IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 83 OF 2022

(C/F Land Application No. 24 of 2021 District Land and Housing Tribunal of Babati at Babati)

THERESIA YAE GITTING ..... APPELLANT

VERSUS

NONI TLUWAY ..... 1ST RESPONDENT

BOAY SAFARI ..... 1ST RESPONDENT

JUDGMENT

14th April & 12th May, 2023

TIGANGA, J.

This appeal emanates from the District Land and Housing Tribunal of Babati at Babati (hereinafter, the trial tribunal) in Land Application No. 24 of 2021 in which the appellant filed a complaint against the respondents over the piece of land measuring 2 ½ acres located at Wareta Village, within Wareta Ward in Hanang' District (hereinafter, the suit property).

According to the evidence on records, at the trial tribunal, the appellant claimed that, she co-owned the suit land with the 2nd respondent as her husband since 1980 after clearing a virgin land. That, they had been using the said land peacefully up to 2010 when she got mental sickness and while on the verge of finding cure the 2nd respondent, her

husband, sold the suit land to the 1st respondent without her consent and that she never signed any sale agreement. On the other side, while the 1st respondent claims that, during the sale agreement both the appellant and her husband, the 2nd respondent were physically present and they both signed the sale agreement, the 2nd respondent acknowledges the fact that, when selling the piece of land to the 1st respondent, the appellant was not present, she was mentally sick hence, he signed on her behalf. At the end of the trial, the trial tribunal decided in favour of the 1st respondent on the ground that, both the appellant and the 2nd respondent jointly, willingly and legally sold the suit land to the 1st respondent and that, these claims are unfounded as they only want to revert the suit land back to them.

Aggrieved by the decision, the appellant preferred this appeal with four (4) grounds as follows;

1. That, the trial tribunal erred in law and in fact in delivering a judgment in favour of the respondents relying on an unfounded allegation, speculative claims and forged documents hence reached into a wrong verdict.

2. That, the trial tribunal erred in law and in fact in delivering its decision basing on the contradictory evidence adduced by the respondents during hearing hence reached to unfair decision.
3. That, the trial tribunal erred in law and in fact in delivering its decision basing on a forged sale agreement which was never signed by the appellant as she was suffering from mental illness facts which was well proved by the appellant's witnesses.
4. That, the trial tribunal chairman erred in law and in fact in failing to consider and evaluate properly strong evidence and satisfy itself rather than taking into account weak and cooked evidence in relation to this matter and hence reached a biased decision.

During the hearing which was by way of filling written submissions, the appellant and the 2nd respondent appeared in person and unrepresented whereas the 1st respondent was represented by Ms. Zahara Musa Chima, learned Advocate.

Supporting the 1st ground of appeal, the appellant submitted that, she co-owns the suit land with her husband from 1980 as they cleared a virgin land. They had been using the suit land peacefully until 2010 when she had a mental illness and underwent multiple treatments. She averred that, the 1st respondent had been using the suit land from 2011 until 2021

when she recovered from mental illness, and asked her about her legality on the disputed land. That is when she knew that the suit land was sold by her husband, the 2nd respondent, to the 1st respondent without her consent. She further adduced that, the sale agreement tendered in court was a fraud as the same shows her signature while at that time she was sick and she never signed the same. She further averred that, according to section 161 (2) of the **Land Act**, Cap 113 R.E. 2019, her being the wife of the 2nd respondent, one of them could dispose off any property jointly owned without the consent of the other.

It was the appellant's further submission that, she tendered enough proof showing that she was mentally unfit during the time within which the sale agreement was entered. She insisted that, the trial tribunal erred in its findings based on forged documents and assumptions.

On the 2nd ground of appeal, the appellant submitted that, the trial Tribunal erred in holding that, she was physically involved in the sale agreement while at that time she was sick. Further to that, in the 2nd respondent's written statement of defense at the trial tribunal, he admitted to having signed on the appellant's behalf as his wife hence the trial tribunal ought to have considered this fact that, she was not physically present during the sale.

As to the 3rd ground appeal, the appellant asserted that, her name in the sale agreement is written in a different handwriting compared to the rest of the document. In the circumstances, since her medical documents show that at the time she was receiving medical treatment, and the fact that her husband admitted to having signed for her, the whole sale was a fraud and cannot legalize ownership of the suit land to the 1st respondent.

Regarding the last ground, it was the appellant's submission that, the trial tribunal failed to evaluate the evidence as a whole as seen hereinabove and come up with a just decision but rather, the trial chairman delivered the decision in favour of the 1st respondent which was erroneous. She prayed that this appeal be dismissed with cost.

Opposing the 1st ground of appeal, Ms. Chima submitted that, the sale agreement was made before the Wareta Hamlet Chairman who is also a relative of the appellant. Further to that, no medical chits were tendered and admitted into evidence by the appellant hence no legal proof of her mental illness. More so, the appellant was allegedly admitted to Mirembe Hospital from 2012-2014 but the sale agreement was done in 2011 before the admission which connotes the fact that, she was sane during the said sale agreement and she signed the same.

On the 2nd ground, Ms. Chima averred that, although the appellant claimed that the evidence was contradictory, she failed to highlight which part of evidence exactly was contradictory. She rather reiterated her submission on the 1st ground that, she was sick when the transaction was conducted. Learned counsel argued that, the evidence is clear on how the 1st respondent came into possession of the suit land and that, there is nothing contradicting to that effect.

Learned counsel submitted on the 3rd ground of the appeal that, forgery is a criminal offence contrary to sections 333 and 337 of the **Penal Code**, Cap 16 R.E. 2022. She contended that, the appellant did not manage to prove this offence at the trial tribunal during the hearing which proves that the agreement was valid. She added, had it been a forged document, the appellant would have reported the matter to the right channel. However, she left the 1st respondent to enjoy the use of the suit land for more than 10 years without saying a thing. As to different handwritings in the sale agreement, Ms. Chima averred that, the same happened out of using different ink pen when writing.

On the last ground, Ms. Chima submitted that, the trial tribunal properly analysed the evidence on record and reached to a justifiable decision. He prayed that this appeal be dismissed with cost.

The 2nd respondent to this appeal conceded with the appeal on the ground that, he acquired the suit land jointly with the appellant in 1980 and he solely sold the same to the 1st respondent without her wife's consent. He also. Admitted the fact that, during that time, the appellant was mentally ill hence, he signed the sale agreement on her behalf together with their son Lelo Boay, a fact which he also disclosed at the trial tribunal.

In her rejoinder, the appellant reiterated her earlier submission and insisted that, the 2nd respondent disposed of their co-owned land without her consent hence the sale agreement entered was a fraud.

After I have gone through the appellant's submission and trial tribunal records, this being the first appeal, the Court is inclined to re-assess and re-evaluate the entire evidence on record and come to its own conclusions. Before I determine the merit or demerit of this appeal, from the outset, is an undisputed fact that the suit property was jointly owned by the appellant and the 2nd respondent before being sold to the 1st respondent. Upon keenly passing through the appellant's evidence at the trial tribunal, her grounds of appeal as well as her submission, her main grievances is the fact that, the sale was done without her consent.

Now, the question which needs this court's determination is whether the appellant consented to the sale of the suit land or not. Determination of this issue will definitely cover all four grounds of appeal and my answer will be guided with the tendered sale agreement and the appellant's medical chits.

Starting with the sale agreement the same was tendered by the 2nd respondent

It is a well-established principle of law that, once the exhibit is admitted, a person tendering the exhibit shall read out loud its contents in court to enable the opposing party to understand the contents of the document(s) and to afford him the opportunity to raise objection if any. Where there is any objection, the trial court/ tribunal will rule on the admissibility of the exhibit. Failure to allow the witness to read it, infringed parties right to a fair hearing and therefore vitiates the proceedings.

In the appeal at hand, the gist of the dispute is centered on the sale agreement which the 1st respondent claims that both appellant and her husband, the 2nd respondent signed voluntarily and jointly. On the day the said sale agreement was tendered in court the following is what transpired;

"Namfahamu mleta maombi aliniuzia shamba yeye pamoja na mjibu maombi wa pili. Miaka mbili na nusu waliuza kwa shilingi milioni moja. Ilikuwa tarehe 26/9/2011. Tuliandika makataba nikiuona nitaujua kwa sababu ina majina yangu na yao. Naomba niutoe kama kielelezo kwenye Ushahidi wangu.

***Mleta maombi**; sina pingamizi*

Sgd H.E. Mwihava
Mwenyekiti
23/5/2022

***Baraza**: Mkataba umepokelewa D1*

***SU1 Endelea**: Mimi nilendelea kulima shamba la mgogoro. Tuliuziana kitongoji (ofisi ya kitongoji). Anna Tluway ni jina langu na lipo kwenye hati ya mauziano. Ninacho kiapo cha mahakamani kuhusu majina yangu. Naomba nitoe kiwe ni kielelezo cha Ushahidi*

***Mleta maombi**; sina pingamizi*

Sgd H.E. Mwihava
Mwenyekiti
23/5/2022

***Baraza**: Kielelezo kimepokelewa kama D2*

Sgd H.E. Mwihava
Mwenyekiti
23/5/2022

Chanzo cha mgogoro huu ni tamaa wanataka kudai upya..."

From this quoted part of the proceedings, it is clear that, both of the admitted exhibits were never read out after being admitted into evidence. The only remedy for such failure is to expunge such document

from the court records. This principle of the law was propounded in various Court of Appeal decisions including that of **Mbaga Julius vs The Republic,** Criminal Appeal No. 131 of 2015, CAT at Bukoba (unreported), the court held that:

> *"Failure to read out documentary exhibits after their admission renders the said evidence contained documents, improperly admitted, and should be expunged from the record"*

The above principle applies to both civil and criminal cases as it was held in the case of **Bulungu Nzungu vs Republic**, Criminal Appeal No. 39 of 2018 CAT (unreported) Court of Appeal of Tanzania had this to say;

> *"It is now a well-established principle in the law of evidence as applied in trial of cases,* ***both civil and criminal,*** *that generally once a document is admitted in evidence after clearance by the person against whom it is tendered,* ***it must be read over to that person****." (emphasis added)*

I have no doubt that, in the case at hand, exhibits D1 (Sale Agreement) and D2 (Hati ya Kiapo cha kuthibitisha majina yangu) were not read out in the trial tribunal after being admitted. It is my considered opinion that, failure of the said document being read out loud, infringed the appellant's right to cross examine on the same considering the fact that, she was unrepresented and a layperson.

In the circumstances, applying the above principle set out in the Court of Appeal decisions, the available remedy is to expunge the exhibits from the tribunal record as I hereby do. Exhibits D1 and D2 are therefore expunged from the records. After expunging them, the oral evidence by the 1st respondent left does not suffice to support the decision meted by the trial tribunal. I say so because, without the sale agreement, the whole case crumbles and the 1st respondent's name appearing in said sale agreement is Anna Tluway whereas in the matter at hand, she appears as Noni Tluway. These are two different names and in the absence of an affidavit of names, she cannot have the locus.

More so, the evidence of the appellant's 1st and 2nd witnesses and 2nd respondent written statement of defence shows that, the appellant was mentally unwell during the transaction. On the day of the hearing before the defence started the trial court's proceedings reflects as follows;

"Maswali ya ufafanuzi toka kwa wajumbe kwa SM2

Nilikuwa form three nikiwa na miaka 17.

Sgd H.E. Mwihava
Mwenyekiti
16/2/2022

Mleta Maombi*: Nitaleta nakala ya vyeti vya hospitali*

Sgd H.E. Mwihava
Mwenyekiti
16/2/2022

Amri

Shauri lije kwa utetezi tarehe 15/3/2022

Sgd H.E. Mwihava

Mwenyekiti

16/2/2022

Tarehe 15/3/2022

Mbele ya H.E. Mwihava - M/kiti

Washauri – Bwana Hyera na Bi Hamida

Mleta Maombi;

Mjibu maombi;1 wote wapo

2. –

Mleta Maombi:

Nimeleta vyeti nakala Pamoja nimewapa wajibu maombi

Sgd H.E. Mwihava

Mwenyekiti

15/3/2022

Amri

Shauri litaendelea na utetezi tarehe 23/5/2022

Sgd H.E. Mwihava

Mwenyekiti

15/3/2022"

From this quoted part of the proceedings, it is clear that, the medical chits which includes proof of the appellant's sickness were brought to court and are in the case file but the same were ever tendered and admitted into evidence. Considering the fact that, the appellant was a lay person, the trial chairman ought to have directed them on the

proper way of tendering such documents instead of just receiving them and filing them in the case file.

All these irregularities as shown hereinabove, justice demands that only one remedy should be retrial so as to enable both parties a fair hearing as held in the case of **Ahmedi AM Dharamsi Sumar vs Republic,** Criminal Appeal No. 75 [1964] E.A, the court held: -

> *"Whether an order for re-trial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it not likely to cause an injustice...* "

Depending on the circumstance of this case and for the interests of justice. I hereby quash the proceedings of the trial tribunal and set aside its judgment reached. I thus order the case file to be remitted to the trial tribunal for hearing of the same afresh before a different chairman and different set of assessors. Hearing should be done expeditiously not in less than 45 days from the date of this judgment. I give no order as to the costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 12th day of May, 2023

J.C. TIGANGA

JUDGE