IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 5 OF 2022

(Arising from Application No.26/2021 in the District Land and Housing Tribunal for Kagera at Bukoba)

BASHIRU ATHUMANI.....APPELLANT

VERSUS

ANNAJOYCE MUTUNGI (An administratix of the Estate of the late Veneradiana F. Ihangwe)

.....RESPONDENT

JUDGMENT

29/09/2022 & 11/11/2022
E.L. NGIGWANA, J.

Being disheartened with the decision of the District Land ad Housing Tribunal for Kagera at Bukoba (henceforth) "the trial court" handed down on 26/11/2021 in Application No. 26/2021, the appellant has registered this appeal as Land Appeal No.5 of 2022 to challenge the same.

In order to comprehend the context upon which this matter was brought, the brief facts on historical background are inevitable. The appellant alleges to have contracted a customary marriage with the respondent's young sister, the late Verdiana F. Ihangwe (Also known as DIANA or VENERADIANA) since 2002, the fact which is strongly disputed by the respondent. Veneradiana F. Ihangwe died on 4/6/2020 and left a house built on the land in dispute and one child Palvina Kaumbwi Angelo who is not a biological child namely; of the appellant. The respondent was therefore appointed by the Kasambya Primary

Court in Misenyi District to administer the estate of her young sister, the late Diana.

In the process of applying for letters of administration in Kasambya Primary Court, the respondent was objected by the appellant at the same primary court on the ground that the appellant was the legal husband of the late Diana who had jointly acquired the house and other matrimonial properties together. He complained that he was not involved in the process and therefore prayed to be appointed as an administrator of the deceased's estate. The primary court determined the matter by hearing both parties and eventually ruled that there was neither customary nor presumption of marriage to be so called between the late Diana and the appellant. The primary court also found that the appellant had no interest in the property and hence could not be appointed.

The respondent in the course of administering the estate of the deceased Diana met an obstacle especially in the suit land/house as she found the appellant had trespassed the same therefore, she filed the suit in the DLHT for Bukoba and prayed among other reliefs that be declared a trespasser in the house in dispute owned by the late Diana and prayed for eviction order. The DLHT heard the parties after being guided by the primary court findings on the issues of probate and marriage which was once adjudicated thereat, it ruled on the respondent's favour by declaring that the appellant is a trespasser and ordered to be evicted from the said Suitland. Hence the rationale of this Appeal preferred by the appellant.

In his amended petition of appeal, the appellant has coined the following quoted grounds:

1. *That, the trial tribunal grossly erred in law to enter decision against the weight of evidence.*

2. *That, the trial tribunal grossly erred in law and fact for failure to decide the land in dispute was obtained through joint effort of the appellant and the late Diana Ihangwe whom they lived together as husband and wife since 2002.*

3. *That, the trial tribunal having discovered that there was cohabitation since 2002 grossly erred in law and fact to decide the case against the appellant by ignoring the appellant's evidences available in the record.*

4. *That, the trial chairman erred in law to decide that there was no marriage between the appellant and the late Diana Ihangwe against exhibit D1 (Affidavit regarding marriage of the Appellant and Diana Ihangwe) that was not contested by the respondent during trial.*

5. *That, the trial tribunal erred in law to adjudicate matrimonial matters in land matters without jurisdiction to do so.*

6. *That, the trial chairman was canvassed with bias in the whole process of trial to the extent of entering personal emotions and feelings against the appellant.*

7. *That, the trial tribunal was not dully constituted during the whole period of trial and assessors did not participate fully in the proceedings to the extent of occasioning injustice.*

Wherefore, the appellant prays to this court the following orders:-

1. *That, the land in dispute was obtained through joint effort of the appellant and the late Diana Ihangwe.*

2. *That, the appellant is the lawful owner of the land in dispute.*

3. *Costs of this appeal and lower tribunal entered against the respondent.*

4. *Any other order this honorable court deems fit and just to grant.*

When the matter came for hearing, Advocate Pereus Mtasingwa and advocate Dionysius Mjuni represented the appellant and respondent respectively. Pereus prayed to argue only the 7th ground which touches on the issue of participation of assessors in the proceedings having in mind that it suffices to dispose the entire appeal. His prayer was not objected by the respondent's counsel and thus this court allowed him to argue the said ground. Upon doing a thorough research through reading the relevant law and case laws, this Court realized that the said argued ground could not dispose the entire appeal. Thus on 27/9/2022 the proceedings were re-opened and parties were required to submit for and against on the remaining grounds of appeal. They complied with and I will therefore include the 7th ground which was earlier argued to form part of this submission. Mutasingwa therefore argued the 1st, 5th, 6th and 7th grounds separately whereas 2nd, 3rd and 4th grounds were collectively argued.

Submitting on the 7th ground of appeal, Advocate Mutasingwa submitted that in accordance with section 23 (1) (2) of the Land disputes Courts Act Cap. 216 R.E 2019 and Regulation 19 (1) of the Land Disputes Courts (The District

Land and Housing tribunal) Regulations, 2003 assessors must be present and give their opinion before judgment and the said opinion ought to be recorded in the proceedings by the trial chairman. The major complaint of the appellant's counsel in this case at hand was that the opinions given were not recorded in the proceeding by the chairman. His arguments were backed up by cases of **Sikuzani Saidi Magambo and Another versus Mohamed Roble**, Civil Appeal No.197 of 2018, CAT at Dodoma (Unreported), **Paul Mushi (as an Attorney of Salim Ally) versus Zahra Nuru**, Civil Appeal No. 221 of 2019, CAT at Dar es salaam(unreported). All these authorities were used by Mr. Mutasingwa to convince this court that failure to record the opinions is fatal and triggers the proceedings and judgment to be nullified and quashed.

As regard to the 1st ground which blames the trial tribunal to have decided the case against the weight of evidence he substantiated that the appellant had two sale agreements over the suit land which purchased the same from Merenciana Inocent and the respondent had three sale agreement over the same land in dispute which she alleges to purchase from the same Merenciana Innocent and her child **Geofrey Jacob**. It was the appellant's counsel conviction that the sale agreements of the appellant were valid as they were witnessed by the Village Authority and they summoned Merenciana, the seller unlike those presented by the respondent which was not witnessed by the Village Authority and did not call Merenciana in the tribunal to testify. On the issue of the sale being witnessed by the village leaders, he cited sections 147 (1) of Local Government Districts Authorities Act, Cap. 287 which states that the executive powers on all affairs and businesses in the village are bestowed to the Village Council. He also cited

the case of this court in **Prucheria John versus Wilbard Wilson and Another**, Land Case Appeal No. 64 of 2019. HCT at Bukoba (Unreported) which cited with approval the case of **Bakari Mhando Swaya versus Mzee Mohamed Bakari Shelukindo and 3 Others**, Civil Appeal No. 389 of 2019, CAT at Tanga (Unreported) He contended that since the appellant bought the Suitland on the first agreement on 10/7/2010 and the second one on 2014 while the deceased Verdiana appears to have purchased the same on 29/07/2010 hence the first purchaser is the owner of the suit land.

Mr. Mutasingwa contended that at page 28 of the trial court typed proceedings the appellant stated that the respondent's agreements were forged but the trial court did not address it and the appellant was not cross examined on that issue. It was the appellant's counsel submission that failure to cross examine the witness on the very important matter implies that the allegation is true. He cited the case of **George Maili Kemboje versus the Republic**, Criminal Application No. 327 of 2013 at page 4. He argued that the trial tribunal would have ordered the sale agreements to be investigated given also the facts that those who witnessed the respondent's agreements were not indigenous. He added that Mereciana in the trial tribunal identified the appellant to be the one she sold the Suitland and there was no point in time she said to have sold the land to the respondent. The appellant's counsel argued that the trial tribunal ought to have drawn adverse inference since the appellant said the deceased lived with her child Palvina but when cross examined, she said she did not call her to testify. That under section 110 and 111 of the Evidence Act the one who alleges must prove.

As regard to the 2nd, 3rd and 4th grounds, which touches on the marriage relationship between the Appellant and the deceased Verdiana. Mr.

Mutasingwa submitted that the appellant and the deceased as per evidence were husband and wife and they started living together since 2002.The appellant tendered an affidavit as exhibit D1 to evidence such relationship as they had once secured loan and such affidavit bearing signature of the deceased and appellant was therefore used. He added that the trial tribunal was wrong to include the suit land into the estates of the deceased as the suit land was acquired jointly between the appellant and the deceased as depicted in the sale agreement. He added that the trial tribunal said that the affidavit cannot prove marriage. But since the fact that the trial tribunal was convinced that the appellant and the deceased were just cohabiting that alone cannot deprive the appellant to own the property with the deceased as the cohabitee still has the right to the property acquired during cohabitation. He cited the case of **Sesilia Mshamu versus Dicky Kawogo** (2001) TLR 318 where a cohabitee was not deprived his right to property. He also made reference to the case of **Hoka Mbofu versus Pastory Mwijage** (1983) TLR 286 where it was held that there was concubinage association therefore division of property acquired in the relationship is subject to division. It was also the submission of the appellant's counsel that the deceased is no more hence the principle of survivorship applies.

As far as the 5th ground is concerned, the appellant faults the trial tribunal to have adjudicated on the issues of matrimonial and probate without jurisdiction to do so. He explained that the respondent alleged to have petitioned for letters of administration of the deceased Diana and before distribution, she found the appellant in the house of the deceased.

It was the appellant's counsel submission that the said evidence connotes that the case falls squarely per se to probate case and not land case. He

added that the Land tribunal has no jurisdiction to determine the relationship between the appellant and deceased or to declare whether the appellant was concubine or legally married as such power was solely clothed to the matrimonial court. He added that, even the issues which were framed on page 5 of the trial proceedings as to whether the disputed property is part of the deceased estate or not, connotes that the matter was purely a probate case which the land tribunal has no such jurisdiction. He made reference to the case of **Hamida Hajji Idd Seif versus Yahaya Khamis and Another**, Land Case No.16 of 2016 HC Bukoba at page 7 where it was held that Land Court cannot deal with a matrimonial or Probate issue.

As regards to the 6th ground, the appellant's counsel submits that the trial chairman was biased as there was no issue raised concerning concubinage. but it rose in the judgment only, therefore, that was personal emotions. He added that the trial chairman exhibited double standard as the purchase agreements were not analyzed and the respondent evidence was not analyzed. He finally prayed this court to declare that the suit land was acquired jointly and thus belongs to the appellant.

In reply, Advocate Mjuni for the respondent started to react on the 7th ground submitted by the appellant's counsel which touched on the issue of assessors' involvement in the proceedings and he said that the cited relevant law by the appellant's counsel was complied with as the assessors were invited to read the opinions to parties before the chairman and they did so in court and that, assessors' opinions were in writing as per the law and formed part of the proceedings in case file lest that they were not reproduced in the proceedings by the chairman, the requirement which is not provided by the law. That the cited cases by the appellant's counsel are distinguishable. He

was fortified by the decision of this court in **Justus P. Mutakyawa versus Bernadetha Kanyankole** Land Case Appeal No.54 of 2019, HCT at Bukoba where this court once said that the law does not mandate the Chairman to reproduce the opinion of assessors in the proceedings where they are written and read to parties and annexed in the case file to form part of the record.

Mr. Mjuni continued to argue the 1st ground of appeal where he said that the purchase agreements by the appellant from Marenciana Innocent were not genuine. He was shocked to hear that they were not cross examined on them and were not analyzed by the trial tribunal. He referred this court at page 36-37 where cross examination was conducted. He explored that when DW2 (Merenciana Innocent) was cross examined on the said contracts and she replied that she doesn't know how to write while the documents showed to have been signed by her. She also refused to know exhibit D2 (the sale agreement) and to have ever signed the same. That, the said seller continued to answer that the one who knows all the sale agreements is the village chairman. That DW2 eventually told the court that they made arrangement with a person known as Pendo to testify that way.

Mr. Mjuni went on that Exhibit P2 shows that the respondent was appointed as administratix hence issues of probate were dealt by the probate court which is the Primary Court. That page 10 of exhibit P2 is to the effect that the appellant objected the appointment of the respondent in the primary court as a probate court but with no success and the appellant did not appeal. That is the same judgment of the probate court (Exhibit P2) which assisted the hon. Chairman to decide the way he decided. That Pendo Isidory as per exhibit P2 at page 2 stated that the seller of the disputed land was one Geofrey Jacob. That Merenciana Innocent and Pendo Isdory were

persuaded to testify in appellant's favour and it shows that the sale agreements for the appellants were forged. That in the trial court Merenciana disputed the same sale agreements and testified that the one who knew the same was the Chairperson of the Village. Pendo Isdory said at page 42 of the proceedings that the documents were written by the village chairperson. That when the said chairman came as DW5 Vicent Apolinaly at page 44 to 45 disputed completely to have authorized the purchase agreements purported by the appellant and testified that the same were written by his secretary but the said secretary was never summoned in court to testify. Mr. Mjuni therefore found that it was right for the trial tribunal to decide for the respondent.

The respondent's counsel further contended that at page 21 of the proceedings the Mason (Fundi) who built the house for the deceased appeared in court and testified as PW4, the fact which was admitted by the appellant as per page 30 of the typed proceedings. That the appellant was just a mere driver and their relationship does not amount to marriage. The appellant's evidence was contradictory. He reasoned that under the circumstances of this case who can trust the chairman.

Mr. Mjuni distinguished the cited case of **Pulcheria John** (supra) that in that case, the purchase agreement disclosed no names and the law cited does not state that every sale agreement must be witnessed by a Village Council. Again, the case cited by the appellant of **George Maili Kembuya** (supra) which held that failure to cross examine a witness on a very important point implies acceptance but in the instance case cross examination was done hence the cited case doesn't apply.

Responding on the 2nd, 3rd and 4th grounds which were collectively argued, he replied that the appellant's counsel is trying to convince this court that there was customary marriage between the deceased and appellant and the appellant produced exhibit D1 which was an affidavit to prove marriage and not how parties obtained loan. During cross examination at page 30, the appellant said exhibit D1 was brought to him by the advocate who drew the same. He lamented that looking at the said exhibit, it is very easy to discover that it was forged that is why it was not even tendered at Kasambya Primary court to prove marriage. He added that at page 8 of exhibit P2 shows that the wife of the appellant was **Arafa Baraza** and the certificate of marriage to prove that Arafa was a legal wife of the appellant was tendered in the Probate Court. That the issue of marriage is so serious and the evidence has shown that there was no marriage.

Replying why the child of the deceased did not testify in Land Court, the learned counsel testified that the child was at school. He cited the case of **Idaria Upendo versus Shadrack Lumira Ngomba** (1987) TLR,31, marriage and concubinage were differentiated. The appellant stated that he paid no dowry but he paid 1,000,000 Tshs. and he never said the marriage was ever celebrated.

DW2 said he had a conflict with the respondent but did not say how the marriage was celebrated. That the appellant had never disputed the marriage between him and **Arafa Baraza**.

As far as the 5th ground is concerned, which the appellant claimed that the tribunal had no jurisdiction to adjudicate on matrimonial matters in land matters, as in the DLHT what was claimed was land and not matrimonial

property. That the disputed land was the land of the deceased and was never acquired by joint effort. The case of **Hamis Hajji Seif** (Supra) is distinguishable from the instant case. That since Cap 216 of Land Dispute Courts Act mandates the District Land and Housing Tribunal to determine land dispute therefore it had jurisdiction to determine that the land in dispute forms part of the deceased estate.

In the last argued ground which blames the trial chairman to have been biased. It was the learned counsel for respondent's reply submission that the appellant's counsel failed to prove how the trial chairman was biased and that he contends that the chairman was not biased. He finally prayed this appeal to be dismissed for want of merit.

In rejoinder, Advocate Mutasingwa stressed that the court cannot resolve the controversy where forgery has been raised on the two conflicting sale agreements. That, cross examination was done on forgery. He contended that investigation on the sale agreement is needed as forgery is the criminal offence. That the learned counsel did not come with the judgment which states that the sale agreement which has not been witnessed by the chairperson is valid but what he exposed was contradiction. That the contents of the contract cannot be disputed orally. That the Chairman and Merenciana did not dispute the signature on the sale agreement and there was nowhere Merenciana accepted the sale agreement of the respondent. That in Civil Cases, we look on balance of probabilities and not contradiction.

Further rejoining on the issue of marriage, Mr. Mutasingwa submitted that the appellant stated that the marriage was customary one and that the child of the deceased was not able to understand the issue of marriage as was

young. That exhibit P2 to wit; a judgment was not read in Court for the appellant to understand the contents and cross examine accordingly. That the Probate Court hasn't been closed hence the appellant may object at any time.

I have considered the grounds of appeal and a reply thereon together with submissions advanced by all learned advocates in this appeal. I believe at this juncture I have to determine whether this appeal is meritorious. I will adopt the style of determining grounds of appeal separately and some collectively in the same style they were argued for and against by the learned counsels. Before I venture on the merit of this appeal, I must state at the outset that I will only confine and consider relevant arguments and disregard the irrelevant ones so as to narrow down the scope of this appeal and avoid going astray from the grounds coined down and evidence available at the trial court. Equivalently, it is worth noting that the duty of the first appellate court is to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact if necessary. See the case of **Siza Patrice versus The Republic** Criminal Appeal No. 19 of 2010 (All

CAT unreported). Consistently, the Court of Appeal of Tanzania in **Sugar Board of Tanzania versus. Ayubu Nyimbi & 2 Others,** Civil Appeal No. 53 of 2013, CAT at Dar es Salaam (Unreported) held that the duty of the first appellate court is to review the record of evidence of the trial Court in order to determine whether the conclusion reached upon and, based on the evidence received, justifies a re-evaluation in relation to the referred framed issues, to see whether they were properly determined.

The 7th ground was the first to be argued by the appellant's counsel which is grasped that failure to record or reproduce the assessor's opinion by the trial chairman in the proceedings as they are given by assessors is fatal and vitiates the proceedings. The respondent's counsel opposes that proposition.

My thorough scrutiny on the record of the trial tribunal reveals that the assessors who heard the matter were **Christina Kabigiza** and **Yusuph Omary Mbelwa** and the two sheets/documents are attached in the case file which embody the opinion of both assessors who heard the matter to finality. It is true that they were not reproduced or recorded in the proceedings but the proceedings feature that the assessors read them to the parties and hence in my view, they form part of the trial tribunal's record. It should be noted that there are two circumstances which reveal the modality of giving opinions by assessors in practice; the first is by giving them in writing and finally read in court and the second is being given orally. Regulation 19 (supra) requires being given in writing and in Kiswahili like it was sufficiently done in this case. It will be awkward and actually unbecoming to demand and task the trial chairman to reproduce and record opinions in the proceedings while the written records of opinions which were read are in the case file already. This Court in this registry when confronted with similar situation in the case of **Justus P. Mutakyawa vs Bernadetha Kanyankole** Land case Appeal No.54 of 2019, HCT at Bukoba, also referred by Mr. Mjuni my sister, her ladyship, Kairo (as she then was) had this to say:

"...Therefore regulation 19(2) requires the opinion by assessors to be presented to the chairman in writing and in Kiswahili as was done in this case. With due respect to Advocate Kabunga, the law does not impose mandatory requirement for assessors' opinion to be reproduced in the

proceedings. The intention was to ensure that the assessors submit their opinions to the chairman before he writes a judgment which in this case the said purpose was fulfilled. I thus join hands with Mr. Mutatina that since they were recorded/written and read before the tribunal chairman and annexed in the case file, it suffices to fulfil the purpose of the law and the same form part of the tribunal's record like any document in the case file..."

I am thus inclined to agree with Mr. Mjuni that the regulation does not mandate reproduction of the written opinion in the proceedings. Moreso, in my view, it may not even be practicable and efficient for trial chairman to reproduce and record the submitted written opinion by assessors in case there is a volume of written opinions with many pages given the limited time available during hearing. Equally so, the cited authorities by Mr. Mtasingwa are distinguishable as they were explaining the practice in the High Court hence are far from the interpretation of regulation 19 which do not apply to the High Court save for tribunals only. I therefore find no merit in this ground.

Ground number 1 touches on the validity of sale agreements. The appellant alleges to have two different sale agreements of 2010 and 2014. (Collectively exhibit D2). The appellant proposes that his sale agreements were genuine compared to the ones tendered by the respondent which are exhibits (P5, P10 &P11). The major reason which the appellant believes the tribunal would have decided on his favour is that they called the seller to testify in court and that the sale agreements tendered were witnessed by Hamlet Chairperson while the witnesses for the respondent's sale agreements were not indigenous. The trial chairman made a finding by discrediting the probative value and weight attached in the appellant's sale agreements as well as

witnesses who came to testify concerning purchasing the suit land and the preparations of the sale agreements as quoted on page 10 and 11 of the trial tribunal judgment as follows:

"....Aidha wakati SU3 Merenciana Innocent ambaye ndiye muuzaji,wakati anatoa Ushahidi wake na hasa alipokuwa anaulizwa maswali ya dodoso na wakili Mjuni anayemwakilisha mwombaji,alikana kuitambua mikataba hiyo ya manunuzi (D2) kati yake na mjibu maombi.Alichosema ni kwamba yeye hatambui mikataba hiyo na badala yake anayeitambua mikataba hiyo ni mwenyekiti wa Kijiji. Pia alikana kuhusiana na kielelezo D2. Zaidi ya hayo wakati Mjibu maombi (SU1) akitoa Ushahidi wake alisema kwamba wakati ananunua eneo hilo Godfrey Jacob ambaye ni mtoto wa Merenciana Innocent alikuwepo na alishuhudia manunuzi hayo. Hata hivyo wakati SU3 anaulizwa maswali ya dodoso na wakili Mjuni alikanusha Godfrey kuwepo wakati wa manunuzi hayo. Lakini pia SU3 Merenciana ambaye ni mama wa Godfrey kuuza eneo la babu yake,kama yeye alivyouza vitu vya baba yake.

The trial tribunal went on evaluating evidence on page 11 as follows:

"Lakini pia nyongeza ya hayo ni kwamba SU4 Pendo Izidori alisema kwamaba Godfrey Jacob hajawahi kuuza eneo la mgogoro na kwamba hatambui hata Saini iliyepo kwenye kielelezo P5,P10 na P11 kuwa ni za kwake .Katika Ushahidi wake anasema aliyeuza ni Merenciana Innocent,(kwa mujibu wa D2 ambao mkataba wenyewe ulikanushwa na muuzaji) niseme tu kwamba Ushahidi huu sio wa kuaminika hata kidogo na una lengo la kupotosha mahakama kutotenda haki....kwamba kwa mujibu wa kielelezo P2 ambacho ni uamuzi wa Mahakama ya Mwanzo Kasambya, kwenye shauri la Mirathi Na. 4/2020 kati ya wadaawa hawa,katika ukurasa wa 5 na 6, SU4 Pendo Izidori

alitoa Ushahidi wake kama SM2 na kusema kwamba aliyeuza eneo la mgogoro alikuwa Godfrey Jacob. Lakini cha kushangaza mbele ya Baraza hili alisema uongo kwa kusema kwamba Godfrey Jacob siye aliyeuza eneo la mgogoro badala yake aliyeuza ni Merenciana Innocent."

The trial tribunal in seeking to verify which sale agreements were valid, it further faulted the appellant's sale agreements by deducting as quoted here under:

"Lakini pia wakati SU4 Pendo Izdory anatoa Ushahidi wake alisema kwamba aliyeandika na kuandaa mikataba ya manunuzi ni Mwenyekiti wa Kitongoji (SU5). Lakini wakati shahidi huyu SU5 alipokuja kutoa Ushahidi wake,alikanusha yeye kuandika na kuandaa mikataba hiyo na badala yake akasema kwamba aliyeandika na kuandaa mikataba hiyo ni katibu wake aitwaye Sudi Clavery. Shahidi huyu Pendo Izdori (SU4) hastahili kupewa heshima hata kidogo ya kutenda haki katika shauri hili."

I have passionately reviewed the record of evidence of the trial Court proceedings in order to determine whether the conclusion reached upon or findings were based on the evidence received and justifies a re-evaluation in relation to the referred framed issues, to see whether they were properly determined. I have confirmed in affirmative and for that reason I shake hands with the trial tribunal findings for its proper evaluation. I say so because in civil cases parties cannot tie, the one with heavier evidence than the other is the one who is held to have proved the case to the required standard of balance of probabilities.

The stance was underlined in the case of **Hemedi Said versus Mohamed Mbilu** [1984] TLR 113 that:

" According to law, two both parties cannot tie, but the person whose evidence is heavier than of the other is the one who must win"

In determining the heavier evidence, the court may assess the probative value of evidence, may assess which witnesses are more coherent, credible and consistent. Consistency of the witness's evidence is assessed by comparing with what is agreed or clearly shown by other evidence to have occurred and if there is a reason of not believing a witness the trial court will say and give such a reason of discrediting.

Therefore, it is Cristal clear from the trial proceedings that the witnesses brought by the respondent such as PW2 (Godfrey Jacob) PW1 (George Geofrey) and PW4 Dickson Mushobozi were consistent and coherent in their testimony even when they were put to cross examination, they did not change their answers, but the situation was different for witnesses who were brought by the appellant at the trial tribunal to prove on the genuine of the sale agreements were rightly found to be untrustworthy and unbelievable.

I concur with the trial tribunal together with the respondent's counsel that Pendo Izidory (DW4) was not a credible witness because she testified different version from that she had prior testified in the probate Court to wit; the Primary Court at Kasambya as PW2 through exhibit P2 which is the Primary Court Judgment. Her evidence had material contradiction on who sold the land in dispute and who prepared and witnessed sale agreements. Moreso, the hamlet chairman (DW5) one Vicent Apolinary who refused to have prepared the said sale agreements as testified by Pendo Izidori (DW4) confirms the respondent's argument that the said sale agreements were not witnessed by the hamlet chairman and had therefore no knowledge on them.

Therefore, the appellant's sale agreements cannot be said that they were witnessed by the Kitongoji chairman. The cited case of **Prucheria John**(supra) is therefore rendered of no use in this circumstance leave alone that it binds no this court. Furthermore, the testimony of the Mason who built the house in dispute who testified as PW4 for the respondent had in fact added more weight on the respondent's evidence as he testified to have been hired and paid to build the house by the deceased and not the appellant. His evidence was not discredited by the appellant anyhow instead, the appellant admitted to know the said Mason.

If that was not enough, **exhibit P9** was tendered by the respondent and admitted collectively by the trial tribunal to show various receipts used by the deceased to buy building materials alone, the receipts used to pay rent for the house in dispute, the same applies to the admitted exhibit P8 by the respondent. I am thus respectfully constrained to rule that the trial tribunal was right to have found that the evidence from the respondent proved the ownership to the required standard and it was right to hold that the sale agreements for the appellants had no probative value and weight to prove that the land in dispute to has been purchased by the appellant and the deceased Verdiana jointly as rightly argued by Mr. Mjuni.

I am alive that both parties had submitted sale agreements and were all admitted without objection but that does not mean that all admitted exhibits will automatically be accorded weight, because it should be noted that admissibility of a certain documentary evidence or exhibit is one thing and assessing or determining its weight and probative value to be attached to it is another thing altogether. See **Edward Sijaona Mwinamila (Administrator of the late Idd Almas Katende) versus Abdul Idd**

Almas Katende, Land Case Appeal No. 59/2019, HCT at Bukoba (Unreported).

Mr. Mtasingwa had commented that where there is allegation of forgery on the two conflicting sale agreements the court cannot resolve the controversy. I hestate from buying the appellant's counsel idea at this appellate stage, because he was the same learned counsel who represented the appellant at the trial tribunal but the record shows that he did neither pray before the trial court so that the proceedings can be stayed and subject the sale agreements to the forensic examiners for checking authenticity nor did tell this court that he made such a prayer and was denied.

At this stage, neither the appellant's counsel nor this court can confidently and competently state that the sale agreements were forged because neither the appellant's learned counsel nor this court do profess any expert knowledge in the subject as the determination of the authenticity or otherwise of a signature questioned is the specialized task for forensic document in the forensic field. See **Costancia Chaila and Another versus Evarist Maembe** Civil Application No. 227/17 of 2021, CAT at Dar es Salaam (Unreported). Only what this court can do as correctly did by the trial court is to assess which exhibits had more weight and probative value to prove the case than others after assessing together with other evidence available in totality.

It is on this note I see no any reason to disturb the finding and proper evaluation which found the sale agreements of the respondent to have a probative weight and hence credible to have proved ownership to the

deceased who was found to have purchased the land in dispute solely and not jointly with the appellant.

I now turn to the 2nd, 3rd and 4th issues which were argued together as they all touch on the marriage relationship between the appellant and the deceased one Verdiana.This ground I think, I need not be detained much by it. It emerged in the trial tribunal after the respondent had tendered exhibit P2 which was a ruling of Kasambya Primary Court upon which the appellant had objected on the appointment of the applicant thereat who is the respondent herein and prayed for himself being appointed. The objection was determined and finally dismissed for want of merit hence another ruling as exhibit P3 which proceeded to appoint the respondent. In exhibit P2 the issue of marriage relationship between the appellant and the deceased were litigated as the appellant was complaining to have not been involved in the clan meeting which proceeded to propose the respondent instead of him. The appellant claimed to have interest in the estate as a lawfully husband of the deceased. The said exhibit P2 had three issues framed by the Primary Court viz:

1) *Endapo ni kweli SM1 alikuwa mume wa marehemu?*

2) *Endapo SM1 anafaa kuwa Msimamizi wa mirathi?*

3) *Endapo pingamizi lina mashiko?*

The primary Court ruled among other things, that the appellant had no qualification of objecting and of being appointed as he had no interest on the estate of the deceased and that there was no any marriage legally to be so called between the appellant and the deceased rather the relationship was of a mere concubinage which cannot even entitle him being a heir save the only

left child who was not a biological child of the appellant. I must hasten to register my concern that neither the said ruling (Exhibit P2) nor the judgment which appointed the respondent (exhibit P3) recognizing the rightful heirs with interest to the deceased estate was never challenged by way of appeal until this case was filed and heard. Additionally, the instant appeal I am dealing with, is the land appeal challenging the trial tribunal judgment and not the probate ruling and judgment in exhibit (P2 and P3) hence this court has no jurisdiction to alter or reverse them. What any tribunal or court like this one can do is to take judicial notice under section 58 and 59 of evidence Act, Cap. 6 (R:E 2002) that the said ruling and judgment exist and to take all contents therein to have been proved. I find apposite to quote the said provision from Evidence Act as here under:

58. No fact of which a court takes judicial notice need be proved.

59.-(1) A court shall take judicial notice of the following facts- (a) all written laws, rules, regulations, proclamations, ***orders*** *or notices having notice the force of law in any part of the United Republic;*

(a).....N/A, (b)..... N/A, (c).....N/A, (d) ***all seals of all the courts*** *of the United Republic duly established and of notaries public, and all seals which any person is authorized to use by any written law;*

The act of the appellant to tender exhibit D1 in the DLHT which is an affidavit which he alleged to have once used to secure loan upon which the appellant and the deceased appeared to have sworn jointly as husband and wife respectfully and intending to prove that he was legally married with the deceased amounted not only to prove existence of marriage in the wrong forum but also to challenge the exhibit P2 which is the judgment of the

probate court to the Land Tribunal which is not legally acceptable in the administration of justice as the tribunal could not have neither changed anything nor gone against it. Primary Courts have exclusive jurisdiction to all matters of civil nature where the law applicable is customary or Islamic and including probate and matrimonial issues till their decisions are appealable to District Courts and not District Land and Housing Tribunal. It suffices to state at this stage that the trial tribunal was right to have taken judicial notice on the existence of exhibit P2 and P3 which are ruling and judgment of primary Court of Kasambya which held that there was no legally customary marriage between the appellant and the deceased as it had no jurisdiction to correct the probate court while adjudicating land matters.

The fifth ground, too has nexus with the above discussed ground. It faults the DLHT to have adjudicated on probate matters without jurisdiction. Mr. Mutasingwa had argued that the framed issue depicts that the matter was probate. Mr. Mjuni had opposed that the issue was not a probate one but the issue was ownership between the appellant and the deceased.

I revisited on page 5 of the trial tribunal proceedings to see the issues which were framed if at all were probate issues. Let the record speak itself as follows:

(1) Iwapo eneo bishaniwa ni sehemu ya mirathi ya Marehemu Veneradiana F.Ihangwe?

(2) Nafuu ambazo kila upande unstahili kupata.

The first issue which is relevant here can be literally translated to mean whether the land in dispute was part of the estate of the late Veneradiana F. Ihangwe. The record shows that Advocate Mutasingwa and Mjuni who are

representing parties to this appeal were the same learned advocates who represented them at the trial tribunal and thus are the ones who assisted the trial Land Tribunal to frame issues which were agreed by both of them. The essence of this issue in my view, intended the court to answer whether the land which was in dispute between the appellant and the respondent forms part of the estate of the deceased. Verdiana is now dead, if she was alive, there could be no issues of estate and the question or issue could rather be who owns the land in dispute between **Verdiana** and **Bashiru** but because she is no more, the respondent legally stood into her shoes as legal representative or adminitratix. An administratix is not the owner of the disputed land and therefore the issue could not have been framed as who owns the land in dispute between the appellant and the respondent. Therefore, the tribunal was right to have framed the issue of whether the land in dispute formed part of the estate of the deceased or not and if the issue could be tested in negative, the obvious answer would be that the suit land belongs to the appellant who was sued.

The peculiarity of the circumstances of this case is that before it went to the Land Tribunal, it had passed to the Probate Court and the Probate Court had already determined issues of probate which later came to emerge in the DLHT therefore, the DLHT could not have decided otherwise. In the case of **Mgeni Seifu vs Mohamed Yahaya Khalfani**, Civil Application No.1 of 2009, CAT at Dar es Salaam (Unreported) the court had this to say where there is a dispute over the estate of the deceased only the probate and administration Court seized on the matter can decide on ownership.

I am thus inclined to agree with Mr. Mjuni that the issue framed touched on the ownership and not probate hence, the issue of the DLHT to have no

jurisdiction is misplaced and cannot arise in the circumstances. As already hinted in ground number 5, the DLHT did not determine probate issues but took a judicial note on exhibit P2 and P3 which were probate decisions and orders. This ground also fails.

The 6th ground which was argued lastly by the appellant's counsel was the complaint that the trial tribunal was biased. With due respect to the appellant's counsel, this complaint was supposed to be better raised at the trial tribunal before the chairman who could have two options to rule on; to recuse himself or dismiss such objection. Bringing this ground at this stage becomes a new ground which the trial tribunal had never determined. I say so because this ground needs evidence to prove that the chairman had personal or financial interest in the matter. The mere allegations of bias will therefore remain as flimsy without any proof. It is difficult to see bias in the court record. Courts have now and then warned to determine grounds on matters which were not litigated at the trial court.

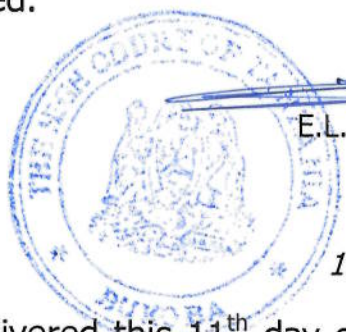
In **Hotel Traventine Limited and two Others versus National Bank of Commerce** [2006] TLR 133 it was held that;

"As a matter of general principle, an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."

This ground is also bound to fail.

In the event, this courts having re-evaluated the relevant evidence from the record of the trial tribunal has come to the same conclusion reached by the trial tribunal as there is no reason to differ and disturb the same. I therefore find no sentiment of merit in this appeal. I consequently dismiss this appeal with costs.

It is so ordered.

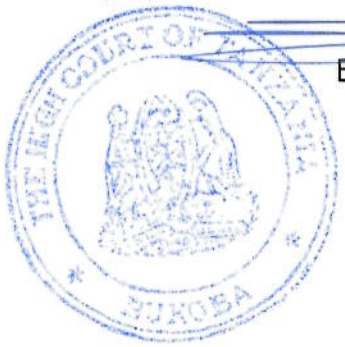


E.L. NGIGWANA

JUDGE

11/11/2022

Judgment delivered this 11th day of November, 2022 in the presence of Mr. Pereus Mutasingwa, learned advocate for the Appellant, Respondent and her advocate Mr. Pontian Mujuni, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Sophia Fimbo, B/C.



E.L. NGIGWANA

JUDGE

11/11/2022