IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

LAND APPEAL NO. 22 OF 2021

(Originating from Application No. 18/2020 of the District Land and Housing Tribunal of Iringa before Hon. A. J. Majengo, Chairperson)

SUBIRA MDOKA ..... **APPELLANT**

VERSUS

PAUL L. TABANI ..... **RESPONDENT**

JUDGMENT

6th Oct. 2022 & 31st March, 2023

I.C. MUGETA, J:

The respondent sued the appellant before the District Land and Housing Tribunal (DLHT) among other prayers for a permanent injunction and declaration order that he is the legal owner of the suit premises located at Mjimwema Street, Nduli Ward within Iringa Municipality and for order of removal of the name of the respondent from the list of persons who will be compensated from the land dispute. The DLHT decided in favor of the respondent. The appellant seeks to challenge the said decision based on the following grounds:

i. That the Chairperson of the District Land and Housing Tribunal erred in law and fact for failing to evaluate well the contract that the appellant and

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the respondent entered in regards to the distribution of the land in dispute.

ii. *That the Chairperson of District Land and Housing Tribunal erred in law and fact for failing to evaluate well the evidence tendered by the appellant at the trial tribunal hence ending up delivering unfair decision against the appellant in this appeal.*

iii. *That the chairperson of the District Land and Housing Tribunal erred in law and fact for failing to evaluate well that the person who sold the land in dispute to the respondent was not the legal owner of the land in dispute.*

The appeal was heard by way of filing written submissions. The appellant appeared in person and unrepresented whereas the respondent was represented by Mr. Geofrey Mwakasege, learned advocate. However, in the course of composing judgment based on the parties' written submissions, this court, Justice Utamwa, (as he then was) noted that in the DLHT proceedings there are irregularities material to justice which are not in the grounds of appeal in that the chairperson of the DLHT did not require assessors to give their opinion before he passed the judgment and that the suit properties was not properly described. The proceedings were thus

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reopened and the parties were directed to address the court on the following issues:

i. *Whether or not the DLHT Chairman violated the provisions of section 23(2) of the Land Disputes Courts Act and Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003*
ii. *Whether or not the applicant before the DLHT (now the respondent in this appeal) offended the provisions of Regulation 3(2) (b) of GN. No. 174 of 2003.*
iii. *In case the answers to both preceding issues or to any of them is in the affirmative, then what is the effect of the violation (of the respective provisions of law cited above) to the proceedings and the impugned judgment of the DLHT.*
iv. *Which orders should this court make depending on the answers to the three preceding issues.*

Again, matters raised were argued by way of filing written submissions. On the first court issue, the appellant submitted that the record of the DLHT is clear that only one assessor participated in the proceedings to the end. Therefore, in her view the Chairman violated the law and thus this court should order a retrial as it was in **Engineer Justin D. Rweyemamu v.**

James Rugakingira and 3 Others, Land Case No. 61 of 2021, High Court of Tanzania (HCT) at Bukoba (unreported) and **Andrea Mushongi (Administrator of estate of the late Hosea Mushongi) v. Charles Gbagambi**, Land Case Appeal No. 66 of 2021, HCT at Bukoba (unreported).

On the second court issue, she submitted that the suit premise was not fully described as required by Order VII Rule 3 of the Civil Procedure Code, Cap. 33 R.E 2019. She also cited the case of **Romuald Andrea @ Andrea Romuald @ Romuald A. Materu v. Mbeya City Council**, Land Appeal No. 13 of 2019, HCT at Mbeya (unreported).

In reply, the respondent conceded that the Chairman violated the provisions of section 23(2) of the LDCA and Regulation 19(2) of GN 174 of 2003 when he received the opinion of only one assessor. On the second issue, he argued that the disputed land is unsurveyed and since there was no any dispute between the parties on boundaries, the omission to properly describe the suit land is not fatal as the parties during hearing described the address of the disputed land.

On 20/7/2021, the defence case was closed. The Chairman among others made this order:

"Maoni ya washauri wa baraza 19/08/2021"

This means the assessors were required to prepare and present their opinion. The tribunal record shows that on 19/08/2021 the assessor's opinion was read. Such opinion was not recorded by the Chairman but the copy thereof is filed in the tribunal record. In **Tubone Mwambete v. Mbeya City Council**, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported), the Court held as follows;

> *"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."*

Since the assessor gave his opinion in writing and the Chairman read that opinion to the parties on 19/8/2021, I hold that the Chairman did not violate the provisions of section 23(2) of the LDCA and Regulation 19(2) of the GN. No. 174 of 2003. I see nothing in regulation 19(2) which presupposes that assessors' opinion ought to be recorded by the chairperson by his hand in the proceedings. Doing so would defeat the

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condition that each assessor should give opinion in writing. The first issue is answered in the negative.

On the second issue, Regulation 3 (2) (b) of the G.N No. 174 of 2003 which is applicable in the situation under consideration, provides that the application should provide the address of the suit promises or location of the land involved in the dispute to which the application relates. It is the law that court orders must be certain and executable. It follows, thus, that where the description of the land in dispute is uncertain, it will not be possible for the court to make any definitive order and execute it. This was underscored in the case of **Daniel Dagala Kanuda (**As Administrator of the Estate of the Late Mbalu Kushaha Buluda**) v. Masaka Ibeho and 4 others,** Land Appeal No. 26 of 2015, HCT at Tabora (unreported).

In this case there is no dispute that the land at issue is unsurveyed. The respondent in his application before the DLHT ought to have named specific boundaries or permanent features surrounding the land at issue for purposes of its identification from other pieces of land neighboring it. However, the respondent only named the location as Mjimwema Street, Nduli Ward within Iringa Municipal District. Therefore, it can be concluded that the dispute land in the matter at hand was not sufficiently described

for identifying it. The foregoing notwithstanding, as submitted by the applicant, the parties to this case have no dispute over boundaries. They are both clear with the boundaries of the dispute land. Their dispute centers on a contract where the respondent surrendered eleven acres of the dispute land to the appellant and he wants to recover them back by the court declaring the surrender voidable. I shall revert to this issue when considering the merits of the appeal.

Further, despite the insufficient description of the suitland, the omission is saved by section 45 of the LDCA which reads:

> *"No decision or order of the Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."*

It is my view that in the instant case the insufficient description of the property in dispute has not occasioned a failure of justice as the dispute is

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not about boundaries. The second issue is answered in the negative too which takes me to consideration of the grounds of appeal on mertis.

The brief fact of this case is that the respondent bought the dispute land from Asia Mkundi as wife of the late Maulid Mohamed Mdoka, the original owner of the suitland who had several wives including Asia Mkundi. Later, some family members raised issues with the respondent that the seller had no powers to dispose of the land. The total land measures 22.93 hectres. In order to have amicable settlement of the dispute, the respondent agreed to surrender a total of eleven hectres to the appellant who acted as a representative of the family. The said land has been acquired by the Government for the construction of the Iringa airport and compensation is due for payment. Upon surrender of the eleven acres, the respondent informed the Municipal Council about it so that the value of the eleven acres compensation should be paid to the appellant. This was done vide exhibit P3 which was written on 6/3/2018. On 24/7/2018, the respondent wrote to the Municipal Council revoking exhibit P3 on ground that it was executed on the strength of a misrepresentation of the appellant as administratrix of the deceased's estate which is not true. The revocation letter is exhibit P4. The DLHT found for the respondent, hence, this appeal.

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In support of the first ground of appeal, the appellant submitted that the Chairman failed to evaluate the contract between the respondent and appellant on the division of the suit land. She submitted further that, the respondent had allocated 11 acres to the appellant freely after discovering that the land was wrongly sold to him.

Ground number two was abandoned. Regarding ground number three, it was her submission that the dispute land was legally owned by the late Maulid Mdoka, the late father of the appellant. The respondent bought the disputed land from Asia Makundi who had no title to the land.

In reply, the respondent's counsel argued that the contract entered between the appellant and respondent was voidable and it was revoked by the respondent upon discovering that it was associated with false pretence as the appellant pretended to be the administratix of the estate of the late Maulid Mohamed Mdoka.

As regards to the third ground, the respondent's advocate submitted that the DLHT was correct in evaluating the evidence and finding that the disputed land was sold to the respondent by the legal owner of the land as she was wife of the late Maulid Mdoka and the suit property was thus a matrimonial property. He argued that the wife of the deceased had power

to dispose of the suit land jointly owned between her and her husband per the decision in **Constantino Mhauka V. Pius Lupala,** PC Civil Appeal No. 01/1999, HCT – Mwanza (unreported).

The appellant's main complaint in this appeal, in my view, is centered on evaluation of evidence by the trial DLHT. I will, therefore, deal with both grounds of appeal jointly.

The appellant complains that the DLHT failed to hold that the respondent did not acquire legal little to the land in dispute because the seller had no little to pass. It is on record that the respondent bought the land in dispute from PW.2 (Asia Mkundi) who was the deceased's wife. PW.2 testified that the said land was owned jointly by her and the deceased as husband and wife and that upon the demise of her husband she became the legal owner of the disputed land. However, the record also shows that the deceased had other wives including DW.1 (Anastazia Paulo Lupola) who also lived at the land in dispute. Other wives as mentioned by the appellant (DW.2) includes Ruth Sanga, Rusi Kavilwa and Christina. This evidence was also supported by Shabani Mdoka (DW.3) who also testified that the land in dispute was owned by the whole family.

Based on the evidence adduced at the DLHT, I find that Asia Mkundi (PW.2) had no legal tittle to transfer to the respondent. She was not the administratix of the estate of her deceased's husband and it is doubtful if the land was owned jointly between her and the deceased as the deceased had other wives too. The authority in **Constantino Mhalika's case** (supra) apply where the surviving wife has no co-wives which is not the case here. The cited case is, therefore, distinguishable. The alleged sale between PW.2 and the respondent was illegal. It is a principle of law that no one gives what they do not have (*Nemo dat quod non habet*). In **Farah Mohamed v. Fatuma Abdallah [1992] TLR 205** the Court of Appeal held that he who doesn't have tittle to the land cannot pass good tittle over the same to another.

Is the surrender of the eleven acres to the appellant voidable? Having discovered that Asia Mkundi had no little to pass to him, the respondent negotiated a deal with the family of the late Mdoka through the appellant. They struck a deal for the respondent to surrender eleven (11) out of 22.93 acres to the appellant to have amicable settlement of the issue. It is this deal which the respondent complained about at the DLHT in that he was defrauded by the appellant by representing herself as administratrix of the deceased's state while she was not. The learned chairperson, unlike his

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assessors, agreed with the respondent and held that the appellant had no right to claim any title over the dispute land. He held:

> *"Ninatofautiana na maoni ya mshauri wa baraza kwa sababu ambazo nimezieleza hapo juu. Kesi kwa upande wa utetezi haieleweki aidha kama madai anadai ardhi ya eka 11 kama eneo la familia au la kwake ..."*

With respect, the learned chairperson misdirected himself. The appellant was sued and he had not filed a counter claim. Therefore, the appellant had no claim for a declaration of little to land as held by the learned chairperson. The prayer in the written statement of defence of the appellant that she be declared owner of the 11 acres was untenable in light of the fact that she filed no counter claim. Unfortunately, that statement swept away the chairman and treated the appellant as plaintiff/applicant before the tribunal. This was an error.

The respondent complains that the appellant could not have entered into contract with him without being an administratrix which makes their agreement for the surrender of eleven acres voidable. I agree the appellant is not administratrix of the estate of the late Maulid Mdoka. While that is a matter of fact, it is not true that the appellant had no capacity to contract

on behalf of the family. According to the document in issue which was tendered as exhibit P3 by the respondent, at one of the paragraphs, he acknowledges:-

> *"... kwa hiari yangu mwenyewe nimempatia ndugu Subira Maulid Mdoka ekari kumi na moja (11) ... Ndugu Subira Maulid Mdoka* ***ni mwakilishi wa familia*** *ya Mzee Mdoka ..." (emphasis is mine)*

It follows, therefore, that the respondent contracted the appellant as a representative of the family of the deceased not as administratrix of the deceased's estate. He cannot be heard trying to avoid the contract on ground of misrepresentation. There is no evidence that the appellant presented herself to him as administratrix of the deceased's estate. Their contract is valid as no misrepresentation has been proved. The appellant contracted with the respondent as intermediary and the contract between them is valid and binding.

It was, thus, wrong for the DLHT to decide in favor of the respondent who did not acquire good title from PW.2.

Having disposed of the grounds of appeal, I wish to comment on the manner the learned tribunal chairman marked the exhibits. Instead of receiving and marking as exhibits documents as tendered by witnesses, he

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turned the annextures to the application into exhibits by so marking and endorsing them. This has resulted into all exhibits received being photocopies instead of original copy as required by section 66 of the Evidence Act [Cap. 6 R.E 2022] without meeting the exceptions set out in section 67 of the same Act. This practice is odd.

Exhibits are supposed to be received from witnesses not turning annextures to pleadings into exhibits. I have considered this improper admission of evidence and I have come to a conclusion that the irregularity, despite being detestable, is saved by section 45 of the LDCA. I, however, encourage the learned tribunal chairman to change his manner of admitting exhibits from the said trend which is a norm in cases he presided over which I have encountered on appeal.

In the end, I find merit in the appellant's appeal. The decision of the DLHT is quashed and I substitute it with orders dismissing the application. The appellant shall have costs in this court and at the DLHT.

It is so ordered.

I.C MUGETA

JUDGE

31/3/2023

Court: Judgment delivered in chambers in the presence of the appellant in person and absence of the respondent.

Sgd: M.A MALEWO

DEPUTY REGISTRAR

31/3/2023