THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND APPEAL NO. 14 OF 2021
(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 270 of 2020)

NYANGE BARTAZARI.....APPELLANT

VERSUS

PETER FUMBUKA MAGASHI.....1ST RESPONDENT

ELIAS SIAME.....2ND RESPONDENT

JUDGMENT

Dated: 08th & 28th February, 2022

KARAYEMAHA, J

This appeal traces its origin from the suit founded on the trespass in the respondents' land. At the height of the trial, the District Land and Housing Tribunal (DLHT) declared the respondents lawful owners of the suit land upon being satisfied that they proved the case to a required standard. The appellant was condemned to bear the costs of the case. Believing that the DLHT erred in its decision, the appellant preferred the instant appeal faulting it for declaring the respondents as lawful owner of the suit land on four (4) grounds of appeal as follows:

1. That the whole of the decision of the trial District Land and Housing Tribunal is bad in law and irregular, as the proceedings in record were badly recorded and reflected.
2. That the trial District Land and Housing Tribunal grossly erred in law and facts when it entertained the matter before it without involving Kasinde Village Council as the necessary party.
3. That the trial District Land and Housing Tribunal grossly erred in law and facts by its failure to properly analyse the evidence that was adduced before it, hence arriving at unjust decision.
4. That the trial District Land and Housing Tribunal grossly erred in law and facts by making decision against the appellant in disregarding conflict of evidence in respect to the purported sale transaction of the disputed land.

At the hearing of this appeal, the appellant was represented by Mr. Gerald C. Msegeya, learned counsel whereas the respondents had the services of Mr. Lucas Luvanda, learned counsel.

The first complaint is that the whole decision of the DLHT is bad in law and irregular as the proceedings in record were badly recorded and reflected. I shall discuss this complaint in relation with the complaint

that the trial Chairman failed to analyse the evidence properly as can be scanned from grounds three (3) and four (4).

Mr. Msegeya submitted that the decision did not reflect the proceedings because the 1st respondent who testified as PW1 during the trial evidenced that he purchased the suit land from Elias Siame, the 2nd respondent herein on 29/04/2019, but did not tender the sale agreement. To his dismay, the trial Chairman banked on the sale agreement to declare the 1st respondent as the lawful owner of the disputed land.

I have gone through the record and combed the documents very anxiously. The proceedings are very clear that the 1st respondent didn't tender the sale agreement. The 2nd respondent also testified that he sold 60 acres to the 1st respondent but didn't tender the sale agreement. Therefore, I agree with Mr. Msegeya that the trial Chairman erred in basing his decision on the sale agreement which was not tendered in evidence. It is inferred from this that the trial Chairman referred to the sale agreement annexed to the application. A trite law is that annexure are not exhibits. They are annexed to inform the other part what documents the applicant would rely upon and enable the respondent to soundly prepare the defence. They are then tendered in evidence during

the trial so that they can be tested and cleared before being admitted in evidence. This stance was emphasized in the case of ***Abdallah Abass Najim v Amini Ahmed Ali*** [2006] TLR 55 wherein the following reasoning was postulated:

> *"(i) Annextures to the plaint are not exhibits in evidence; they cannot be relied upon as evidence and cannot be the basis of a decision.*
>
> *(ii) as the annextures to the respondent's plaint were not tendered in Court as exhibits and were not tested in evidence, it was not improper for the learned Regional magistrate to base his judgment on those annexure."*

Having observed that the decision of the DLHT put reliance on annexure, I agree with the appellant that the trial DLHT erred. Therefore, ground one has merit to that extent.

However, after passing through the evidence, I am inclined to hold, sharing Mr. Luvanda's view, that the evidence was properly recorded. The appellant has not shown which parts of evidence were not properly recorded. Nevertheless, I must state firmly that a Court record is a serious document; it should not be lightly impeached due to the presumption that a court record accurately represents what happened.

See the case of ***Halfan Sudi v Abieze Chichili*** [1998] TLR 527 whereby the correctness of the court records Court's record was challenged by the appellant but the assertion was dismissed. However, it may be possible that the record was badly recorded but in order for me to impeach court records, I need something more than mere theories of possibilities. Therefore, this contention is rejected for being baseless.

I have also read the trial DLHT's judgment. Let me state at the outset that the evidence of both parties was considered and appreciated. The trial Chairman looked closely at the defence evidence and I see no reason to fault him.

The next complaint tabled by the appellant was that the DLHT erred in law and fact by entertaining the dispute without joining the Kasinde Village Council as the necessary party. Mr. Msegeya argued strongly that since the appellant alleged that she obtained land from the Kasinde Village Council, the latter was to be joined. He lamented that the request to join the Village Council was table before the DLHT before the appellant commenced the defence but that request was barren of results. Fortified by the case of ***Juma Kadala v Laurent Mnkande*** [1983] TLR 103, the learned advocate stated that non joinder of necessary part is fatal to the proceedings.

Responding Mr. Luvanda took a view that non joinder of necessary party is not fatal and the court should not use the doctrine to defeat the case. He supported his view with Order 1 Rule 9 of the CPC (Cap. 33 RE 2019)]. He also referred this court to the case of ***Farida Mbaraka and Farida Ahmed Mbaraka v Domina Kagaruki***, Civil Appeal No. 136 of 2006 (unreported). Unfortunately the same was not availed to the court.

The DLHT record demonstrates that the appellant got the disputed land from the Kasinde Village Council whether it was sold to her, rented or got it any way. So the village Council was to be joined as a necessary parte. Order I Rule 3 of the Civil Procedure Code Cap 33 R.E. 2019 provides as follows:

> *"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise."*

In order for the 1st respondent to have joined her as a necessary party, in terms of Order 1 Rule 3 of the CPC he had to meet certain conditions, i.e., he had a right to relief in respect of or arising out of the

same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise with the appellant.

In this case, exhibit D1 shows that the Kasinde Village council rented 100 acres to the appellant, 60 acres sold to the 1st respondent by the 2nd respondent inclusive. While the village council alleges that the disputed land belonged to her, the 2nd respondent claim he inherited it from his father. In my considered view, it was crucial for the village council to be joined because the 1st respondent had a right to relief from them both because events and acts were arising from the same transaction. The question that comes to the fore at this juncture is whether or not, the non joinder vitiates the trial DLHT's proceedings. The answer is in the negative. Order 1 Rule 9 provides that:

> *"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."*

Owing to the foregoing provision, I agree with Mr. Luvanda that this matter must be determined substantially regardless of the respondent's failure to join the village council.

Let me now tackle the issue which I raised *suo motto* and invited parties to address this court on. In the course of composing the judgment, I discovered a point of law to the effect that the appellant pleaded and testified that he bought/rented 60/100 acres from the Kisinde village. The issue which this Court invited parties to address the court was whether the procedure provided for under the Village Land Regulations No. 86 of 2001(hereinafter the Regulations) was complied with.

Mr. Msegeya submitted that the village Council is endowed with powers to allocate land to an investor under Regulation 76 (1) (2) and (3) of the Regulations of not more than 20 hectors equivalent to 50 acres. He submitted further that if the land applied for is more than 20 hectors and is 50 hectors (125 acres) the Village Council is obliged to seek consent from the District Council in which the village resides coupled with its recommendations. The District Council shall signify in writing its consent to the said application.

On the other hand Mr. Luvanda held the view that the acquisition of Village land by investor is preceded by application lodged with the Village Council. After discussing it, the application is taken to the Village Assembly as per section 8 (3) and (5) of the Village Land Act Cap 114 R.E. 2019. Since Village Land Act is read together with the Regulations, the Village council has mandate to grant land not exceeding 50 acres.

The law requires an application to be made to the village council for an amount of land. Therefore, in law a grant of land to an investor by the village council is preceded by an application from the investor. This is the spirit of regulation 76 (3) and (4) of the Regulations. I have read the DLHT's proceedings and combed the record. It is apparent that the appellant never lodged any application with the Village Council. In her defence evidence the appellant testified that she lodged an application with the Village Council. Her testimony was supported with that of Jacob Sinkamba the member of the Village Council. Unfortunately, no exhibit was tendered in this respect. I have tried to concert the law on whether it is proper to orally apply. The gist of regulation 76 (2) of the Regulations does not agree. There must a document which will enable the District council to signify. The regulation is quoted hereunder for ease of reference thus:

76. (2) Where the application is made to the village council for an amount of land whether by way of a customary right of occupancy or by way of a derivative right or consent to the grant of a derivative right which is between twenty-one and fifty hectares in extent, the village council shall forward that application to the district council having jurisdiction in the district where the village is situate together with its recommendation on that application and shall not grant that application unless and until the District Council shall signify in writing to the village council that it consents to that application."

In view of the above cited provision, it is practically impossible for the Village Council to forward to the District Council having jurisdiction in the district where the village is situated oral application with recommendation. Broadly, the application required must be in writing and must be seconded by written recommendations.

Exhibit D1 indicates that the appellant's application was discussed and approved. I have observed two irregularities; first, the Village Council discussed about the investor and reduced the minutes into writing without an application. Second, it allocated land to the investor in contravention of section 8 (5) of the Village Land Act which

mandatorily requires allocation of land to be preceded by the approval of the village assembly. Section 8 (5) is quoted for a swift reference:

> *"8. (5) A village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly."*

Connected to that anomaly, is the fact that the Village Council allocated 100 acres (equivalent to 40 hectors) without the consent of the District Council. This is the legal requirement under regulation 76 (2) of the Regulation quoted above.

The legal requirement highlighted above is indeed intended for the sole purpose of managing village land. The District Council has to check on the grant of land to investor in a bid to protect the interest of the indigenous. The law has given the District Council to go through the applications and recommendations and give its consent short of which is an irregularity. In this spirit it is to be emphasized that consent is very important.

The appellant's counsel had another string to his bow. He submitted that the appellant's application was not finalized by the District Council when she was sued in the DLHT. In my view, this is an afterthought because this factual issue was not raised during the trial

the appellant to give the respondents a chance to encounter or support it.

In the end I agree with Mr. Lubuva that procedures in acquiring the Village land by the appellant were seriously flouted. In the end the whole process of acquiring land and the acquisition itself by the appellant was void. It is trite to hold that if land is unprocedurally allocated by the village Government to any person that does not conclude that the person becomes the owner. I say so because; the allocation is null and void.

Having observed as above, I dismiss the entire appeal and all reliefs sought by the appellant. Costs of this appeal and of tribunals below, be borne by the appellant.

It is so ordered.

Dated at **MBEYA** this **28th** day of **February, 2022**

J. M. Karayemaha

JUDGE