IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO. 4 OF 2021

(From Application No. 29/2019, Mbinga District Land and Housing Tribunal)

EMELDA STEVEN MAPUNDA.....APPELLANT

VERSUS

ERASTO DAUDI KOMBA..... 1ST RESPONDENT

FLAVIAN FLAVIAN KAPINGA.....2ND RESPONDENT

JUDGMENT

21/02/2023 & 28/02/2023

E. B. LUVANDA, J.

In the petition of appeal, the Appellant presented three grounds of appeal to challenge the decision of the Mbinga District Land and Housing Tribunal, as follows: One, the honourable trial tribunal erred in law and fact to admit "house and iron sheet handing over agreement and mark the same as exhibit ER1" while the said document was in admissible as evidence before the trial tribunal; Two, the trial tribunal erred in law and fact to admit, adjudicate and decide the matter in favour of the First Respondent while the First Respondent failed to prove that the Second Respondent had stolen his money and thus the house and iron sheet were handed over to him as compensation.

Arguing for the first ground of appeal, the Appellant submitted that exhibit ER1 was totally in admissible for the following reasons, One, the said document was drawn by Mr. Abdalah Mohamed Mmawa – Ward Executive Officer (WEO) who has no legal capacity to draw the document, citing section 113 (1) of the Local Government (District Authorities) Act, Cap 287 R.E. 2010, which is all about duties and function of local government authorities, the WEO cannot prepare the agreement between parties. Tow, exhibit ER1 was not stamped contrary to section 47 (1) of the Stamp Duty Act, Cap 198 R.E. 2019, which provide that any document not stamped shall not be admissible in Court as evidence.

In response, Mr. Dickson Ndunguru learned Counsel for the First Respondent submitted that exhibit ER1 did not contravene any law and admissibility of a document do not depend on who draw the document but rather relevance of the document to the matter on trial. That regulation 10 (2), (3) (a) and (b) of G.N. 174 of 2003 allows the tribunal to receive document with only two caution that is authenticity and if copy was served to the other party. That the WEO can draw document as long as it was for seek (sic, sake) of protecting private property of a person, citing section 113 (2) (a) of Cap 287 (*supra*).

He submitted that exhibit ER1 is not among the documents listed by the law in the schedule made under section 5 of the Stamp Duty Act, Cap 189 R.E. 2019. That the same was not objected at the trial.

On my side, I go along the argument of the learned Counsel for First Respondent that admission of a document has nothing to do with the drawer, rather relevance to the issues in controversy between parties. The contention of parties at the trial was on the contents and not on a form of exhibit ER1. Indeed, nowhere exhibit ER1, reflect that it was drawn by WEO. The Appellant did not say if the drawer of exhibit ER1 has anything to do with it is authenticity, for it to say it fall under the purview of regulation 10 (2), (3) (b) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations G.N. 174/2003, for it to say it was in admissible. Therefore this point is misplaced.

Not every document fall under the dictate of the provisions of section 47 (1) of Cap 189 (*supra*). As correctly submitted by the learned Counsel for First Respondent that the impugned document which is an agreement for handing over a house, is not among instruments listed in the Schedule specifically Article No. 5 made under section 5 of Cap 189 (*supra*) which is all about agreements for sale, tender, service under Employment Act, and apprenticeship deed. Importantly, issue of a

drawer and stamp duty were not among the objection made at the trial. Therefore this ground is unmerited.

On the second ground of appeal, the Appellant faulted the testimony of the First Respondent (DW1), that he failed to prove his allegation that the Second Respondent steal his money, and failed to state the amount stolen, failed to mention the number of account and did not state why a case shifted from the police (criminal) to the WEO (civil). That exhibit ER1, is marred with anomalies and contradictions, because DW1 said the Second Respondent stole his money, while exhibit ER1 reflect a debt of Tsh. 6,984,000/= and WEO said was a debt.

In response, the learned Counsel First Respondent submitted that the basis of the decision was whether the Appellant proved his (sic, her) case to support his (sic, her) application. That the tribunal decided the matter on account of the Appellant's evidence and facts in the application which were in controversy, while the application was that she was surprised by advertisement of the sale of a house in dispute, while in her evidence alleged that the house was just a security for debt, and not sale, which formed a departure from her pleadings, citing **James Fungwe Ngwagilo versus Attorney General** (2004) TLR 169, that parties are bound by their pleadings.

The way this ground is coached, looks like the Appellant was shifting a burden of proof to the First Respondent, seemingly she forget that she is the one who knocked the door of the tribunal with desire for the tribunal to give judgment as to her legal right that her house was unlawfully sold by the Second Respondent to the First Respondent.

On her evidence, the Appellant grounded that she executed exhibit ER1 out of coercion, force and was not aware of its contents.

But she ably failed to prove the alleged use of force, as she did not plead in her application (plaint), rendering it an afterthought. Indeed, her witness Raphael Timoth Matambo who also signed exhibit ER1 as a witness for the Second Respondent, said nothing regarding coercion and force at the time of executing exhibit ER1, meaning that is a concoct.

Now, having failed to establish and prove her case, the Appellant cannot be heard shifting the burden to the First Respondent, on the alleged action between the First and Second Respondents, whether it was a debt or stealing. By the way, all parties are bound by the terms of their deed exhibit ER1, and to say the Tribunal ought to rule otherwise, is legally untenable.

As for ground number three, the Appellant submitted that the First Respondent and his witness (WEO) testified that it was theft issue, therefore the trial tribunal erred to admit and adjudicate the matter as civil. She submitted that the tribunal Chairman erred to depart from wise assessor's opinion that the matter is criminal one which the Chairman (or First Respondent) ought to channel it through proper forum having jurisdiction.

Essentially, the Appellant was trying to raise new grounds of appeal. The issue of criminal matter *vis–a-vis* civil matter and/or assessors, were not grounded in the petition of appeal. As such the two points cannot be entertained as were wrongly inserted in the Appellant's submission. Therefore the appeal is devoid of merit.

The appeal is dismissed. I decline to make the order for costs for reasons stated by the trial tribunal, which are valid and applauded.

E.B. LUVANDA
JUDGE
28/02/2023