IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 30 OF 2021

(Originating from Application No. 64 of 2018 of Moshi District Land and Housing Tribunal.)

ZABRON AMON NGUMA.....1ST APPELLANT

FRANSISCA FELICIAN NYAKI.....2ND APPELLANT

VERSUS

FELICIAN MANGALIA NYAKI..... RESPONDENT

JUDGMENT

25/02/2022 & 19/04/2022

SIMFUKWE, J.

The respondent herein successfully filed a land dispute before Moshi District Land and Housing Tribunal claiming that the 2nd appellant herein had maliciously and without notice to the respondent and other family members secretly sold to the 1st appellant the disputed farm which she was neither given nor belonged to her. That, the said farm was sold secretly in the absence of neighbours surrounding the premises who knew the owner of the farm.

The respondent herein alleged before the District Tribunal that he was a lawful owner of the suit premises since 1974, when he acquired ownership

of 8 acres by clearing the bushes. In 2004, the respondent gave 2 acres to his daughter one Francisca Felician Nyaki (Fransisca Martin Mduma, the 2nd appellant herein). The respondent directed the 2nd appellant to take care of the remaining 6 acres by cultivating seasonal crops together with other members of the family. Then, on March 2018, one family member called Happy Felician Nyaki went to cultivate the said farm when she encountered objection from the 2nd appellant and her son Lewis Mduma who told her that there was no place for her to cultivate as the farm was sold to some other people. After the confrontation, Happy reported the matter to the respondent and it was discovered that the disputed farm had been sold to the 1st appellant herein. Then, the respondent instituted the suit against the appellants.

The defence of the 2nd appellant briefly, was that the respondent acquired a land measuring 6 acres only in 1974 which he possessed until in 1979 when he gave it to the 2nd appellant after he completely failed to use or take care of it. She disputed the allegation that she was given any piece of land in 2004 by the respondent as the same had already been given to her in 1979. Concerning the sale of the disputed land to the 1st appellant, the 2nd appellant alleged that the same was made openly and that it involved neighbours and leaders of that area. Thus, it was not done secretly. The 2nd appellant concluded his defence by stating that the respondent herein was barred by a **doctrine of estoppel** from claiming back a land which he wilfully gave to his daughter, the 2nd appellant herein.

In its decision, the trial District Tribunal after visiting the locus in quo found among other things that the disputed 6 acres belonged to the respondent herein. That, the 1st appellant was a bona fide purchaser who

bought the disputed land from the person who was not the owner of the said land, thus he should be refunded his purchase money. Hence, the matter was decided in favour of the respondent herein.

Dissatisfied with the decision of the trial Tribunal, the appellants lodged the instant appeal on six grounds:

1. *That, the trial Chairman erred in law and facts for failure to evaluate and analyze (sic) evidence given by the parties thus reaching at a wrong and unjust decision.*
2. *That, the tribunal's Judgment is bad for lack of legal reasoning.*
3. *That, the trial Tribunal made a gross error for awarding reliefs which were not pleaded or prayed.*
4. *That, the trial Chairman erred in law and facts for failure to ascertain the exceptional circumstances which necessitated visiting of the locus in quo and for failure to observe procedures and guidelines governing visiting at the locus in quo something which vitiates the trial and which occasioned miscarriage of justice.*
5. *The trial Tribunal erred for leaving almost all the issues framed by the parties unanswered.*
6. *That, the trial Chairman erred in giving a non-executable judgment and decree.*

The appellants prayed the appeal to be allowed with costs. That, this court be pleased to re-evaluate evidence given by the parties and thereby reverse the judgment and decree of the trial District Land and Housing Tribunal. Alternatively, if it is found very necessary for the application to

be re tried, this honourable court be pleased to order re-trial of that application.

The appeal was argued by way of written submissions. Mr. Erasto Kamani learned counsel argued the appeal for the appellants, while the respondent engaged Mr. G. M. Shayo learned counsel, who opposed the appeal for him.

Arguing the 1st ground of appeal, Mr. Erasto Kamani submitted that as the record of the tribunal shows, the trial chairman did not bother to analyse or even consider the evidence on record in reaching his decision. That his judgment is based on assumption and his belief. To make it worse, he left some of the most important issues undetermined. Mr. Kamani gave an example of the issue as to whether the 2nd appellant was given six acres of land by the respondent was not resolved. That, the trial Chairman rushed to conclude at page 6 of the judgment that there is no proof that the 2nd appellant was given two acres and that the important witness who could tell the truth was the claimant/ respondent who allocated that land. Mr. Kamani insisted that, the trial Chairman did not state anything on the evidence which was given by the parties in relation to that issue nor did he resolve the same. That, it is important to note however that, the issue which was framed and which was supposed to be determined was whether the 2nd appellant was given six acres and not whether he was given two acres.

It was also submitted that, in determining whether sale of the suit land to the 1st appellant by the 2nd appellant was lawful, the trial chairman did not analyse or take into account evidence of the parties. He based his findings on allegations of the respondent, and not evidence on the record.

He quoted from page 6 paragraph 5 of the trial tribunal judgment, which reads that:

"Kitendo cha kuuza eneo ambalo ***Baba anadai hajampatia,*** *ni kosa hivyo mauzo hayo ni batili."* (Emphasis added).

Mr. Kamani commented that the statement "**eneo ambalo Baba anadai hajampatia**" is just an allegation and not evidence.

On the issue as to who is the owner of the land in dispute, Mr. Kamani averred that the trial Chairman did not analyse or consider the evidence on record let alone the fact that he did not make any finding on this issue. The learned counsel was of the view that the trial Chairman just rushed to give general statement on page 7 of the judgment that he was guided by all evidence and a copy of a judgment he had cited to decide that the respondent is the owner of the suit land.

It was submitted further that for the trial Chairman to give a general statement that he was guided by all evidence to conclude that the applicant/respondent is the owner of the suit land without pointing out which evidence led him to such a conclusion is a clear indication that he did not evaluate evidence on record. It was the humble submission of Mr. Kamani that if the trial Chairman had evaluated the evidence on record, he could have found that the applicant/respondent is not the owner of the suit land but all of that land was the property of the second appellant up to 2017 when she sold 3 acres to the 1st appellant. That, the respondent himself who testified as PW1 made it clear at page 15 of the typed proceedings that he used the suit land for two years only after acquiring it in 1974. When cross examined, the respondent explained that he gave the suit land to the 2nd appellant after using it for six years from the year when he acquired it and since then it is the 2nd appellant and her husband

who were occupying and cultivating that land. Mr. Kamani opined that, it is obvious that if the trial Chairman had applied his mind to the evidence on record, he could have discovered that the allegations by the respondent, and his witnesses that he gave the 2nd appellant two acres only in 2004 and remained with 6 acres was an afterthought, cooked and unreliable claims.

On the 2nd ground of appeal, it was submitted that the tribunal's judgment is bad for lack of reasoning. The learned counsel for the appellants cited **Regulation 20 (1) (a) – (d) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003,** which requires that each judgment of the Tribunal should always consist of brief statement of facts, findings on the issue, a decision and reasons for such decision. In support of his argument, Mr. Kamani referred to the case of **Tanga Cement Company Limited vs Christopherson Company Limited [2005] TLR** at page 190 where it was held as follows:

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision there on and* ***the reasons for such decision.*** *"*Emphasis added

Mr. Kamani elaborated that, in the tribunal's judgment there is nowhere where the trial Chairman gave reasons for his decision. After resolving the framed issues by basing on his assumption and belief, he just concluded his judgment and ended there. That, lack of reasons for his decision rendered the said judgment a nullity.

On the 3rd ground of appeal, Mr. Kamani submitted that the trial tribunal made a gross error for awarding reliefs which were not pleaded or prayed. That, the 1st appellant who was the 2nd respondent before the trial tribunal did not pray in the pleadings or during the trial that he should be refunded

the money which he used to purchase 3 acres of land from the 2nd appellant. Yet, the trial Chairman decided that he should be refunded that money by the 2nd appellant. To cement his argument, the learned counsel referred to the case of **Tanzania Electric Supply Co. Ltd vs Muhimbili Medical Centre,** in which it was decided *that nothing can be awarded unless pleaded in the plaint.* Mr. Kamani was of the view that, since the trial Chairman awarded a relief which was neither pleaded nor prayed, his judgment is bad in law and that it deserves to be nullified, reversed or varied.

On the 4th ground of appeal, Mr. Kamani submitted that, the trial Chairman erred for failure to observe the procedures governing visit to locus in quo. That, when the court or tribunal decides to conduct a visit to the locus in quo, there are certain guidelines and procedures which should be observed to insure fair trial. He said some of these procedures were articulated in the case of **Nizar M.H. versus Gulamal Fazal Jan Mohamed [1980] TLR 29** where it was held that:

> *"When the court decides to conduct a visit at the locus in quo must attend with the parties and their advocates, if any and with much each witness as may have to testify in that particular matter. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated witnesses, then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future."* (Emphasis added).

The learned counsel for the appellants contended that, although the visit was conducted in this case, it was not conducted in accordance with the procedures and guidelines laid down in the case of **Nizar** (supra). The respondent (applicant) did not attend the locus in quo. That, even Happy Felician Nyaki (PW3) who pretended to be his representative was self-appointed as there was no evidence showing that she had been appointed by the respondent. It was alleged further that; at the end of the visit the tribunal did not assemble and no notes were read out to the parties and their advocates. In addition to that, no comments, amendments or objections were called for. That, even the confusion which necessitated that visit was not resolved. One of the reasons which necessitated the visit was to verify whether the respondent had acquired 8 acres of land from Oria Village. The second reason was to verify whether the 2nd appellant sold four or three acres of land to the 1st appellant and the last reason was to verify whether PW4 one Melkizedeki Materu was neighbour to the suit land. None of those confusions was verified as the trial Chairman decided to deal with irrelevant issues during the visit.

On the 5th ground of appeal, Mr. Kamani submitted that the trial tribunal erred for not resolving some of the issues framed. It was contended that the record of the tribunal shows that , some of the framed issues were not determined. That, one of the framed issues which was not answered was the second issue which required to know whether the 2nd appellant one Fransisca Felician Nyaki was given 6 acres of land by the respondent, the then applicant. That, the issue was not resolved at all.

It was also averred that the fourth issue which was to the effect that who was the owner of the suit land, was not determined. The trial Chairman

did not make any finding on this issue but rushed to conclude in his decision from vacuum that the applicant is the owner of the suit land.

Mr. Kamani went on to state that, it is an elementary principle of pleadings that each and every issue framed in a case should be definitely resolved. He supported his argument with the case of **Sheik Ahmed Said versus The Registered Trustees of Manyema Masjid [2005] TLR 61** in which the Court of Appeal of Tanzania at Dodoma while emphasizing this principle held that:

> *"It is necessary for a trial court to make a specific finding on each and every issue framed in a case even where some of the issues cover the same aspect."*

Mr. Kamani was of the view that, since the trial tribunal contravened this principle which is very important in resolving parties' disputes, its judgment is bad in law and the same should be reversed or nullified.

The 6th ground of appeal was abandoned.

In view of what they submitted and on strength of the authorities cited herein, it was submitted for the appellants that the trial tribunal's judgment is bad in law. They prayed the same to be reversed and the appellants be declared the lawful owners of the suit land. Alternatively, that if this court finds the irregularities discussed herein very serious, be pleased to nullify the proceedings and judgment of the tribunal and thereby order retrial before another Chairman.

Opposing the appeal Mr. G. M. Shayo for the respondent, submitted among other things that the first ground of appeal is grossly misconceived and that it ought to be disregarded by this court on the reason that the trial Chairman evaluated well the evidence of both parties on record and reached to just and fair decision. That, it is apparently clear from the

Court's record particularly at page 2 of the typed judgment which plainly shows that the tribunal's Chairman briefly analysed the evidence on record of PW1 one Felician Mangalia Nyaki and that of his witness who were summoned in court to support his testimony. That, the tribunal Chairman went further to consider evidence of the respondents/appellants herein and pronounced his just and equitable decision. The learned counsel for the respondent also quoted page 7 of the typed judgment of the trial tribunal. (Which was also quoted by the learned counsel for the appellants).

Mr. Shayo contended that, the records are self-explanatory that PW1 (respondent herein) testified on oath that in 1974 he acquired the suit land measured 8 acres from Oria village and that Dionis Mtalo assisted him to acquire the said land. That, PW1 stated further in his testimony that he gave 2 acres to Fransisca the 2nd appellant with her husband and remained with 6 acres. Reference was made to page 17 of the typed proceedings of the District Tribunal.

It was averred further for the respondent that, evidence of PW1 was corroborated with the evidence of PW2 Aureria Felician Nyaki, PW3 Happy Felician Nyaki and PW4 Melkizedek Elisia Materu who testified that the 2nd appellant herein was given only two acres of land by his father, as seen at page 19,20,21,25,26,and 31 of the typed proceedings of Land Application No. 64 of 2018 of the District Tribunal. It was also stated by PW3 when cross examined that the child of the 2nd appellant herein passed away, he was buried in those two acres which she was given by her father, the respondent herein. To buttress their contention, this court was moved to refer at page 28 of the typed proceedings of the District Tribunal.

Concerning the contention that the issue whether the 2nd appellant was given six acres or two acres of land was not resolved, it was submitted for the respondent that, the said issue was clearly determined and resolved by the tribunal as seen at page 6 of the typed judgment where it was stated that:

> *"...kwa kuwa anayeweza kuthibitisha alichotoa ni mtoaji (mdai) ambaye ni baba mzazi wa mdaiwa Na. 1, kitendo cha kuuza eneo ambalo baba anadai hajampatia ni kosa hivyo mauzo hayo ni batili."*

It was insisted that evidence of PW2, PW3 and PW4 corroborated evidence of PW1 to justify that PW1 Felician Mangalia Nyaki offered only 2 acres of land to the 2nd appellant with direction to take care of 6 acres of land being property of the respondent Felician Mangalia Nyaki which was properly held by the District Land and Housing Tribunal of Moshi. On that basis, Mr. Shayo opined that it was apparent that the District Tribunal had considered properly the second issue that the 2nd appellant herein was given only two acres of land from the land of the respondent and not 6 acres. That, the trial tribunal adjudged and determined to the effect that the sale of 3 acres of land by the 2nd appellant to the 1st appellant out of 6 acres of land which was alleged to be the property of the respondent was illegal. The observation of the trial Chairman in his judgment was quoted which reads:

*"Hata hivyo kwa kuwa mdaiwa Na. 2 aliuziwa na Ofisi ya Kijiji ikahusishwa hawezi kuitwa mvamizi **ila mauzo hayo siyo halali."** Emphasis added*

On the issue that the respondent testified on oath that he used the suit land for two years after acquiring it in 1974, and that when cross examined, he said that he used the suit land for six years from the year

when he acquired it; it was submitted for the respondent that the issue of time spent on cultivation of the suit land, does not waive the respondent's right to claim ownership over the suit land as the respondent may wish to cultivate his land at any time he wishes to do so. It was suggested that the important issues for determination were who is the lawful owner of the suit land, whether the respondent trespassed to the suit land and whether the sale of the suit land by the 2nd appellant to the 1st appellant was illegal of which the trial tribunal did consider in the framed issues leading to the adjudication of the disputed facts in Land Application No. 64 of 2018, hence reached at the just and fair decision.

The assertion that it was the 2nd appellant and her husband who were occupying and cultivating the land, was opposed to the effect the same was worth of no credit, as nowhere in the typed proceedings particularly at pages 15 and 17 of the typed proceedings clearly show that the respondent herein said that from the date he stopped using the suit land the 2nd appellant and her husband were occupying and cultivating the suit land. That the appellants try to insinuate and misdirect this court.
Responding to the contention by the appellants that the 2nd appellant was given the suit land way back in 1980s as per testimony of PW2 an elder sister of the 2nd appellant who found the 2nd appellant with the suit land when she went to the suit land in 1990, it was submitted that the record at page 19 of the typed proceedings reveals the testimony of PW2 one Aurelia Felician Nyaki who said as follows:
"When I arrived there, I found my young sister (1st appellant) to the 2nd appellant herein with her land she acquired from father (it was 2 acres) I

was also shown the land to use. The further testified that (sic) Fransisca was not given a whole land. She was given 2 acres only."

It was contended that from the evidence of PW2 it is apparent that the 2nd appellant was given only 2 acres of land from her biological father, thus the respondent herein. That, to amplify their contention the appellant conceded in his written submission that PW2 found the 2nd appellant with that land given by her father. Mr. Shayo referred to page 19 of the typed proceedings of Land Application No. 64 of 2018. He said that evidence of PW2 does not join hand to that of the 2nd appellant.

On the issue that evidence of PW2 corroborated with that of DW2 alleged to be a neighbour to the suit land who testified that it was Fransisca the 2nd appellant who was occupying the land and that she never saw any other person occupying or using the land; Mr. Shayo submitted that evidence of PW2 Aurelia Felician Nyaki does not corroborate with that of DW2. He said that, the said allegation was an afterthought and that it should be disregarded by this court.

Regarding the averment by DW3 that from the year 2000 up to 2017 he never saw any person other than the 2nd appellant using that land, Mr. Shayo said that the said contention is worth of no credit since failure to see any person other than the 2nd appellant does not mean that the respondent is not the owner of the suit land and thus the appellants cannot technically benefit from the doctrine of adverse possession as no test of adverse possession that can be refuge to the 2nd appellant as underscored in the case of **Registered Trustees of Holy Spirit Sisters Tanzania versus January Kamili Shayo and 136 others, Civil Appeal No. 193 of 2016,** Court of Appeal of Tanzania (unreported), cited in the case of **Philemon Mushi versus Kaleb Rabson Samiel**

Mwanga and Fatuma Aminiel Sinai, Misc. Land Application No. 14 of 2021, High Court of Tanzania, Moshi District Registry (unreported).

To substantiate his point, Mr. Shayo submitted further that, the 2nd appellant has nothing to substantiate his contention as there is no documentary evidence on record proving that she was given 6 acres of land as alleged. That, the testimony of DW2 as seen under page 44 of the typed proceedings are mere words with nothing to support that the respondent was indeed offered 6 acres of land to the 2nd appellant. What is on record is 2 acres of land given to Fransisca of which the respondent did allow Fransisca' s Child to be buried on it. That, the respondent under oath, did not say that the child be buried on the 6 acres. Page 44 of the proceedings is self-explanatory. It was further insisted among other things that the tribunal chairman did analyse and evaluate evidence of both sides well and reached into a fair and justifiable reasons. That, the respondent's testimony and that of his witnesses (PW2, PW3 and PW4) managed to persuade the Tribunal's Chairman that the 2nd appellant was only given 2 acres of land and thus the sale of 3 acres as conceded by the appellants in their written submissions was illegal. That, the tribunal was of considered opinion that the sale of the piece of land by the 2nd appellant who had no good title was illegal.

Responding to the 2nd ground of appeal, as to whether the tribunal's judgment is bad for lack of legal reasoning as per **Regulation 20 (1) (a)- (d) of the Land Disputes and Housing Tribunal Regulations** Mr. Shayo submitted that, the Tribunal's judgment has legal reasoning and the Honourable Tribunal Chairman did consider the condition precedent set forth in the case of **Farah Mohamed versus Fatuma**

Abdallah [1992] TLR 205, whereby **Hon. Mrosso J** (as he then was) held inter alia that:

> *"He who doesn't have legal title to the land cannot pass good title over the same to another person."*

Basing on the above cited authority, the learned counsel for the respondent submitted that the above condition precedent is the legal reasoning which led the tribunal Chairman to arrive into his just and equitable decision that the 2nd appellant had no power to sale the land which she had no good title. That, the tribunal Chairman did comply with **regulation 20 (1) (a)- (d)** (supra). Also, the learned Chairman complied with the condition precedent set out in the case of **Tanga Cement Company Limited** (supra) cited by the appellants. The learned counsel referred to page 6 and 7 of the typed judgment of the trial tribunal to support his argument.

On the 3rd ground of appeal that the trial tribunal made a gross error for awarding reliefs which were not pleaded or prayed, Mr. Shayo responded that, at paragraph 7 (g) of the original Land Application No. 64 of 2018 of the District Land and Housing Tribunal, the applicant (respondent herein), prayed to be awarded any other reliefs as the tribunal deems fit to grant. That, the grant of any other reliefs was on court's discretion based on the nature and circumstances of the case at hand. Thus, the Tribunal Chairman was correct to order the 2nd appellant herein to refund the amount of money to the 1st appellant, which were unlawfully used to purchase 3 acres of land the property of the respondent herein. It was submitted further that the cited case of **Tanzania Electric Supply Company Limited versus Muhimbili Medical Centre** cited by the appellants was distinguishable to the case at hand.

On the 4th ground of appeal that the trial Chairman erred in law for failure to observe the procedure governing visit at the locus in quo; Mr. Shayo replied that the procedure was adhered to as PW3 the daughter of the respondent attended the locus in quo on behalf of the respondent as the respondent is 95 years old and he was sick when the tribunal visited the locus in quo on 24/3/2021 as seen at page 60 of typed proceedings. That, it was found that the suit land was 8 acres as pointed out by PW3 Happy Felician Nyaki and the tribunal's judgment that the 2nd appellant had trespassed into 6 acres of land excluding 2 acres which she was given previously making a total of 8 acres. In addition, it was averred that visiting the locus in quo is in the discretion of the tribunal as nowhere in the provision of the Regulations of the District Land and Housing Tribunal **(G.N No. 174 of 2003)** mandatorily provides for the visit of locus in quo. In that sense, the cited case of **Nizar** (supra) was said to be distinguishable to the present case. Moreover, it was alleged by Mr. Shayo that the case of **Nizar** has been recently overruled by the Court of Appeal in the case of **Dar es Salaam Water and Sewerage Authority versus Didas Kameka and 17 others, Civil Appeal No. 233 of 2019,** at Dar es Salaam (unreported), at page 30 of the typed judgment it was held inter alia that:

> *"We think the learned trial judge found it unnecessary to inspect the locus in quo which is not mandatory and as rightly argued by Mr. Kariwa, the learned trial judge found the facts and evidence placed before him were sufficient to dispose of the dispute."*

It was the firm view of Mr. Shayo that, despite the fact that the tribunal visited the locus in quo, it was not necessary to be bound with the facts or evidence obtained during the visit of the locus in quo since the facts

and evidence placed by witnesses before the tribunal's chairman were sufficient to dispose of the dispute as per the position of the case law (supra).

On the 5th ground of appeal that the trial tribunal erred for not resolving some of the issues framed, it was submitted in reply that, the 2nd issue was resolved after the trial tribunal did consider that the 2nd appellant was given 2 acres of land out of 8 acres and trespassed to the remaining 6 acres of land which was in dispute. Mr. Shayo quoted from page 7 of the typed judgment of the trial tribunal where the Hon. Chairman held that:

"Nikiongozwa na hukumu hiyo hapo juu na Ushahidi wote uliotolewa natoa hukumu kama ifuatavyo

- *Madai ya mdai yanakubaliwa hivyo yeye ni mmiliki wa eneo akiondoa Eneo la ukubwa wa Ekari mbili (2) zilizo upande wa kusini ilikuwa (sic) na nyumba ya mdaiwa Na. 1.*
- *Mdaiwa Na. 1 ni mvamizi kwenye eneo lililobaki ambalo lipo upande wa Kaskazini nae neo lake la ekari 2 kwani ni la baba yake...."*

On the cited case of **Sheik Ahmed Said** (supra), it was Mr. Shayo' s opinion that the same was distinguishable to the facts of the case at hand. In the light of their contentions, Mr. Shayo prayed this Court to uphold the decision of the trial tribunal taking into account that the purported sale of the suit land between the 2nd and the 1st appellant was illegally made for lack of blessings from the village land council as required by the law. He referred to page 52 of the typed proceedings which reveal that members who participated to the sale of the suit land were only three people to wit:

1. Ten cell leader.
2. Kitongoji Chairman

3. V.E.O (Village Executive Officer)

It was commented that the sale of the suit land was illegal for lack of reasonable number of 7 members to meet the required corum number of members of the village land council with legal mandate to issue blessings in the sale of the suit land within its jurisdiction as observed in the case of **Bakari Mhando Swaga vs Mzee Mohamed Bakari Shelukindo and Others, Civil Appeal No. 389 of 2019,** Court of Appeal of Tanzania at page 7 where it was held inter alia that:

> *"In our view is in compliance with **section 142 (1) of the Local Government District Authorities Act, Cap 287** which provides: A Village Council is an organ vested with all executive powers in respect of all affairs and business of the Village. Under normal circumstances it was expected for the appellant after he had executed the purported sale deed with Khatibu Shembilu, to present the document to the village Council of Kasiga to get its blessings. However, the appellant did not comply with this requirement."*

Mr. Shayo went on to submit that it is not proven as to whether the sale of the suit land between the 2nd and the 1st appellant was indeed presented to the Village Land Council to obtain its blessings. Furthermore, records of the trial tribunal at page 52 of the typed proceedings shows that only three members participated to the sale of the suit land who were not termed as members of the Village Land Council of Oria Village with legal mandate to effect the sale of the suit land by giving their blessings as required by the law. Thus, the sale of the suit land between the 2nd and 1st appellants were a nullity as was recently observed by this court in the case of **Philemon Mushi versus Kaleb Rabson Samiael Mwanga and Fatuma Aminiel Swai, Misc. Land Application No. 14 of 2021,**

High Court of Tanzania at Moshi whereby at page 9 of the typed ruling the court considered that:

> *"Pursuant to the above quoted provision of the law, the Village Land Council is composed of seven members while in this matter the village leaders who witnessed the sale agreement between the 1st respondent and the 2nd respondent were three. It is not certain whether the said village leaders were among the seven members of the Village Land Council. It is on that basis that I find the first ground worth to be referred to the Court of Appeal for determination."*

The learned council for the respondent concluded by praying that this appeal should be dismissed with costs and nullify the sale of the suit land between the 1st and 2nd appellants for lack of blessings from the Village Land Council and declare the respondent to be lawful owner of the suit land.

In his rejoinder on the 1st ground of appeal, Mr. Kamani for the appellants submitted that the trial Chairman did not analyse any evidence either on page 2 or on any other page of his judgment. That, what he did from page 2 up to page 5 of the judgment was to reproduce and copy the evidence given by the parties, but he did not expound or apply his mind to the evidence on record and weigh the credibility and weaknesses of that evidence. Mr. Kamani reiterated his submission in chief that the trial Chairman did not evaluate the evidence on record and if he evaluated it, he would find that all of the suit land measuring 6 acres was given to the 2nd appellant in 1980s.

It was re-joined further that, evidence of PW1, PW2, PW3 and PW4 was a fabricated story and therefore should not be relied upon by this court. That the explanation that the respondent (PW1) acquired 8 acres of land

in 1974 and in 2004 he gave 2 acres of that land to the 2nd appellant and remained with 6 acres was a cooked story. That, according to PW1, PW3 and PW4, 2 acres of land was given to the 2nd appellant in 2004, while according to PW2, that act occurred before 1990 and when PW2 arrived at the suit land in 1990 she found the 2nd appellant already occupying that land. Mr. Kamani was of the view that the contradiction proves that this is a cooked story. Otherwise, witnesses of the respondent could not have given different stories concerning the same issue. That, very unfortunate, the contradiction goes to the root of the case.

Concerning the explanation that evidence of PW1 was corroborated by PW2, Pw3 and PW4, the learned counsel for the appellants contended that the same was worthless as evidence of PW1 could not be corroborated by the evidence of PW2 and PW4 because all what PW2 and PW4 testified was a hearsay story which they had been given by PW1 himself and therefore incapable of corroborating evidence of PW1. That, PW2 and PW4 themselves on page 20 and page 31-32 of the typed proceedings respectively, while answering questions advanced to them during cross examination told the tribunal that they were not present when the 2nd appellant one Fransisca was given the land in dispute but they were informed by the respondent PW1 that he gave her 2 acres of land in 2004. Even the explanation by PW2 that the 2nd appellant acquired 2 acres only and not the whole land, was just a fabricated story which she was given by the respondent as she herself on page 20 of the typed proceedings stated:

> *"When Fransisca was given the land, I was already married, I agree I heard later that Fransisca had been given the land. I could not*

know the size of the land which was given to Fransisca. I agree that it is my father who notified me that he gave her 2 acres."

It was cemented that, from this testimony, it is apparent that PW2 does not know the size of the land which the 2nd appellant was given and therefore she can not be justified to say that the 2nd appellant was not given the whole land as all what she testified was hearsay evidence.

Regarding the testimony of PW3 that she was present when the 2nd appellant was given 2 acres of land in 2004, it was also re-joined that the same was a cooked story as it was defeated by the evidence of PW2 who on page 19 of the typed proceedings testified that when she arrived at the suit land in 1990 her young sister (thus, the 2nd appellant) was already there occupying and using that land after she had acquired it from her father. It was Mr. Kamani's humble submission that it could not be true for the 2nd appellant to be given 2 acres of land in 2004 while since 1990 she had already acquired that land and was using it.

Mr. Kamani referred to page 17, 5th line of the typed proceedings where he alleged that PW1 himself admitted that he had many children but he gave the suit land to the 2nd appellant and remained at home with his 10 children. That, at the 4th line on the same page, PW1 said that it was his child one Fransisca and her husband who were cultivating that land. That, evidence of PW1 gained support from a testimony of PW2 who on page 20 of the typed proceedings told the tribunal that when she shifted his livestock to the suit land in 1990, she did not find any other relatives there except Fransisca.

In view of the above submission, Mr. Kamani stated that it was obvious that evidence of the respondent and his witnesses was fabricated story which is calculated at depriving the 2nd appellant of her land which she

was given and which she had been taking care of for more than 42 years now.

On the 2nd ground of appeal, it was re-joined that the trial Chairman did not give any reason for his decision. Submissions in chief in respect of the same was reiterated.

On the 3rd ground of appeal, Mr. Kamani reiterated his submission in chief that by awarding relief which was not pleaded or prayed, the trial Chairman made a gross error. He said that although the applicant had prayed for any other relief as deemed fit to be granted by the tribunal, the person who was ordered to refund the 2nd respondent was his co-respondent and not the applicant. That, it was improper to use prayers contained in the applicant's application to give the 1st respondent a relief which he had not prayed in his written statement of defence.

On the 4th ground of appeal, it was re-joined that, during the visit of the locus in quo, the tribunal did nothing to verify whether the suit land was 8 acres or 6 acres although that was one of the reasons which necessitated to carry out that visit. That, the words of PW3 that the suit land is 8 acres was her own words and not the verification of the tribunal. Mr. Kamani challenged PW3 as she was not among the parties to the suit but a self-appointed representative who had no locus to tell anything about the size of the suit land. The learned counsel also disputed the allegation that the trial Chairman was of the views that the 2nd appellant trespassed six acres of land as there is nowhere in the trial tribunal judgment where the trial Chairman decided so. He was of the view that after visiting the locus in quo, the trial Chairman was not supposed to come up with views or opinions but with real facts which he had verified.

Regarding the procedures set forth in the cited case of **Nizar** (supra) that the same cannot apply in this case on the reason that there was no provision in the **District Land and Housing tribunal regulations, GN No. 174 of 2003** which makes it mandatory to visit the locus in quo; it was stated that the requirement to visit the locus in quo is not a creature of any statute but a case law. Reference was made to the case of **Nizah MH. Ladak vs Gulamal Fazal [1980] TLR 29** where it was stated that locus in quo is visited in exceptional circumstances where it is necessary to verify the confusion which arise during the hearing in order to resolve the dispute conclusively.

Concerning the argument that the position of the case of **Nizar** (supra) has been overruled by the Court of Appeal in the case of **Dar es Salaam Water and Sewerage Authority vs Didas Kameke and 7 others** (supra), it was submitted in rejoinder that the learned counsel had misconceived or failed to comprehend the gist of that decision. That, the Court of Appeal in that case did not overrule the decision in the case of Nizar but it decided that given the circumstances surrounding that case plus evidence which had been adduced by the parties there was no need to visit the locus in quo. It was stated further that in our case it was necessary to visit the locus in quo in order to resolve the confusion which had risen in the course of hearing.

It was Mr. Kamani's strong contention that since the trial tribunal had decided to visit the locus in quo, it was necessary for it to observe the procedure and guidelines articulated in the case of **Nizar** and that since it did not observe them its proceedings and judgment was a nullity.

With regard to the 5th ground of appeal, Mr. Kamani reiterated their submission in chief that the trial tribunal erred for not resolving the framed

issue No. 2 and issue No. 4. He stated that there is nowhere where the trial Chairman decided that the appellant was given 2 acres of land out of 8 acres and trespassed 6 acres. That, the trial tribunal decided that there was no proof that the applicant/respondent acquired 8 acres of land and there was no proof that he gave 2 acres of land to the 2nd appellant. Mr. Kamani referred to paragraph 3 and 4 at page 6 of the typed proceedings where the trial Chairman stated that:

> *"Nikianza na kiini cha mgogoro cha kwanza....* ***hakuna uthibitisho wa ekari nane kwani hata aliyepewa anakisia tu.***
>
> *Kuhusu kiini cha pili cha mgogoro pia* ***hakuna uthibitisho kuwa eneo alilopewa mdaiwa Na. 1 Ni ekari 2."*** *(Emphasis added)*

In that regard, it was reiterated that the second issue which was whether the 1st respondent, now 2nd appellant was given 6 acres of land was not answered. The learned counsel also alleged that the 4th issue was not answered. That, issues cannot be resolved by referring to the authority of the previous decided cases but by evaluating the evidence adduced by the parties. It was also averred that issues could not be resolved by merely stating that the trial Chairman was guided by all evidence without showing how much such evidence led him to the conclusion he made in relation to such issues.

Mr. Kamani submitted further that it was imperative to state that the above statement of the trial Chairman was a decision from the vacuum and not the finding on the framed issues.

The issue of members of the village council who were supposed to give blessings to the sale of land, was disputed by Mr. Kamani on the ground that the same was strange as it was not discussed anywhere in the

submission in chief. Thus, it was improper to discuss it at this stage of rejoinder. He urged this court to ignore it.

The learned counsel for the appellants finalised by submitting that the trial tribunal's judgment was bad in law and he prayed this appeal to be allowed with costs and that judgment of the trial tribunal be reversed and appellants be declared lawful owners of the suit land

That marked the end of submissions of both parties.

According to the evidence on the trial Tribunal's record and submissions of both parties, there is no dispute that the suit land belonged to the respondent together with the 2 undisputed acres of the 2nd appellant. It was also undisputed fact that the 2nd appellant is a biological daughter of the respondent. On the outset, the main issue for consideration is *whether the respondent granted the whole disputed land to the 2nd appellant?*

The raised issue will be determined together with the grounds of appeal. Starting with the first ground of appeal, that, the trial Chairman erred in law and facts for failure to evaluate and analyse evidence given by the parties, thus reaching at a wrong and unjust decision; in rebuttal of this ground of appeal the learned counsel for the respondent submitted among other things that this ground is misconceived and ought to be disregarded by this court on the reason that the trial Chairman did evaluate well the evidence on the record produced by both parties and reached to a just and fair decision. Having gone through the decision of the trial tribunal, I concur with the learned counsel for the respondent that the trial Chairman did evaluate evidence on the record prior to reaching to his decision. In determining the 1st and 2nd issues raised before the trial tribunal, the trial Chairman referred to the evidence tendered by both parties to the effect that there was no evidence to substantiate 8

acres and 2 acres. That, the same were just estimated. I am of settled opinion that what was done by the trial Chairman at page 6 of the typed judgment, amounts to evaluation of evidence. For that reason, I find the 1st ground of appeal lacks merit, it therefore dismissed.

On the second ground of appeal that the tribunal's judgment is bad for lack of legal reasoning, in support of this ground the learned counsel for the appellants cited **Regulation 20(1) (a) – (d) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations** (supra) which outlines the contents of a judgment. He said in the tribunal's judgment there is nowhere where the trial Chairman gave reasons for his decision. On the other hand, the learned counsel for the respondents was of the view that tribunal's judgment has legal reasoning as the learned tribunal Chairman in his decision did consider the condition precedent set forth in the case of Farah Mohamed (supra). That, he who doesn't have legal title to the land cannot pass good title over the same to another person. That, the above condition precedent is the legal reasoning which led the tribunal Chairman to arrive into his just and equitable decision, that the 2nd appellant had no power to the sale the land which she had no good title. With due respect to the learned counsel for the appellants, I totally agree with the learned counsel for the respondent that judgment of the trial tribunal complied to **Regulation 20 (1) (a) – (d)** (supra). Moreover, I wish to quote part of the typed judgment of the trial tribunal at page 6 where it was held that:

> *"... kwa kuwa anayeweza kuthibitisha alichotoa ni mtoaji (mdai) ambaye ni baba mzazi wa mdaiwa Na. 1, kitendo cha kuuza eneo ambalo baba anadai hajampatia ni kosa hivyo mauzo hayo ni batili."*

In my considered view, the above quoted statement of trial tribunal judgment, amounts to legal reasoning. Since evidence of witnesses of both parties had been summarised by the learned Chairman at the beginning of his judgment, there was no need of reproducing the same. What was done by the learned Chairman, was to refer to the particular point of evidence concerned in short. It should be noted that judgment writing is an art. Thus, styles of composing judgment differ. What matters is whether the ingredients of judgment prescribed by the law are complete. On this, reference is made to judgments of our Lordships the late **Mwalusanya J** (as he then was) as opposed to judgments of the late **Munyera J** (as he then was) are good examples. While judgments of **Hon. Munyera J** are concise and clear, judgments of **Hon. Mwalusanya J** are detailed and clear.

The 3rd ground of appeal that, the trial tribunal made a gross error for awarding reliefs which were not pleaded, will not detain me since the record of the trial tribunal is crystal clear. As correctly submitted by the learned counsel for the respondent, the learned Chairman granted the reliefs which were specifically prayed plus other reliefs which deemed just and fit to the tribunal which were also prayed by the respondent. In his rejoinder, the learned counsel for the appellants was of the opinion that since other reliefs were granted to the 1st appellant who had not prayed for the same, the trial tribunal erred. I am of considered opinion that since the 1st appellant was found to be a bona fide purchaser and village leaders were involved in the sale agreement, he was entitled to be refunded his money although he had not prayed for the same.

On the 4th ground of appeal which is in respect of visiting the locus in quo, the record of the trial tribunal is to the effect that the visit was

requested by Advocate Bwire for the applicant (respondent herein) on 4/12/2020. What transpired at the locus in quo is recorded in the tribunal proceedings. The coram indicates that counsels of both parties were present at the locus in quo. All parties gave their testimonies thereat. In the circumstances, I am of the view that no injustice was occasioned by the visit of the locus in quo in this matter.

Concerning the issue that the trial tribunal left almost all the framed issues unanswered, with respect, I concur with the learned counsel for the respondent that the raised issues were determined by the trial Chairman. From page 6 of the typed judgment 1st paragraph and 4th paragraph the record shows that issues were determined. On the 1st paragraph, the trial Chairman stated that:

> "***Nikianza na kiini*** *cha kwanza cha mgogoro.....* "Emphasis added

Then, he continued to discuss the raised issue and concluded that there was no evidence to substantiate the 8 acres. Thereafter followed the words:

> "***Kuhusu kiini cha piii cha mgogoro,*** *pia hakuna uthibitisho kama eneo alilopewa mdaiwa Na. 1 ni ekari mbili. Hata hivyo shahidi muhimu wa kuthibitisha ukweli huo ni mdai mwenyewe aliyetoa eneo.* "Emphasis added

The rest of the raised issues were discussed simultaneously and no issue was left undetermined. At the end the learned Chairman summarised his decision.

Having determined all the grounds of appeal in favour of the respondent, now I turn to the issue *whether the respondent granted the whole disputed land to the 2nd appellant?* As I have already pointed out, the respondent is a biological father of the 2nd appellant. At page 40 of the

typed proceedings, the 2nd appellant when cross examined, she stated among other things that:

> *"I agree that I requested him permit to sell the land*
> *I told him "Baba natoa eneo la eka tatu niuza (sic). Akisema (sic) sawa mtoto toa hapo."*
> *My father was at Hospital and I am the one taking care of him."*

In her testimony, the 2nd appellant also alleged that she sold the suit land in order to get money for treating her father. With respect, I hesitate to believe the version of the story of the appellant. **First,** I ask myself if the respondent had granted the whole land to the 2nd appellant how comes that she asked for permission to sell part of her land? **Second,** if the suit land was sold for the purpose of obtaining money for treating the respondent, how comes that the father has turned hostile and failed to be grateful for the same? It may be noted that the two questions which I have posed are based on matters of fact.

It is trite law that in matters of assessment of credibility of witnesses, courts of first instance are the best. This has been over emphasised in a number of decisions. In the case of **Ibrahim Ahmed v. Halima Guleti (1968) HCD** 71, **Cross J.** (as he then was) held that:

> *".... Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence."*

In another case of **Ali Abdallah Rajab v. Saada Abdallah Rajab [1994] 132,** it was observed that:

"Where a case is essentially one of fact in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to erroneous conclusion."

In the instant matter, the trial tribunal believed the version of the story of the respondent as opposed to that of the 2nd appellant. I acknowledge to have discovered minor contradictions in testimonies of witnesses of both sides in the trial tribunal proceedings, in particular in respect of the size of the suit land and years of events. However, the said contradictions, in my considered view, do not extend to the root of the matter. It worth at this juncture to note that evidence is weighed and not counted. Thus, what matters in this case is the evidence of the respondent which the trial tribunal found worth to be believed. Whether his witnesses (PW2, PW3 and PW4) corroborated his testimony or not, it is does not matter. Also, the fact that the suit land plus the two acres alleged to have been granted to the 2nd appellant, belonged to the respondent, was not in dispute. The dispute is in respect of the fact that the respondent granted the whole of his land to the 2nd appellant. Which I think is based on the assessment of credibility of witnesses which undoubtedly the trial Chairman was in a better position to make sound findings on the same.

Otherwise, having in mind the relationship between the respondent and the 2nd appellant, I am convinced to uphold the findings of the trial tribunal. I hesitate to believe that having granted the suit land to his daughter, the respondent at the age of 95 was convinced by the rest of his children to claim it back by filing a suit as alleged by the 2nd appellant. I therefore conclude that, the respondent did not grant the whole suit land to the 2nd appellant. As correctly found by the trial tribunal, on

preponderance of probabilities, the 2nd appellant was granted 2 acres only which were not in dispute. The suit land whether it was 6 acres or 4 acres (as the trial tribunal found that the same was estimated) was still owned by the respondent. Cultivating it for a long period did not suffice to confer ownership on the 2nd appellant.

It is on the basis of the above findings that I find this appeal devoid of any merit. The decision of the trial tribunal is hereby upheld in its entirety save for the costs. I therefore dismiss this appeal with costs.

Order accordingly.

Dated and delivered at Moshi, this 19th day of April, 2022.

S.H. Simfukwe

Judge

19/04/2022