IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA DISTRICT REGISTRY)

AT MBEYA

LAND APPEAL NO. 18 OF 2021

(Originating from Land Appeal No.252 of 2019 in the District Land and Housing Tribunal for Mbeya at Mbeya)

REHEMA SAINI NZUNDA ..... APPELLANT

VERSUS

MARTHA ROBERTSON SIMUMBA .....1ST RESPONDENT

UBATIZO MWALUKOMO .....2ND RESPONDENT

JUDGEMENT

Date of Last order: 15.12.2021

Date of Judgement: 25.02.2022

Ebrahim, J.:

The Appellant herein filed an application at the District Land and Housing Tribunal claiming that the Respondents herein have invaded his suit land located at Nyerere Street at Tunduma. The 1st Respondent is her mother. She claimed that she was allocated the land by the family with no conditions attached since 2003 and that the plot was surveyed to five plots. She sold four plots and remained with one plot that has been invaded by the Respondents in August 2019. The Appellant called **Henry Saini Nzunda**, his brother as a witness **(PW2).** He said the Appellant

was allocated land about 15 acres in 2003 and she developed it by planting trees and bananas in 2016. Another witness, **PW3** was Elizabeth Saini Nzunda, Appellant's sister who testified that the Appellant was given 2.5 acres of land by their mother in 2002 which she developed by planting trees and bananas. The 4th witness for the Appellant was one **Maiko Msagao Kabsa (PW4)** a Kitongoji Chairman of Nyerere Street Tunduma. He said the land was surveyed in 2016 and it is registered in the name of Rehema Nzunda. He said he saw Customary Certificate of Right of Occupancy and that it was the 1st Respondent who told them that she had given the suit land to the Appellant. He admitted not knowing the size of the land. The Appellant's husband one **Ditrick Sanga (PW5)** testified at the trial Tribunal that the 1st Respondent gave the disputed land to the Appellant who surveyed it and obtained five (5) plots. He said it was wrong for the 1st Respondent to take back the land that she had given to the Appellant and sold it.

On her side, the 1st Respondent (DW1) testified before the court that the disputed land is part of her land that he sold to the 2nd Respondent. She said she started using it since 1972 before it was surveyed. She said the land had no dispute before 2019 and she only allowed the Appellant to use it. After the land was surveyed, she was

given 4 plots among which she sold it to the 2nd Respondent who is the owner of the disputed land, said the 1st Respondent. Responding to cross examination questions, she denied to have given land to her children but only allowed them to use it. She said her mother passed on in 2006. **DW2, Ubatizo Mwalukomo (the 2nd Respondent)** told the trial Tribunal that when he was informed of the plots for sale, he went to "Ofisi ya Mtaa" for verification where he was told that the owner of suit land is Martha Namumba. He was given the survey plan and bought the disputed land for 10million. He tendered the sale agreement which was admitted in court as **exhibit D1.** The defence side called another witness **George Enos (DW3),** the Mwalimu Nyerere Street Executive at Tunduma since 2017 who witnessed the sale agreement on 10.08.2019. He said he called the Street Chairman one Maiko Kabasa to also witness the same.

After hearing the evidence from both sides, the trial Chairman in agreeing with one of the assessors Musa Mwasapili ruled out that there was no enough evidence to prove that the suit land belonged to the Appellant. He therefore dismissed the application with costs.

Aggrieved, the Appellant lodged the instant appeal raising six grounds of appeal and one supplementary ground. Looking at the

grounds of appeal save for the supplementary ground of appeal which suggests that there was no active involvement of assessors, the remaining grounds could be summarized thus:

1. That the trial Tribunal did not grasp the main issue of the dispute.
2. That the trial Tribunal failed to analyse the evidence properly hence failed to see that Appellant's evidence was heavier than the Respondents.
3. That the trial Tribunal added new evidence.

This appeal was disposed of by way of written submission. The Appellant was represented by advocate Moses Mwampashe whilst the Respondents preferred the services of advocate Emil Mwamboneke.

Submitting in support of the grounds of appeal, counsel for the appellant argued the 1st and 2nd grounds of appeal together, and the 3rd and 4th grounds together as well. The rest, he argued them in seriatim.

On the 1st and 2nd grounds of appeal, counsel for the Appellant argued that the trial Tribunal failed to resolve the issue as to whether the 1st Respondent gave the disputed land to the Appellant for cultivation or ownership.

On the 3rd and 4th ground of appeal, whilst citing the case **of Lutter Symphorian Nelson Vs Attorney General and Ibrahim Said** (2000) TLR 419 (CAT), submitted that the trial Tribunal was supposed to analyse the evidence of both sides before reaching the decision something that was not done hence reached to an unjust decision. Arguing the 5th ground of appeal, counsel for the Appellants stated that it was not possible for the 1st respondent to admit her wrong doing hence the only evidence needed on the circumstances was that of the eye witnesses at the time when 1st Respondent gave the land in dispute to the Appellant. As for the 6th ground of appeal, counsel for the Appellant argued that the phrase in the judgement that the 1st Respondent said that the Appellant framed the facts and she is a liar is not on the record.

Submitting on the supplementary ground of appeal on the assessors' involvement, Counsel for the Appellant stated that the assessor's opinion must be in the record and not by being acknowledged in the judgement. He cited the cases of **Sikuzani Saidi Magambo & Kirioni Richard Vs. Mohamed Roble**, Civil Appeal No. 197 of 2018 (CAT) and the case of **Ameir Mbarak & Azania Bank Corp Ltd Vs Edgar Kahwili**, Civil Appeal No. 154 of 2015 (CAT), to substantiate his argument. He prayed for the appeal to be allowed.

Responding to the submission by the Counsel for the Applicant in respect of the 1st and 2nd grounds of appeal, counsel for the Respondents in citing the provisions of **Order XIV Rule 1(1) and 2 of the Civil Procedure Code, Cap 33 RE 2019** which explains on the general rule that the findings of the suit must be based on issues arising from pleadings – **International Commercial Bank Limited Vs Jacadam Real Estate Limited**, Land Case No. 6 of 2019 (HC). He submitted therefore that while the Appellant claimed to be the legal owner of the disputed land, the 1st Respondent also claimed to be the legal owner and justifiably sold the same to the 2nd Respondent. Hence the framed issue as to who is the legal or lawful owner of the suit land was correct. He contended further that there was no dispute that the Appellant was given land for use only and that a mere invitee to the land cannot have the title over the land – **Mukyemalila & Thadeo Vs Luilanga** [1972] HCD 4.

Responding to the 3rd and 4th grounds of appeal, Counsel for the Respondent argued that the trial Chairman evaluated the evidence as it is seen from page 4 of the judgement and came to the conclusion that the appellant evidence was based on hearsay. He relied on the

case of **Hamed Said Vs Mohamed Mbilu** [1984] TLR 113 on the principle that a party whose evidence is heavier must win.

On the 5th ground, Counsel for the Respondent argued that the appellant did not call any material witnesses to prove the fact that they were present when the 1st Respondent gave the land to the Appellant. He challenged the 6th ground of appeal that counsel for the Appellant is trying to convey the same meaning from Kiswahili to English while it is true that the 1st Respondent is the biological mother of the Appellant and it is not true that the Appellant owns the suit land.

On the issue of opinion of assessors under the provisions of **section 23(2) of the Land Dispute Court Act, Cap 216 RE 2019,** he argued that the records are clear that on 21/01/2020 the opinion was availed to the assessors and the trial chairman showed in his judgement that he considered the opinion of the assessors. He contended further that the best practice developed by the Court in the case of **Ameir Mbarak** is that opinion should be found in the records. He contended further that the Appellant's counsel did not show whether there was miscarriage of justice for not recording in full opinion of the assessors. He cited the case of **Richard Mebolokini Vs Republic** [2000] TLR 90. He urged the court not

to be tied up by technicalities and prayed for the appeal to be dismissed.

In rejoinder, nothing new was added apart from reiterating submission in chief.

I have carefully followed the rival submissions between the parties and issues in controversy. Clearly, the bone of contention in this case is who is the lawful owner of the disputed land following the complaint by the Appellant that she was given the disputed land by the 1st Respondent who unlawfully sold it to the 2nd Respondent.

Nevertheless, before I proceed to address the issue in controversy, there is a legal issue advanced by the counsel for the Appellant pertaining to the assessor's opinion. He contended in his submission that the opinion of assessors is missing in the proceedings as the same are supposed to be recorded and be part of the trial proceedings. In rebuttal, counsel for the Respondent argued that the argument by the counsel for the Appellant is misconceived as the practise is not to record assessors' opinion in the proceedings but rather the proceedings should reflect that the same were read before the parties, forms part of the proceedings and considered by the trial Tribunal. I hasten to agree with him.

Indeed, **Section 23(2) of the Land Dispute Courts Act, Cap 216 RE 2019** provides as follows:

" *(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors* ***who shall be required to give out their opinion before the Chairman reaches the judgment***"

From the above provision of the law, it follows that the assessors are required to give out/state their opinion before the Chairman pronounces his/her judgement. More so **Regulation 19 (2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulation, 2003** requires every assessor who has been present at the conclusion of the hearing of the case to give his opinion in writing. The requirement of receiving assessors' opinion as provided by the law has been extensively expounded by the Court of Appeal in the case of **Edina Adam Kibona Vs Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (CAT – Mbeya) which quoted with approval the principle enunciated by the Court in the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) where it was held thus:

"In view of the settled position of the law, where the trial has to be conducted with the aid of the assessors, as earlier intimated, they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is

composed. Unfortunately, this did not happen in this case. ***We are increasingly of the considered view that, since Regulation 19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict.***" [emphasis is mine]

In recapitulating the principle exemplified by the Court in the case of **Tubone Mwambeta (supra),** the Court in the cited case of **Edina Adam Kibona Vs Absolom Swebe (Sheli) (supra)** stated that:

"We wish to recap at this stage that in trials before the District Land and Housing Tribunal, ***as a matter of law, assessors must fully participate and at the conclusion of evidence****, it terms of Regulation 19 (2) of the Regulations, the Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili.* ***That opinion must be in the record and must be read to the parties before the judgment is composed****. For the avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment.* ***However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how and at what stage they found their way in the court record.*** *And in further view of the fact that*

they were not read in the presence of the parties before the judgment was composed, the same have no useful purpose".

The same principle has been emphasised in the cited case of **Sikuzani Said Magambo and Another (supra)** which quoted with approval the case of **Ameir Mbarak and Azania Bank Corp (supra)** and referred to the above cited case of **Edina Adam Kibona (supra)** and **Tubone Mwambeta (supra)**.

My reading and understanding of the above position of the law as expounded by the above case laws is that there should be opinion of the assessors in writing conspicuous in the records forming part of the proceedings. Furthermore, the Chairman must cause the opinion to be read to the parties before issuance of a judgment date and the exercise must be recorded or reflect in the court proceedings (**Tubone Mwambeta's case; Edina Adam Kibona's case; and Ameir Mbarak's case).** The practice is clear that the assessors read their written opinion in court in the presence of parties and same be placed in the court records and not as suggested by the counsel for the Appellant that by being in the record it means their written opinion must be re-recorded by the trial chairman. That is a misconception in my concerted views.

Tailoring the above jurisprudential position with the proceedings in the instant case, it was conspicuously recorded by the trial Tribunal at page 30 of the typed proceedings on the last order on 10.11.2020 that opinion to be availed to parties on 07/12/2020. On 07.12.2020, the trial Chairman recorded that both parties were present, opinion availed to parties and he set the judgement date to 21.01.2021. On 21.01.2021 when no judgement was delivered, opinion of assessors was availed to parties again. Indisputably is the fact that the written opinions are in the court records and the trial Chairman vividly considered their opinion and gave his reasons for differing with one of the assessors namely Vivian Chang'ombe on the reason that there was no enough evidence that the Appellant was given the disputed land by the 1st Respondent. That being said, I find the supplementary ground of appeal to be baseless and I dismiss it.

I shall address the remaining grounds of appeal generally in mind of the fact that being the first appellate court, I am obliged without fail to subject the entire evidence on record into objective scrutiny and draw own inferences and findings of facts having regard to the fact that the trial court had the advantage of assessing the credibility of the witnesses in so far as demeanour is concerned. This principle has been

illustrated by the Court of Appeal in the cases of **Jamal A. Tamim vs. Felix Francis Mkosamali & the Attorney General**, Civil Appeal No. 110 of 2012 (unreported); and **Martha Wejja vs. Attorney General and Another** [1982] TLR 35, to mention but a few.

In determining this case, I shall be guided by the principle of the law that *"he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence at all were given on the other side"* –**section 110(1) and 111 of the Law of Evidence Act, Cap 6 RE 2019.**

In re-visiting the evidence on record as recapitulated earlier, the Appellant testified during the trial that she was given the suit land by her mother (1st Respondent way back in 2003). The land was surveyed and it produced 5 plots. She testified also that the land records shows that the land is in her name. She said also that the land was invaded in 2019. Evidently, much as the Appellant claimed that the land was surveyed in 2016 and it is in her name, she did not tender any documentary proof to prove that indeed when the land was surveyed in 2016, she was the lawful owner and the documents proves the same. Neither did she prove the size of the said land. Since she alleged that there are records proving her ownership, she had the burden to prove that fact. PW2 –

Henry Saini Nzunda, a brother of the Appellant, said he has been living in the area since 2016 and that the Appellant was given the suit land of 15 acres in 2003. However, there is nowhere in the record where he evidenced to be present or witness the 1st Respondent giving the disputed land to the Appellant on the permanent basis and unconditionally. Obviously, there is no evidence that he was an eye witness. Then comes PW3- Elizabeth Saini Nzunda, the Appellant's sister. She said the Appellant was given the suit land in 2002 by the 1st Respondent as each child was given a piece of land. She said the Appellant was given 2.5 acres. First of all, there is a contradiction on the size of the land alleged to have been given to the Appellant by the 1st Respondent. While PW2 said the Appellant was given 15 acres of land in 2003, PW3 said she was given 2.5 acres of land in 2002. In consideration of the fact that even the Appellant herself did not state the size of the land that she was given, outrightly, I discard the testimonies of PW2 and PW3 as they contain major contradictions going to the root of the matter. It is obvious that they do not even know the size of the alleged land and when exactly the Appellant was availed such land. PW4 – Maiko Msagao Kabasa's testimony leaves a lot to be desired. I am saying so because, as a Kitongoji Chairman, he said he convened a

meeting and the 1st Respondent told him that the land belonged to the Appellant. He testified also that the land was surveyed in 2016 and it is in the name of the Appellant but he could not produce any documentary proof even from his office to prove the same. The alleged Customary Certificate of Right of Occupancy was not tendered by anyone to prove what he was testifying. However, he admitted not knowing the size of the land of the 1st Respondent and that the whole land originally belonged to the 1st Respondent. He did not also testify to have witnessed the 1st Respondent giving the alleged land to the Appellant. He only said that he was told by the 1st Respondent that the land belonged to the Appellant. The question now comes, if he knew that the land belonged to the Appellant way back from 2016, why did he then witness the sale agreement **(exhibit D1)** between the 1st Respondent and the 2nd Respondent in 2019 as a Kitongoji Chairman? This also shows clearly that PW4 has no first-hand information/knowledge as to the proof that indeed the 1st Respondent gave the suit land to the Appellant. PW5- the husband of the Appellant also like other witnesses apart from saying that the 1st Respondent gave the land to the Appellant and that the same was surveyed, he could not exactly tell the court that he was present when the 1st Respondent gave the land to

the Appellant. He only insisted that they have been using the suit land since 2003.

On her part, the 1st Respondent (DW1) told the court that she sold the disputed land to the 2nd Respondent because it was part of her land that she has been using since 1972. She testified further that the Appellant has never been the owner of the disputed laud but she only allowed her to use the same. She testified further that the land was surveyed and she was given 4 plots which one of them she sold to the 2nd Respondent and gave the remaining ones to her children who sold them. DW2 – the 2nd Respondent told the court that when he wanted to purchase the plot he went to the Mtaa Leaders to verify and he was told that the owner of the said land is the 1st Respondent. He was availed with the survey plan which showed that the plots belonged to the 1st Respondent. He tendered **exhibit D1**, the sale agreement. The purchase was witnessed by Ward Executive Officer and Street Chairman- "**Mwenyekiti wa Mtaa**". DW3 – George Enos Mtaa Executive Officer testified to have witnessed the sell agreement – exhibit D1. He testified further that the town plan indicated that the dispute belonged to the 1st Respondent.

Indisputably is the fact that the land in dispute had initially belonged to the 1st Respondent. The 1st Respondent rebutted the argument by the Appellant that she gave her the land unconditionally. She said she only invited her to use the land. The fact that the Appellant has been using the land since 2003 is not disputed. What is disputed is the Appellant's contention that the 1st Respondent gave her the land permanently and unconditionally. As already observed above following the facts that neither the Appellant nor her witnesses failed to prove the ownership of the Appellant, the fact remains that the land belonged to the 1st Respondent and the Appellant was a mere invitee. It is the principle of the law that permission to use land does not warrant a person to claim ownership of the same. I thus subscribe to the principle held in the cited case of **Mukyemalila & Thadeo Vs. Luilanga (supra)**. If at all, all of the Appellants witnesses did not tell the court that they were present when the 1st Respondent availed the land to the Appellant. Again, the Appellant failed to prove by documentary evidence as claimed that the land records are in her name nor did PW4 who claimed to have seen the Customary Certificate of Occupancy.

From the above therefore, I find that the Appellant failed to prove that she was the lawful owner of the disputed land. In the analysis of the quality of evidence, the evidence of the 1st Respondent is heavier than that of the Appellant in proving that she was the lawful owner of the disputed land and justifiably sold it to the 2nd Respondent.

At the end result, I find this appeal to be unmeritorious and dismiss it in its entirety with costs.

Accordingly ordered.

THE HIGH COURT OF TANZANIA

R.A.Ebrahim
Judge

Mbeya
25.02.2022

Date: 28.02.2022.

Coram: Hon. P.R. Kahyoza - DR.

Appellant: Present.

For the Appellant: Ms. Msuya/Ms. Grace, Adv.

1st Respondent: Absent.

2nd Respondent: Present.

For the Respondents: Ms. Msuya/Mwamboneke, Adv.

B/C: P. Nundwe.

Ms. Msuya: This matter is scheduled today for judgement. We are ready.

Court: Judgement delivered in the presence of parties.

P.R. Kahyoza

Deputy Registrar

28/02/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA