IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

LAND APPEAL NO. 12 OF 2022

(Arising from Land Application No. 51 of 2020 of the District Land Housing and Tribunal for Kigoma. Before F. Chinuku, Chairperson)

HOPE JAFFAR KAWAWA (Administrator of Estate of Late Doris Kayanda Mursali) .....APPELLANT

VERSUS

DAGRAS HOSEA KAYANDA .....1ST RESPONDENT

SPESIOZA DOMINIC .....2ND RESPONDENT

EX-PARTE JUDGEMENT

09/09/2022 & 15/03/2023

MANYANDA, J

Hope Jaffar Kawawa, as an administrator of estate of his mother, Late Doris Kayanda Mursali, hereafter referred to as "**the Appellant**", is aggrieved by a decision of the District Land Housing and Tribunal for Kigoma, hereafter referred to as "**the DLHT**", dated 05/05/2022 by Hon. F. Chinuku, Chairperson. Before the DLHT, the Appellant unsuccessfully sued Dagras Hosea Kayanda, "**the Respondent**", who is

his maternal uncle, being a brother of his demised mother Doris Kayanda Mursali.

He sued him for ownership of a house situated at Plot No. 206/1/Block "J" Kumwayi Area in Kibondo Town hereafter referred to as "**the suit house**", agitating that the suit land belonged to his mother the said Late Doris Kayanda Mursali not the Respondent. The second Respondent, Spesioza Dominic, is a wife of the first Respondent.

After hearing the two witnesses for the Appellant and four of the Respondents, the DLHT decided in favour of the Respondents. The DLHT reasoned that the Appellant failed to tender documentary evidence to support his version that the suit house belonged to his mother, instead the first Respondent tendered documentary evidence which included a letter of offer for allocation of the suit land to him. Moreover, the DLHT found that the act of the Appellant's mother, Doris Kayanda Mursali, who was administratrix of their father Hosea Kayanda's estate, to allow the Respondent continue occupying the suit land means the suit land was not her property.

Aggrieved, the Appellant has lodged thirteen (13) grounds of appeal which may be summarized as follows: -

1. The Hon Chairperson grossly errored in law and facts for denying the Appellant opportunity to re-examine his own witness after conclusion of cross examination by the Respondent;
2. The Hon Chairperson grossly errored in law and facts for failing to reason and evaluate the evidence hence decide in favour of the Respondent disbelieving the findings of the primary court, arguments and submissions of the Appellant and act on hearsay evidence and believe lies by the Respondent by believing the letter of offer (Exhibit D2) and clan meeting minute which was subsequently revoked;
3. The Hon Chairperson grossly errored in law and facts for failing to visit locus in quo; and
4. The Hon Chairperson grossly errored in law and facts for failing to summon Albert Hosea as a court witness.

This Court allowed the Appellant to argue his appeal ex-parte after finding that the Respondents deliberately refused to enter appearance in this Court after refusing service of summons twice.

Supporting his appeal, the Appellant, who is also an advocate of this Court but appeared in person, submitted complaining that the Chairperson of the DLHT was correct in law for denying him to re-

examine his witness after completion of cross examination by the Respondent. He argued that had he re-examined his witness the result would have been different from the one he is challenging.

Then he submitted combining grounds 2, 3, 4, 5, 6, and 7 that the trial Chairperson misdirected herself on evaluation and reasoning, hence arrived at a wrong final decision.

The Appellant went on pointing the areas in the judgement of the DLHT which he thought is wrong as being; One, at page 3 it was clear to the trial Chairperson that the Respondent was a child of ten (10) years while Doris was already an adult.

Two, at page 13 it was clear that Nehemia worked hardly for one year and died from an accident, hence he could not have managed to construct the house in issue.

Three, the trial Chairperson was wrong in ignoring the evidence of PW2 which she recapitulated at page 3 of the judgement that after completing his studies, the 1st Respondent was invited to live in the suit house until got married but still wrongly found at page eight (8) of the judgement that the same 1st Respondent was not invited to live in the same suit house.

Four, the trial Chairperson wrongly recorded at page four (4) of the judgement that the 1st Respondent claimed that the suit house was not discussed at the clan meeting. However, at page 13 of the proceeding, the 1st Respondent contradicted himself when he stated that when his father Hosea Kayanda passed away in 2014, clan members convened and resolved that the suit house in which he was living belonged to him.

Five, the trial Chairperson was not correct when she relied on Exhibit D1, a minute of clan meeting dated 31/12/2017 and a letter of offer regarding the suit house and D2 land rent payments receipts. This is contrary to the position of the law as pronounced by the Court of Appeal of Tanzania in the case of **Magoiga Nyakorongo Mriri vs. Chacha Moroso Saire**, Civil Appeal No. 464 of 2020 (unreported), no copy was supplied to the court.

Six, the Appellant challenged the trial Chairperson findings that completely ignoring Exhibit P1, minutes of the clan meeting which urged the Respondents to vacate from the suit house and erroneously believed Exhibit P6, second clan meeting which the 1st Respondent signed that nullified the first clan meeting decision.

The Appellant also pointed some pieces of evidence which he was of the views that contradicted each other, contradictions which the trial Chairperson did not resolve. He submitted that there is a contradiction on the plot number and location at which Helena, the 1st Respondent's mother gave him to build a house. At page 13 of the proceedings show that the plot is No. 206/01 Block J in Kibondo Mjini and it is registered in the 1st Respondent's name but at the same time it was recorded that a plot at which Helena gave the 1st Respondent to build a house is Plot No. 129 at Kwumulilo Kibondo.

Seven, the Appellant submitted in support of complaint that the trial Chairperson acted on hearsay as reflected at page 6 of the judgement in respect of the testimony of DW4. He went on arguing that the trial Chairperson also wrongly ignored arguments and submissions advanced by the Appellant. To bolster his argument, the Appellant cited the case of **Tanzania Breweries Limited vs. Anthony Nyingi** (2016) TLS 99 which requires courts to consider party's arguments otherwise it leads to arbitrariness.

Further, in support of his complaint that the trial Chairperson failed to visit *locus in quo* argued that the house exhibited in Exhibits D1 and P6 that the suit house left by Late Hosea Kayanda was made of wood

and iron sheets, it was very important for the trial Chairperson to visit *locus in quo*. Before delivering the judgement.

As it can be seen, the Appellant first complaint is legal in nature that the trial Chairperson wrongly denied him opportunity to re-examine his only witness after completion of cross examination by the Respondent. He did not cite any law to support his argument.

My perusal of the proceedings reveals that the Appellant though an advocate of the High Court and courts subordinate to it, he appeared in person before the DLHT. I did not find anywhere recorded that the Appellant asked for leave to re-examine the witness. Therefore, I find that this complaint is an afterthought.

However, apart from this complaint been an afterthought, I know no law that provides for a room for a party who is unrepresented to put questions to a witness he calls to support him in his case, unless such a party obtains leave of the court to contradict his own witness on the testimony given and this is done for a purpose of declaring such a witness a hostile one.

It is my firm views that a party who is an advocate, as the Appellant in this matter is, loses his privilege to examine witnesses as an advocate. In this matter, the Appellant could not act as an advocate to

represent himself in a case which he is a party and appearing in person without stumbling with conflict of interest. The first ground of appeal has no merit.

As regard to the complaints in grounds 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 the complaint is generally against the facts that the trial Chairperson did not properly evaluate the evidence as well as the arguments and submissions presented before it.

This is a first appellate court. In law, a first appellate court is in a form of re-hearing of the case, and in so doing it needs not necessarily to come to the same conclusion. This is what was said in many cases including the case of **Halid Hussein Lwambano vs. R.** Criminal Appeal No. 473 of 2016 (CAT at Iringa) (unreported) and **Jumanne Salum Pazi vs. R.** [1981] TLR 246, In the latter case this Court, Kisanga, J. as he then was, held inter alia that;

> *"(i) this court being the first appellate court must consider the evidence, evaluate it itself and draw its own conclusion...."*

Also, in the case of **Kulwa Kabizi and 2 Others vs Republic,** [1994] TLR 210, the Court of Appeal held, inter alia, as follows: -

"(i) The High Court was right to evaluate the evidence on record and to act on some crucial evidence which the trial court had wrongly and deliberately disbelieved;

(ii) Where a trial court wrongly rejects certain evidence, it is the duty of the appellate court to arrive at its conclusions upon a consideration of the whole of the evidence properly admissible and available on record."

In this matter, the Appellant summoned one witness making a total of two witnesses including himself. His testimony in short was to the effect that the suit house belonged to his mother Doris Kayanda Mursali who constructed it with help of her sister Grace Hosea. His mother passed on in 2019 and is a dully appointed administrator of her estate. That, before her demise, she attempted several times to evict the Respondents from the suit house but in vain. The Appellant's mother, Doris Kayanda Mursali was appointed administratrix of the estate of their father' Late Hosea Kayanda after his death in 2014. Her efforts to evict the Respondents from the suit house proved futile following Respondents' refusal. That, his mother was capable of constructing the house because she was an employee of the Government between 1963 and 1998, It was constructed on an unsurveyed land given to her by Late Hosea Kayanda Ntamalengelo.

Therefore, the house in issue is not part of the Estate of the said Hosea Kayanda Ntamalengelo.

SM2 testified in support of the Appellant adding that she contributed the money for construction of the house of which construction started in 1970 and completed in 1971. Initially, the house was leased, but later on the 1st Respondent was invited to live in it and has been so living to date.

The defence evidence is that the suit house was constructed on a plot of land given by his mother Helena using money from insurance by his uncle Nehemia Hosea who worked in Kenya for one year. That, after death of Late Hosea in 2014 his relatives decided that the house he was living in (the suit house) belongs to him after been given by his parents. He registered his name as owner of the plot after been surveyed as Plot No. 206/1 Block J Kibondo following advice by his mother Helena. SU2 stated that the suit house was given to the 1st Respondent by Late Hosea Kayanda Ntamalengelo. SU3 stated that the clan meeting decided the suit house was a property of the 1st Respondent. SU4 stated that he heard Late Hosea Kayanda telling him that he will give the suit house to the 1st Respondent because he did not provide him with education like his siblings.

As it can be seen, the evidence of the Appellant supported by SM2 is that the suit house was constructed by his mother been assisted by her young sister Grace Hosea. On the other hand, the 1st Respondent's evidence is that he constructed the house using insurance money from his uncle Albert Hosea. However, the witnesses supporting him all testified that the house was given to him by his father Hosea Kayanda. That, it is a clan meeting which said so.

As I stated above when summarizing the facts of the case, the DLHT decided in favour of the Respondents on reasons that the Appellant failed to tender documentary evidence to support his version that the suit land belonged to his mother, on the other hand, the respondent tendered documentary which included a latter of offer for allocation of the suit land to him.

The DLHT also relied on failure by the Appellant's mother, Doris Kayanda Mursali, who was administratrix of their father Hosea Kayanda's estate, to evict the Respondents from the suit house, which meant that it was not her property.

In my view, the DLHT was wrong to rely on information about registration of the house in the name of the 1st Respondent whereas apart from there been no documentary evidence, such as a letter of

offer, tendered in court, the 1st Respondent himself stated that he unilaterally registered his name after been so told by his mother Helena Hosea. I say so because had the suit house was his property then, he needed not to be told by any person to register it. Further, the 1st Respondent stated that he constructed the house, but at the same time he was 9 years old when the house was constructed. At that age, he was incapable of constructing the house. The contention that insurance money was paid in his name is also unsupported by the evidence. Equally, the defence witnesses who were called by the Respondent stated that the house was given to the Respondent by his father because his father failed to provide him with education like his siblings.

The story of the 1st Respondent remains that he was given the suit house, but who constructed it? It is the Appellants evidence which shows that it was constructed by Doris Kayanda Mursali and Grace Kayanda. Is there any evidence that the Appellant's mother surrendered the house to her parents? The answer is in negative. Doris Kayanda Mursali and Grace Kayanda were employees living away from Kibondo; which means construction supervision was been undertaken by Late Hosea Kayanda, that is why SU2 stated that he was been paid money by Late Hosea Kayanda.

In my views, a mere fact that SU2 was been paid the construction money by Late Hosea Kayanda does not mean that he was the owner of the property.

The DLHT also relied on a clan meeting holding that the suit house belonged to the 1st Respondent. However, that clan meeting was followed by another minute of the same clan meeting which held in vice versa. Hence making the alleged clan meetings unreliable. If the DLHT disbelieved the second meeting, there are no reasons why it believed the first meeting. Moreover, a clan meeting cannot confer ownership of a property over any person who is otherwise not entitled to, it has no such powers. It is a court of law which after examining the evidence of both sides that can do so.

The DLHT also decided in favour of the 1st Respondent because Late Doris Kayanda been administratrix of Late Hosea Kayanda estate failure to evict him. However, to the contrary there is ample of evidence that she attempted several times to evict him without success because the Respondents were adamant. This evidence was corroborated by SU2.

It is from the evidence I have reappraised above that I find the evidence is overwhelmingly strong for the Appellant as compared to that

of the Respondents. Grounds 2, 3, 4, 5, 6, 7, 8, 9, 10 and 12 have merit.

As regard to the complaint in ground 11 where the complaint is that the DLHT errored in law and facts for failure to summon a person called Albert Hosea as a court witness, I have failed to find any justification. The Appellant did not elaborate about the role and importance of the said Albert Hosea in the case. It is not clear also why he is condemning the trial chairperson while there was no any prayer by the parties, including the Appellant himself, to have the said Albert Hosea called as a witness. This ground, been an afterthought, has no merit.

Ground 13 concern a complaint that the DLHT failed to visit *locus in quo*. Apart from absence of such prayer by the parties, the Appellant did not elaborate why the visit was necessary. I say so because visiting of *locus in quo* by the court is a rare step taken with cautions to avoid the court turning itself a witness.

There are a number of factors to be considered before the court opts to visit a *locus in quo*. The main purpose is to clear the doubts coming from differing evidence of the witnesses on the subject matter. See for example the case of **Othiniel Sheke v Victor Plankshak**

[2008] NSCQR Vol. 35, p. 56. Another reason which can be considered in visiting the locus in quo, is to clear any doubts or discrepancies in relation to the physical condition of the land in dispute. However, that does not mean it gives a party an opportunity to make a different case from the one a party has led in support of the claim before the Court.

In the matter at hand, as I have said above, there were no circumstances established which could demand visit to *locus in quo*. This ground has no merit as well.

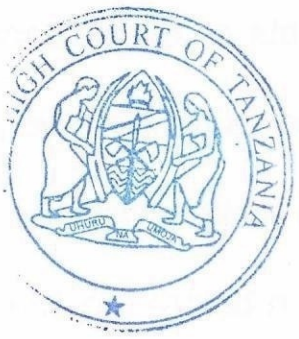
In the upshot, for reasons stated above, I find that appeal has merit to the extent I have elaborated.

Consequently, I do hereby make the following orders; -

1. The appeal is allowed to the extent explained above;
2. The trial Tribunal judgement is quashed and its decree set aside;
3. The Appellant's mother, Late Doris Kayanda Mursali, was a lawful owner of the suit house;
4. The Respondents should vacate from the suit house
5. This been a family issue, no order as to costs, each party should carry its own costs.

Order accordingly.

Dated at Kigoma this 15th day of March, 2023



F. K. MANYANDA

JUDGE