IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF KIGOMA

AT KIGOMA

LAND APPEAL NO. 33 OF 2022

(Arising from the District Land and Housing Tribunal for Kigoma in Land Application No.78 of 2015)

RUHOMVYE HASSAN ..... APPELLANT

VERSUS

EDWARD MRISHO ..... 1ST RESPONDENT

HALIMA JUMA ..... 2ND RESPONDENT

Date of Last Order:13.03.2023

Date of Judgement: 24.03.2023

JUDGEMENT

MAGOIGA, J.

This is an appeal against the judgement and decree of the District Land and Housing Tribunal for Kigoma at Kigoma dated 28/09/2022 in Land Application No.78 of 2015.

In Land Application No.78 of 2015, the appellant sued the respondents for declaration that, he is the lawful owner of Plot No.201 H.D Block 'A' Mlole, the agreement dated 28th day of March, 2015 between respondents be rescinded and declared unlawful, demolition order and vacant possession, general damages, costs of the application and any other reliefs the Tribunal deem just and fit in the circumstances of this suit to grant.

The respondents resisted the application and prayers sought on reasons that the 1st respondent is a bona fide purchaser, has developed the suit land and they agreed to pay compensation of Tshs.5,000,000/-. Upon hearing both parties on merits, the trial Tribunal decreed that, the agreement dated 28/03/2015 was unlawful for want of the consent of the appellant, ordered the respondents to compensate the appellant Tshs.10,000,000/- to be paid as follows: by 1st respondent Tshs.7,000,000/= and 2nd respondent Tshs.3,000,000/-, the 1st respondent continue occupying the suit plot and after payment of compensation, the ownership be changed to himself and that each part to bear his own costs.

Aggrieved by the above orders, the appellant preferred this appeal to this Court faulting the trial Tribunal findings in the following language, namely:

1. *That, since the trial District Land and Housing Tribunal for Kigoma answered the 1st and 2nd issues in favour of the appellant, then that subsequently, the same erred in law and fact in granting reliefs not sought by the appellant and or ordering the two respondents to pay the appellant Tshs. Seven Million and Three Million respectively without bases and justification;*
2. *That having found that there was no sale agreement for the suit plot No.201 H.D.Block 'A' Mlole Kigoma, and or agreement for*

compensation executed at the Ward Tribunal for Gungu Ward between the appellant and the 1st respondent, then, that the trial Chairman erred in law and facts in letting the 1st respondent stay in the suit plot on account of construction made during the trespass notwithstanding the local stop order issued;

3. *That the trial Tribunal erred in law and fact in not ordering costs of the application and so without assigning reasons for so doing as by the law required;*
4. *That having discarded exhibit P2, the trial Chairman erred in law and fact in ordering the 2nd respondent who is the appellant's sister to pay the latter with Tshs. Three Million (3,000,000/=) without legal basis and or justification.*

In the end, the appellant prayed that, this appeal be allowed with the former prayers affirmed, and or, in the alternative, this court enhance Tshs.7,000,000/- to Tshs.13,000,000/- among others.

At the hearing before this Court, the appellant was represented by Mr. Ignatus Kagashe, learned advocate, while the 1st respondent had the legal services of Mr. Method R.G. Kabuguzi, learned advocate and the 2nd respondent was present and unrepresented.

Mr. Kagashe addressing this Court stated the background of Land Application No.78 of 2015 and issues framed before trial and the findings

of the trial Tribunal on exhibit P1 and exhibit D1 and strongly argued that much as the trial Tribunal found issues numbers 1 and 2 in favour of the appellant, then, according to him, the trial Chairman erred and went extra mile in granting reliefs not prayed for in the pleadings. The learned advocate for the appellant pointed out that, the trial Chairman was enjoined to order and declare the appellant lawful owner of the suit land, order the 1st respondent to give vacant possession and others prayers as contained in the application. In support of this ground, Mr. Kagashe cited the case of **Ramadhani Kauli Mkinga Vs.Ramadhani Said [1985] TLR 140** in which it was held that any development done by the trespasser has no any right to be paid any compensation and has to move at his costs.

Mr. Kagashe argung ground number 2, submitted that, much as the trial Tribunal found out that the sale dated 18/03/2015 was unlawful it erred to decree that the 1st respondent remained in the suit land. He strongly urged this court to find merits in this ground and overturn the trial Tribunal order by declaring the appellant lawful owner of the suit land.

On the third ground of appeal, the trial Tribunal erred in law for failure to grant costs of the application and no reasons were assigned for not granting the costs. In support of this ground, the learned counsel cited section 30 (2) of the Civil Procedure Code, [Cap 33 R.E.2019] to buttress

his point that, an order for costs is mandatory unless reasons are given. On that note, Mr. Kagashe prayed that costs be granted both in the trial Tribunal and in this appeal because were denied without reasons.

Mr. Kagashe dropped ground number 4 and urged this court to allow the appeal with costs.

Mr. Kabuguzi in reply for the 1st respondent strongly opposed the appeal and urged this court to dismiss this appeal with costs.

On the first ground, Mr. Kabuguzi told the court that the gist of the 1st ground's complaint was that he was granted what was not prayed but charged that the prayer for compensation was the prayer by the appellant himself and pointed out that at page 15 of the typed proceedings the appellant prayed compensation which has been an issue since then. According to Mr. Kabuguzi, the appellant prayed Tshs.13,000,000/= but which amount was not proved and the Tribunal in its wisdom granted him Tshs.10,000,000/- to be shared by respondents by 7/3 respectively. Mr. Kabuguzi urged this court to dismiss ground number one for want of merits.

Mr. Kabuguzi denied that the 1st respondent is a trespasser but a bona fide purchaser and was willing to pay another Tshs.5,000,000/- which was reduced into writing. According to Mr. Kabuguzi, no justification whatsoever was given for enhancing the amount from the original

Tshs.5,000,000/- to Tshs.13,000,000/=. He, thus urged the decision of the trial Tribunal to be left to stand.

As to the 2nd ground of appeal, Mr. Kabuguzi argued in reply that, the trial Tribunal gave reasons that, because the 1st respondent has constructed a house and the appellant is in need of compensation, then, the representation of the appellant by the 2nd respondent was enough as per section 18 (2) of the Land Disputes Courts Act, [Cap 216 R.E 2019]. According to Mr. Kabuguzi, the contention by the 2nd respondent that, was induced by the 1st respondent is an afterthought because these people are blood relatives. Mr. Kabuguzi pointed out that SU2 told the trial Tribunal that she came with authority but which has been misplaced because of moving.

On the 3rd ground, it was brief reply of Mr. Kabuguzi that, what was argued is true but was quick to point out that, it was not prayed for in their memorandum of appeal.

In sum, Mr. Kabuguzi prayed that this appeal be dismissed with costs for want of merits.

The 2nd respondent in reply admitted that she was sent by the appellant to represent him but qualified her representation that, she did not confirm before signing exhibit P2. The 2nd respondent denied to have Tshs.3,000,000/= to pay the appellant.

In rejoinder, Mr. Kagashe argued that the reasons to enhance were stated at page 16 of the proceedings, so is justifiable.

On section 18(2) of [Cap 216 R.E.2019] was his reply that, for the section to apply the party must be present in the Tribunal and request so, in this appeal, pointed out, Mr. Kagashe that, no such request was made, hence, inapplicable.

Finally, Mr. Kagashe reiterated his earlier prayers.

This marked the end of hearing of this appeal. The noble task now of this court is to determine the merits or otherwise of this appeal after hearing the rivaling parties' submissions. However, before going into that hill task, I have noted through reading the record of the trial Tribunal proceedings and rivaling submissions of the learned counsel for parties' that there are some facts not in dispute between parties, which will assist this court to do justice to this appeal. These are: **one,** there is no dispute that the appellant and the 2nd respondent are blood brother and sister. **Two,** that the 2nd respondent was sent by the appellant to represent him in the Ward Tribunal on 28/03/2015 and signed exhibit P2 on that day. **Three,** by virtue of exhibit P1, the appellant was allocated the disputed plot in 1998 but now the 1st respondent occupies and has constructed a residential house in the disputed plot.

However, what is in serious dispute is the signing of exhibit P2 and the ownership of the disputed plot. From the rival submissions and the parties' pleadings, I noted that, the ownership of the disputed plot by the appellant was to be declared after rescinding and declaration of exhibit P2 unlawful. Exhibit P2, despite the appellant holding exhibit P1, in the circumstances of this appeal, was another agreement that the appellant was willing to relinquish his rights upon compensated that amount. This means, the determination of the application in favour of the appellant was conditional upon him proving that, the creation of exhibit P2 was by fraud, or was not sanctioned by him at all, and that was not willing to be compensated at all.

Apparently, the trial Tribunal and the parties counsel framed issues which the trial Tribunal adopted and used in determining the dispute. But upon perusal of the trial Tribunal's decision, strictly speaking, did not examine and deal with the core of the dispute in relation to the existence of exhibit P2 and the testimonies of the witnesses, in particular, that of PW1, DW1, DW2, DW3 and DW4. This being the first appeal, this court is enjoined to step in and evaluate the evidence on record, because from the above testimonies of both prosecution and defence witnesses, I find the trial Chairman misapprehended the evidence on record and arrived at a wrong conclusion. The assessors seem to have rightly apprehended the evidence

on record. I shall do so in the course of determining the grounds of appeal as raised and argued.

The appellant, in the first ground of appeal faults the trial Tribunal for granting reliefs not sought by the appellant and by ordering the respondents to pay the appellant Tshs.10,000,000/- without justification. According to Mr. Kagashe, much as the trial Tribunal found issues number 1 and 2 in favour of the appellant, it was enjoined to order the appellant rightful owner of the disputed premise and order vacant possession of the suit land. Mr. Kagashe went further to argue that, it was wrong and erroneous to grant reliefs not prayed for.

While on the other hand, Mr. Kabuguzi argued that the issue of compensation has featured before the inception of the suit and it was the appellant own testimony who prayed that, if he be compensated of Tshs.15,000,000/= or at least Tshs.13,000,000/- he will leave the land to the 1st respondent. According to Mr. Kabuguzi, the trial Tribunal granted the amount of Tshs.7,000,000/= out of the appellant's own prayer and not that it was granted without prayer.

The 2nd respondent has nothing useful to submit on this point, however, in her defence I will highlight some point worth for the determination of this appeal.

Let me pose here and observe that, indeed, it is erroneous for court to grant reliefs not sought, however, each case must be decided on its own facts. What happened in this suit in respect of this ground will be discussed in details herein.

Equally important to note is that, under section 110(1) of the Tanzania Evidence Act, [Cap 6 R.E.2019] the burden of prove of facts to enable the court to give judgement in his favour lies on the person who alleges of its existence.

Therefore, as noted above, the burden of prove that exhibit P2 was to be rescinded and declared unlawful was on the appellant. Now can we say firmly that on the evidence on record, the appellant discharged this onus. With respect to the appellant and his learned advocate, no such proof was put forward during trial. The only reason advanced by the appellant denying the existence of exhibit P2 was that he did not authorize the 2nd respondent to enter the said agreement.

Having gone through the record of the trial Tribunal proceedings, I have noted that, indeed, PW1's testimony in chief testified nothing on what transpired on 28/03/2015. But the testimony of DW3 (the 2nd respondent and blood sister to PW1) was that she went into the Tribunal on 28.03.2015 because his brother called her on 27/03/2015 and instructed her to represent him before the Tribunal in a case pending before the

Tribunal. But going by the testimonies of all witnesses, the appellant inclusive, the appellant had no case before the Ward Tribunal on that day. This is other than that, DW3, in my own findings supported by the trial Tribunal's proceedings, the 2nd respondent went to the Tribunal under the instructions of the appellant and signed exhibit P2. Not only that but also that, DW3 at page 44 of the typed proceedings went on telling the trial Tribunal that, when PW1 came back they went to the Tribunal and the appellant demanded Tshs.10,000,000/-. And the ball went on that the appellant again during trial in his testimony in chief changed the story that he wanted Tshs.15,000,000/= or Tshs.13,000,000/= an amount he has insisted till the hearing of this appeal in his petition of appeal and in submission in support of this appeal. Considering, the above evidence, I have no doubt that, the appellant was the one who engineered all what transpired on 28/03/2015 and his denial and demanding more money cannot be accepted. As demonstrated above, the appellant agreed a compensation of Tshs.5,000,000/= and same was reduced into writing and it was the same writing which gave the 1st respondent breath to continue constructing the house, which the appellant admits is finished and under the occupation of the 1st respondent. I find the appellant's denial of exhibit P2 an afterthought and is estopped to deny its contents and considering that the testimonies of DW1, DW2 and DW4 relating to

the contents of exhibit P2 was not challenged that DW3 went under the instruction of the appellant, regardless of minor contradiction of whether there was written instruction or not between DW2 and DW4. These witnesses from the Ward Tribunal categorically testified that on that date the two parties went to record what parties had agreed. Indeed, the evidence of DW2 and DW4 went unchallenged on creation of the exhibit P2.

Therefore, in the circumstances of this appeal, it was wrong for the trial Tribunal to order the 1st appellant to pay more money than what parties agreed in the original agreement. In my respective opinion, I find that exhibit P2 was lawfully executed under the instruction of the appellant and any denial by him or his sister she never confirmed from him before signing is calculated and intended to defraud the other player in its creation.

In that vein and with the above findings, I quash the trial Tribunal's order that the 1st respondent pay Tshs.7,000,000/= and substitute it with the order of payment of Tshs.5,000,000/= as originally agreed. The order for the payment of Tshs.3,000,000/= by the 2nd respondent is equally quashed for want of evidence of misconduct by the 2nd respondent. I have reached that conclusion, because the appellant has been eager of fixing the 1st respondent but thanks to his sister who shed light and has shown

that the appellant's aim is to take advantage of the 1st respondent, using exhibit P1. More so, by the creation of exhibit P2, exhibit P1 was of no value and since it was the appellant's own creation by opening this suit, he cannot claim interest because he is the initiator of all this legal dispute. Another reason, I am reaching the above conclusion is that the appellant prayed to rescind exhibit P2, but no reason was advanced why this agreement should be rescinded and be declared unlawful. Refusal to take Tshs.5,000,000/- as agreed was his own making, as such this court cannot allow him to benefit from his own wrong.

Now being satisfied that, exhibit P2 was created under the instructions of the appellant as demonstrated above and that was rightly represented under section 18 of [Cap 216 R.E 2019], makes the whole ground number one of appeal of no merits because the issue of compensation was once concluded when exhibit P2 was created. For the reasons, I associate myself with Mr. Kabuguzi's arguments that, the order of compensation was not given by trial Tribunal out of blues but was the prayer of the appellant himself during his testimony in chief as pointed out at page 15 of the typed proceedings. The prayer that he has repeatedly prayed for even during the filing of the appeal and hearing herein.

Therefore, this court having found that exhibit P2 was made under the instructions of the appellant, the conduct of the appellant in this matter is

no other than taking advantage through legal gymnastic to fix the 1st respondent and I have drawn adverse inference to his conduct and his sister. These two have interest to serve in this appeal.

That said and done, it is my considered opinion that the appellant's challenge against the trial Chairman that he granted reliefs not prayed is, with respect, without any justification, and so, ground number one is held to be devoid of any useful merits. It is accordingly dismissed.

The second ground of appeal which is that, much as no sale agreement for compensation was affirmed, then, it was wrong for the trial Tribunal to let the respondent continue in possession of the suit land. This ground will not detain this court's much time because of this court's finding in respect of ground 1 above. As already demonstrated above, the compensation agreement is valid and the appellant is to take what parties agreed and because of time, the same to be paid within 30 days from the date of this judgement.

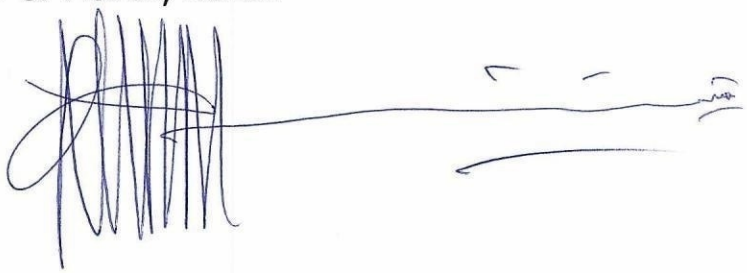
This takes this court to the third and last ground that, the trial Chairman erred for not granting costs and without assigning any reasons. Mr. Kagashe cited sections 30(2) of the Civil Procedure Code, [Cap 33 R.E.2019] which mandatorily require the Court or Tribunal to give costs to the winning party in civil suits unless reasons for not granting the costs are stated. Mr. Kabuguzi admitted that it was wrong for the trial

Chairman's failure to state reasons. He, thus, urged this court to ignore them because same was not prayed for.

I have followed less rivaling arguments on this ground but with due respect to Mr. Kabuguzi, the appellant prayed for costs at the trial Tribunal and in this Court. This ground is merited in this appeal. However, given what I have found above and the conduct of the appellant, I decline to grant costs and instead I order that each party to bear his own costs in order to brings this litigation to an end.

That said and done, this appeal is partly allowed and disallowed to the extent explained above with no order as to costs.

Dated at Kigoma this 24th day of March, 2023.



S. M. MAGOIGA
JUDGE
24/03/2023