IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND APPEAL NO 28 OF 2022

(Arising from Land Appeal No. 28 of 2022 of the District Land and Housing Tribunal for Kigoma and original Land Case No. 07 of 2020 of Nyakitonto Ward Tribunal)

MIRKO KISANZA----------APPELLANT

VERSUS

MARIAM A. NDABABISA----------RESPONDENT

JUDGMENT

09/09/2022 & 06/02/2023

MANYANDA, J

The appellant, Mirko Kisanza, is aggrieved by the decision of the District Land and Housing Tribunal for Kigoma, hereafter referred to as the District Land and Housing Tribunal or simply as the appellate Tribunal, which was delivered by Hon. Chinuku, Chairperson, on 09/02/2022 favouring the Respondent, Mariam A. Ndababisa.

At the Ward Tribunal for Nyakitondo Ward (the trial Tribunal) the said Respondent successfully sued the Appellant for ownership of a strip of land measuring six footsteps. It was a story of the Appellant before the trial Ward Tribunal that he

purchased it from a wife of Mzee Simon called Sara Kibila. On the other hand, it was a story of the Respondent that she purchased the piece of land in dispute from Mzee Simon. The undisputed evidence before the trial Ward Tribunal is that Mzee Simon is now dead.

The trial Ward Tribunal decided in favour of the Appellant on reasons that at her own peril, the wife of late Mzee Simon, resold a piece of land to the Appellant which was earlier sold by the Late Mzee Simon to the Respondent.

The District Land and Housing Tribunal in its appellate jurisdiction, reversed the decision of the trial Ward Tribunal on the ground that a party who purchased the said strip of land earlier is the one entitled to it. It turned out that it was the Respondent who purchased that land earlier, hence she was declared a lawful owner. The Appellant still undaunted has come to this Court to challenge the decision of the District Land and Housing Tribunal armed with six grounds, namely:

1. *That, the appellate Tribunal erred both in law and facts by deciding in favour of the respondent herein while maliciously continued to entertain the matter whose subject matter and its*

size is unknown, save for the Ward Tribunal which visited the locus;

2. *That, the appellate Tribunal erred both in law and facts for non-considering and read over the assessors' opinion to parties as the law requires. That the impugned judgment was arrived at without showing the opinion of assessors as the same [is] not reflected therein;*
3. *That, the appellate Tribunal erred both in law and facts for not considering and scrutinizing well the adduced evidence before the Ward Tribunal and the evidence as the Ward Tribunal proved that the respondent encroached the suit land for about six footsteps after the death of the seller;*
4. *That, the appellate Tribunal grossly erred both in law and facts by holding that the disputed suit plot belongs to the Respondent without any justifiable cause or reason regardless of the facts that the Respondent proved that the Appellant bought the same from Sara Kibila, wife of Late Mzee Simon;*
5. *That, the appellate Tribunal grossly erred both in law and facts in failing to understand the issues in dispute and dispense justice without fear or favour. As the impugned judgement totally disregarded the records by the trial Ward Tribunal since a dispute is boundaries of neighbouring plots, and*

6. *That, the appellate Tribunal grossly erred both in law and facts by invoking the doctrine of adverse possession; misdirecting for holding that the Appellant had [not] proved his case at the trial on the balance of probabilities as required in civil trials.*

Moreover, the Appellant filed three more supplementary grounds of appeal namely:

1) *That the appellate tribunal erred both in law and facts when it failed to determine the appeal on merit;*
2) *That the appellate tribunal erred both in law and facts when it determined the matter without properly evaluating the evidence adduced by the appellant and witnesses at the trial Ward Tribunal; and*
3) *That, could (sic) the appellate tribunal considered the evidence by the Appellant it could have upheld the decision by the trial tribunal.*

After the supplementary grounds of appeal, the Respondent filed a reply to the supplementary grounds of appeal and on it attached a notice of objection containing one ground on point of law that the supplementary grounds of appeal were filed out of the time prescribed by this Court in its order date 06/06/2022, of which life span was seven (7) days.

Hearing of the appeal was ordered to be conducted by way of written submissions. Both parties filed their submissions in time. While the Appellant filed his submissions, the Respondent's submissions were drafted and file by Mr. Method R.G. Kabuguzi, learned Advocate.

Let me start with the preliminary objection, Mr. Kabuguzi in the reply submissions by the Respondent submitted in support of the preliminary objection arguing that the supplementary grounds of appeal were filed out of the time of seven (7) days prescribed by this Court on 06/06/2022.

According to the Counsel, time started to run on 06/06/2022 and the deadline was on 13/06/2022. The impugned supplementary grounds of appeal were filed on 15/06/2022. Hence defying the order of this Court.

The counsel argued that court orders are made to be respected. To bolster his argument, he cited the case of **Buruhan Omari vs. Victioria Revelian**, Misc. Land Application No. 90 of 2020 (unreported) in which this court, Hon. Ngigwana, J. reproduced what the Court of Appeal of Tanzania said in the case of **TBL vs. Edson Dhobe,** Misc. Application No. 96 of 2006 as follows:

"Court orders should be respected and complied with. The court should not condone such failure. To do so is to set bad precedent and to invite chaos. This should not be allowed to occur. Always court should exercise firm control over proceedings."

The Appellant on his side conceded that the supplementary grounds of appeal were file out of the seven (7) days prescribed by this Court. The Appellant advanced the reason for delay as been caused by family matters associated with his advocate. He added that after discovering the delay he has never acted on the said supplementary grounds of appeal. In other words, he abandoned them.

I agree with the Respondent that it is a position of the law that time prescribed by courts for doing an act, must be observed or else any act done in contravention of a court order is a nullity. This is to ensure that court orders are observed as was rightly stated by my brother Judge Hon. Ngingwana in the case of **Buruhan Omari vs. Victoria Revelian (Supra)**.

I uphold the Preliminary Objection and discard the purported supplementary grounds of appeal.

Submitting in support of the appeal, the Appellant argued jointly grounds one to five. The Appellant argued that the District Land and Housing Tribunal acted wrongly when it dealt with the appeal with unknown size or value of the subject matter, hence incapable of knowing its pecuniary value.

That the District Land and Housing Tribunal did not properly evaluate the evidence. Had it evaluated the evidence it could have found not in favour of the Respondent. The Appellant also condemned the District Land and Housing Tribunal for failure to compose a proper judgment. Apart from improper judgment which lacks reasoning per Order XX Rule 4 of the Civil Procedure Code, [Cap. 33 R. E. 2019] the judgement also contravenes section 34(1)(a)(b) and (c) of the Land Disputes Courts Act, [Cap.216 R.E. 2019].

Then the appellant dwelt so much in an issue of none participation of assessors in the proceedings, delivery of their opinion and none-inclusion of their opinion in the judgment.

To bolster his arguments, he cited the cases of **Amerir Mbarak and Azania Bank Cor Ltd vs Edgar Kahwili,** Civil Appeal No. 154 of 2015 (unreported) CAT-DSM (unreported), **Tubone Mwambete vs Mbeya City Council,** Civil Appeal No. 287 of

2017 CAT-Mbeya (unreported) and **Elilumba Eliezel vs John Jaja,** Civil Appeal No. 30 of 2020 CAT-Dodoma (unreported).

In all those cases the Court of Appeal of Tanzania held that the opinion of the assessors must be on record, it is dangerous to assume that they were read basing on the judgment of the chairperson.

In response, the counsel for the Respondent submitted that it was not a duty of the appellate District Land and Housing Tribunal to ascertain its pecuniary in the grounds of appeal which he did. He submitted further that at page three (3) of the impugned judgment the appellate Chairperson re-securitized the evidence to satisfaction and rightly found in favour of the Respondent.

As regard to assessors, the counsel submitted that according to page two (2) of the impugned judgment, the District Land and Housing Tribunal considered the opinion of assessors. Also, he pointed out that at page 8 of the proceedings the trial Chairperson directed the assessor to deliver their opinion the same date and were read out as reflected at page 9 of the proceedings. The counsel was of the views that the complaint that there is no clue that assessors were invited to read out their

opinion is misleading. He distinguished all the cases cited by the Appellant arguing that in those cases there was no directions by the tribunal chairperson to direct the assessors prepare written opinion and read them out.

It was his views that the authority in the cases of **Sebastian Kudike vs Mamlaka ya Maji Safi na Maji Taka,** Civil Appeal No. 274 of 2018 CAT–Arusha (unreported), **Sikuzani Said Magambo and Another Vs Mohamed Roble,** Land Appeal No. 66 of 2021 HC Bukoba (unreported) when read with Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, GN No. 174 of 2003, does not require the Chairman to record the opinion, it suffices if he considers their opinion in the judgment.

In rejoinder, the Appellant basically reiterated his submissions in chief.

Having navigated through the submissions by the Appellant and the counsel for the Respondent, I find that there are two main issues. The first is whether the Appellate Chairperson complied with the requirement of the law in taking opinion of assessors. If in affirmative, whether the same Appellate chairperson properly evaluated the evidence.

Section 23(1) of the Land Disputes Court Act provides that the District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors. Subsection (2) to section 13 of the same law require the assessor to give the opinion either both or any of them who makes to the end of hearing of the case. In case both assessors fail to reach the end of hearing, then the chairman may proceed on disposing the case without their opinion.

As to how the opinion are taken from the assessors is a procedure provided under Rule 19(2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 published on 27/06/2003 via GN No. 174 of 2003 which read as follows: -

> *"19 (2) Notwithstanding sub-regulation (1) the chairman shall, before making his judgment, require every assessor at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili"*

It follows therefore that before the Chairman makes his judgment the assessors are required by him to give opinion in writing.

This provision of the law has been widely interpreted to mean that the Chairman must ensure that the written opinion of assessors was read out to the parties to the case for them to know what the assessors said about the fate of their rights. By this interpretation in my understanding both an endorsement that they were so read and copy of the said opinion have to be found in the file records for the appellate court to satisfy itself that the procedure was followed.

My brother Judge Hon Kilekamajenga was confronted with a situation akin to this one in the case of **Hosea Andrea Mushongi (Administrator of Estate of the Late Hosea Mushongi Vs Charles Gabagambi, Land Appeal No. 66 of 2021 (Unreported)** where relying on the authority in the case of **Sikuzani Said Magambo and Kirioni Richard Vs Mohamed Roble (supra)** in which, as far as a need for reflection of taking of assessors' opinion on record is concerned, the Court of Appeal of Tanzania stated as follows: -

> *"It is also on record that, though, the opinion of the assessors* ***was not solicited and reflected in the Tribunals proceedings****, the Chairperson purported to refer to them in his judgment.* ***It is therefore our considered view that since the***

record of the Tribunal does not show that the assessors were accorded opportunity to give the said opinion, it is not clear as to how and what stage the said opinion found their way in tribunals judgment. *It is also our further views that the said opinion was not availed and read out in presence of parties before the said judgment was composed"* (emphasis added).

He went on making reference to another case of **Ameir Mbaraka and Azania Bank Cor. Ltd Vs Edgar Kiswahili (supra)** where the Court of Appeal insisted on having on record the opinion of assessors by stating as follows: -

"Therefore, ***in our own considered view, it is unsafe to assume the opinion of assessors which is not on the record by merely reading the acknowledgement of the Chairman in the judgment.*** *In the circumstances we are of a considered view that assessors did not give any opinion for consideration in the preparation of the Tribunal's judgment and this was a serious irregularity"* (emphasis added)

Yet another case was considered in **Hosea's case (supra)** that of **Tubone Mwambeta vs Mbeya City Council,** Civil Appeal No. 287 of 2017 CAT at Mbeya (unreported) where the Court of Appeal of Tanzania insisted on the need of reflection of

the record on assessors' opinion reception in the following words:

> *"Such opinion must be availed in the presence of the parties so as to enable them know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict"* (Emphasis added).

From the authorities he quoted above, my brother Judge Hon. Kilekamajenga stated in the **Hosea's Case supra** as follows:

> *"After the hearing of witnesses, the chairman must schedule the case for recording of assessors' opinion. I decided to use the word "record" with a view of insisting that such opinion should appear in the proceeding".*

The counsel for the Respondent is of the views that the judge in using the word "record" wrongly interpreted both Regulations 19(2) of GN No. 174 of 2003 and the cases cited in **Hoseas's case (supra)** because they don't require "recording" of the opinion.

With due respect, I don't, agree with the views of the Counsel. I say so because the only way to ensure compliance of the law is by an endorsement on the proceeding. The words

"recording" and "endorsement" are a matter of semantic both mean one and same thing that is putting on record by writing.

In fact, the Court Of Appeal in the case of **Elilumba Eliezel vs John Jaja, Civil Appeal No. 30 of 2020** CAT-Dodoma (unreported) insistingly used a word "recording". That the Chairman must record the opinion of assessors in the proceedings. It stated at page 11 as follows:

> *"Consideration of assessors' opinion in the judgement go hand in hand with recording their opinion during proceedings. The effect of failure to record and read out assessors opinion was stated in the case of* ***Peter Makuri vs Michael Magwega,*** *Civil Appeal No. 107 of 2019 (unreported)* (emphatis added)".

I have elaborated at lengthy on the position of the law about the requirement of recording assessors opinion in the District Land and Housing Tribunals because the counsel for the Respondent had invited me to diverge from the position held in **Hosea's case (supra)** even after referring to the decisions of the superior court of this land, the Court of Appeal of Tanzania. To hold otherwise is to read the authorities upside down.

It is now clear that the record must reflect reception of opinion and the same be read out by recording and an endorsement to that effect must be in the proceedings. A question now is whether such reflection is available in the proceedings of this case.

My perused of the proceedings reveals that on 20/10/2021 at page 8 of 10 of the proceedings the chairperson ordered as follows: -

1. *Wajumbe waandike maoni*
2. *Moni husomwa 08/12/2021*
3. *Hukumu 08/12/2021"*

Literally means the assessors were to write their opinion and the same to read on 08/12/2021 and judgment be delivered the same day.

On 08/122021 at page 09 of 10 it was recorded as follows:

"shauri linakuja kwa ajili ya maoni na uamuzi, maoni yamesomwa. Hukumu 09/12/2021."

Literally means the case was for taking opinion and judgment, the opinion of assessors were read and judgment rescheduled to 09/12/2021.

From what is reflected in the proceedings the opinion of the assessors were solicited immediately after completion of hearing of the case and the opinion were received and an endorsement to that effect is in the proceeding. The written opinion are also available in the file.

In my strong views, the law was fully complied with by the trial Chairperson. This complaint has no merit.

This finding takes me to go to the second issue whether the trial Chairman properly evaluated the evidence.

The evidence tendered by both sides is direct and brief. It was the evidence of the Appellant that he purchased the suit land from Sarah Kibila, the wife of Late Mzee Simon. The Respondent's evidence in that she purchased the suit land from late Mzee Simon. This means, it was the Respondent who first purchased the suit land.

The District Land and Housing Tribunal dealt with the evidence of both sides and after analysing the same it decided in favour of the Respondent. It stated the reasons for its decision in the following words:

"Kwa upande wangu baada ya kusikiliza rufani hii na kupitia kumbukumbu za awali za shauri hili kutoka Baraza la Kata Nyakitonto nimeona kwamba ni kweli mjibu rufani hakubainisha eneo analodai kwamba lina ukubwa gani..... Hakuna ubishi kwamba muomba rufani ndiye alitangulia kununua eneo kutoka kwa marehemu Simon ambaye ndiye alikuwa mmiliki wa eneo hilo. Mjibu mrufani anadai kununua eneo kutoka kwa Sara Kibila (mke wa marehemu Simon) kama Sara Kibila aliuza eneo ambalo tayari lilishauzwa na mume wake marehemu Simon, hiyo haikuwa sahihi."

Literally means that on its side the District Land and Housing Tribunal after re-evaluating the records of the Nyahitonto Ward Tribunal it found, as a matter of facts, that the Respondent (now the Appellant) did not establish the boundaries of the land he is claiming for. There is no dispute that the Appellant (now the Respondent) was the first to purchase the land in dispute from Late Mzee Simon who was true owner of the suit land. The Respondent (now the Appellant) claims of purchasing the suit land from Sarah Kibila who re-sold a land which was already sold by her late husband was not proper.

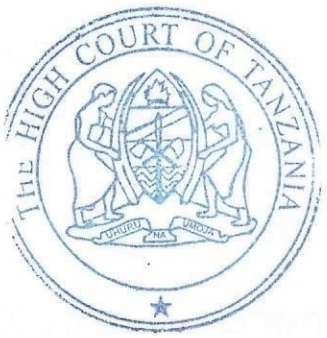
In the circumstances I am satisfied that the District Land and Housing Tribunal properly analysed the evidence adduced by

the parties before the trial Ward Tribunal which was straight and brief as explained above. I answer this issued in affirmative.

In the upshot, and for reasons explained above, I find the appeal devoid of merit.

Consequently, I do hereby dismiss the appeal in its entirety with costs. Order accordingly.

Date at Kigoma this 06th day of February, 2023



F.K. MANYANDA

JUDGE