it was the appellant who sued the respondent on his own capacity that is why the tribunal decided that the application was wrongly filed. He added that, if the respondent was not pleased with the decision of the primary court, he could have appealed to the higher court rather than filing another case in another institution.

Coming to the third ground of appeal, the appellant alleged that since the respondent was served with summons regarding this case, he was not supposed to divide the deceased's properties while this case was still pending before the DLHT. Thus, he prayed for the DLHT's decision to be quashed and set aside and the appellant be declared the owner of the disputed property.

It was the respondent's counsel's reply on this ground that, since the respondent had already filed an inventory to the primary court on 25/03/2020 and the deceased's properties was divided to the heirs

including the disputed properties the respondent was supposed to appeal to the higher court instead of filling a fresh land suit.

On the 4th ground of appeal, the appellant alleged that the trial tribunal failed to properly evaluate his evidence of his witnesses that the disputed land was given to him by his late father as a deed of gift prior to his death, and that the respondent was just trying to snatch it from him under the umbrella of the administrator of the estate, the act which was wrong.

On this ground, the respondent's counsel argued that, the document alleged to be a deed of gift was not witnessed by any of the beneficiaries including the wife of the deceased. He argued further that the appellant was already given 2 ½ acres but still wanted to take the disputed land which was never given to anyone. He supported his argument with the case of **Barelia Karngirangi vs Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT- Unreported) and **Mohamed Said vs Mohamed Mbilu** (1984) TLR 113.

On the 5th ground of appeal, the appellant faulted the decision of the DLHT for the reason that he departed from the decision of the assessors without any justifiable reasons. He added that, the reasons adduced for the heirs being joined in the case were unreasonable since the probate

cause No. 54 of 2019 was closed in 2020 while this case was still pending. Thus, his statements did no tally with the evidence adduced by the parties herein which is contrary to the **Section 24 of the Land Dispute Courts Act**, Cap 216 R.E 2002. His argument was supported with the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (Unreported). Further to that, even the assessor's opinion was not recorded, it was found via the Chairman's statement which is contrary to the law. To buttress his point, he cited the case of **Hosea Andrea Mushongi vs Charles Gabagambi**, land Appeal No. 66 of 2021 (HC-Unreported).

On this ground, the respondent's counsel replied that, this was a land case. However, the evidence reveal that the respondent was once appointed as administrator and he distributed the properties according to the law and file inventory. As for the issue of assessors the Hon. Chairman is not bound by their decision as per **Section 53 (2)** of Cap 216 R. E 2019.thus, this ground lacks justification in the eyes of the law.

As for the sixth ground the appellant complained that the trial tribunal failed to evaluate the evidence submitted before it for its failure to note that the disputed land was given to him by his late father. Further to that,

the Hon Chairman departed from what was submitted by the parties herein and came up with his own decision which does not result from the submission made by the parties herein.

On this ground, Mr Shirima submitted that, the Hon. Chairman was correct in his decision that the respondent was wrongly sued in his own capacity while he was an administrator of the estate of the late Waree Tlatlaa while he distributed the disputed land and he produced evidence to prove the same.

Coming to the 7th ground of appeal, the appellant faulted the decision of the DLHT for its failure to note that the respondent just wanted to rob the appellant's land under the umbrella of the administrator of the estate and that as a child of the late Waree Tlatlaa he was not given a single footstep of the deceased's properties.

Mr Shirima responded that, the disputed land was given to other heirs who were given small portions of land when their father was still alive and the other part was given to their mother. The allegation that the appellant used the disputed land for more than 12 years was not proved at the trial tribunal.

As for the last ground of appeal, the appellant alleged that it was wrong for the trial tribunal to rule that the primary court ordered the respondent to close the probate case on 4/03/2020 while the same was filed on 25/03/2020. More to that, the respondent was not sued in his personal capacity but as an administrator of the estate of the late Waree Tlatlaa. Thus, he prayed for the appeal to be allowed and the decision of the trial court be quashed and set aside.

Responding to this ground, Mr Shirima submitted that, since their claim originated from the probate case, the appellant was not supposed to file this case at the tribunal. Further to that, he stated that his case was not filed on 4/03/2020 that was the day he was supposed to file inventory but rather he filed it on 25/ 03/2020 and that is what the Hon. Magistrate explained. He prayed for the appeal to be dismissed for want of merit.

In his rejoinder, apart from reiterating what has already been submitted in their submission in chief, the appellant added that he claims the disputed land as his personal property and not as part of the deceased's estate via the share distributed to the heirs as the same was given to him as a gift by their late father.

Having heard the rival arguments from both parties, this court will now determine the merit of this appeal.

Starting with the 6th ground of appeal, the appellant challenged the evaluation which was done by the trial chairman who favoured the respondent. The appellant was of the view that if he was given a fair chance to explain himself and his evidence to be accorded the weight it deserves, the tribunal could have realised that his case was filed prior to the filling of inventory form (V & VI) at the trial tribunal. On his side, the respondent was of the view that the evidence was well evaluated by the trial tribunal.

Going through the records of the trial tribunal, this court noted that the evidence was not well evaluated by the trial tribunal since the raised issues were not dealt with. In his evidence, the trial chairman raised one issue *suo motto* of whether the respondent was properly sued and disposed of the application based on that issue alone. The said act, denied the parties the right to be heard since it was not one of the issues raised by the during trial.

As it was ruled out in a number of cases including the case of **Mbeya - Rukwa Auto Parts & Transport Limited vs Jestina George**

Mwakyoma, Civil Appeal No. 45 of 2000 (Unreported), the Court emphasized that:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:*
>
> *(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamiiifu."*

The same was held in **Abbas Sherally & Another vs Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported) that:

> *"The right o f a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Guided by the cited authority the DLHT violated a fundamental principle of right to be heard by deciding on a matter which the parties were never

given a chance to submit regarding the same. More to that, if the parties could have been given right to be heard, they could submit the fact that this case was filed prior to the closure of Probate Cause No. 52 of 2019 and that in his application the respondent was sued as the administrator of the estate of the late Waree Tlatlaa not in his personal capacity as indicated by Hon. Chairman in his judgment.

Now, what are the remedies when the parties were not afforded a right to be heard on a certain matter. It has been the position in number of cases including the case of **Danny Shasha Vs Samson Masoro and 11 Others,** Civil Appeal No. 298 of 2020 (CAT-reported at Tanzlii) where it was held that:

> "*The first appellate court ought to have ordered a retrial after considering that the parties were denied the right to be heard. This being an infraction which violated the rules of natural justice requiring the tribunal to adjudicate over a matter by according the parties full hearing before deciding the dispute.*"

Guided by the cited authority, I find the judgment of the DLHT violated the right to be heard and occasioned a failure of justice to the parties who were condemned without being heard. In the event, I find the judgment

of the DLHT to be a nullity and proceed to nullify, quash and set aside the impugned judgment.

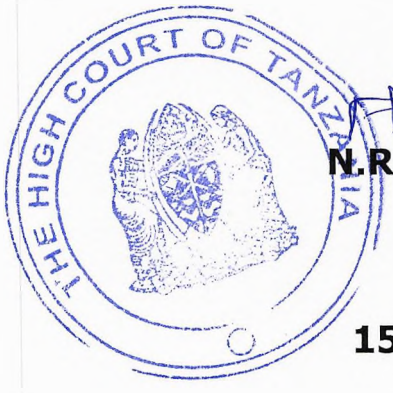
Since the 6th ground of appeal dispose of the whole appeal, there is no need to dwell into the raised grounds of appeal.

In the circumstances of this appeal, I hereby order the DLHT to hear the parties on the raised new issue or to prepare another judgment based on the issues raised during the trial before the trial Chairman as soon as possible.

Taking into consideration the nature of the case and the relationship of the parties herein who are blood brothers, I make no order as to costs.

Ordered accordingly.

DATED at **ARUSHA** this 15th day of November, 2022.



N.R. MWASEBA

JUDGE

15/11/2022