IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. LAND APPEAL NO. 78 OF 2022

(Arising from Land Appeal No. 131/2016 at Bukoba DLHT Originating from Rwamishenye Ward Tribunal in Civil Case No. 15/2016)

HOSEA WILLIAM..... APPELLANT

VERSUS

FELICIANA MLAKI..... RESPONDENT

JUDGMENT

22nd May and 2nd June, 2023

BANZI, J.:

The Respondent sued the Appellant before Rwamishenye Ward Tribunal ("the trial tribunal") alleging that he encroached her land by exceeding the boundary and planted a banana tree therein. The trial tribunal after hearing the parties and visiting the locus in quo, it decided in favour of the Respondent and ordered the Appellant to uproot the banana tree he had planted in the suit land. The decision of the trial tribunal did not please the Appellant who appealed to the District Land and Housing Tribunal for Bukoba ("the appellate tribunal") which upheld the decision of the trial tribunal. Still aggrieved, he has appealed to this Court with four grounds of appeal thus;

1. ***THAT*** *the first appellate court proceedings did not indicate that the assessors' opinion were recorded hence the same are invalid;*
2. ***THAT*** *the learned chairman erred in law to dismiss the appellant's appeal on the ground that the suit was time barred whereas the respondent was the one who filed the suit in the trial tribunal;*
3. ***THAT*** *the trial tribunal's coram of the members did not disclose their gender nor indicate that at every sitting their Coram was recorded;*
4. ***THAT*** *the learned Chairman as the first appellate court did not perform his duty of re-assessing and re-evaluating the trial tribunal's evidence and draw up his conclusion.*

At the hearing, both parties appeared in person unrepresented. In his submission, the Appellant had nothing to elaborate rather than restating his grounds of appeal. In short, his grievances are; one, the assessors' opinion is not recorded in the proceedings; two, parties were not given opportunity to be heard before the chairman decided that, the suit was time barred; three, the trial tribunal was not duly constituted for want of disclosure of their gender; four, the appellate tribunal failed to examine the sale agreement tendered by the Respondent and five, the Respondent did not

produce any witness to support her claims. He concluded by praying for the appeal to be allowed by nullifying the proceedings of both tribunals.

In response, the Respondent stated that, the judgment of the appellate tribunal contains the assessors' opinion because the same was read over in the presence of both parties and the chairman in his judgment explained how he departed from their opinion. Concerning the second ground, it was her submission that, she has been using that land for more than 12 years without any interruption and she brought witnesses save for the one who sold the land to her because he passed away since 1995. With regard to the third ground, she stated that the trial tribunal was properly constituted because there were four members in which two were women. On the fourth ground, the Respondent replied that, the evidence was properly evaluated because when the tribunal visited the locus in quo, the Appellant admitted that, he was never been shown the boundary demarcating his land. Also, his evidence concerning boundary contradicted with that of the seller who showed the real boundary known to the Respondent. She prayed for the appeal to be dismissed.

In a brief rejoinder, the Appellant insisted that, the Respondent did not bring any witness to prove her case. Also, the sale agreement that was

presented before the trial tribunal by the Respondent did not show the measurement of the area she bought.

After a thorough perusal of the petition of appeal, the records of lower tribunals and considering the submissions of both parties, the issue for mination is whether the appeal has merit.

Starting with the first ground, it is worthwhile to underscore that, for the District Land and Housing Tribunal to be properly constituted in terms of section 23 (1) (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] ("the Land Disputes Courts Act"), the Chairman must sit with at least two assessors who are mandatorily required to give out their opinions before the chairman composes the decision of the tribunal. Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 governs the manner upon which the assessors are required to give their opinion. The same provides as hereunder:

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

According the extract above, it is the requirement of the law for chairman to require every assessor to give his opinion before the judgment is composed. It is also the requirement of the law for such opinion to be in writing. Regulation 19 (2) was interpreted by the Court of Appeal of Tanzania in the case of **Edina Kibona v. Absolom Swebe (Sheli)** [2018] TZCA 310 TanzLII where it was stated that,

> *"We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate and at the conclusion of evidence, in terms of Regulation 19 (2) of the Regulations, the* ***Chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion must be in the record and must be read to the parties*** *before the judgment is composed."* (Emphasis added).

It is apparent from the extract above that, before the Chairman composes the judgment, the following things must be strictly complied; one, he must require every one of the assessors to give his opinion; two, such opinion must be in writing and three, must be given in the presence of the parties so 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.

See also the case of **Tubone Mwambeta v. Mbeya City Council** [2018] TZCA 392 TanzLII which underscored the same conditions.

In the case at hand, the record shows that, at first the appeal was heard by Hon. Assey, Chairman with two assessors, Annamery and Bwahama who gave their opinion but, the decision thereof was overturned by high Court following the appeal filed by the Respondent. The appeal was ordered to be heard afresh before another Chairman with new set of assessors. On 23rd March, 2020, Hon. E. Mogasa, Chairman took over the matter with new set of assessors namely, Jenister Lugakingira and Dorah Rutainulwa. The proceedings further reveal that, after hearing the submissions of both parties, on 30th December, 2021 the two assessors gave their opinion by reading the same in the presence of both parties. In addition, the written opinion duly signed by each assessor is within the original case file. Under these circumstances, it cannot be said that there is irregularity committed by the appellate tribunal.

In **Edina Kibona** and **Tubone Mwambeta**, the proceedings were nullified because, despite the fact that there were written opinions of the assessors in the original case files but, the record did not show if the assessors were given opportunity give such opinions to the parties. However, this is not the case in the matter at hand where, there were written opinions

in original case file and the assessors were given opportunity to give such opinions in the presence of parties. Therefore, the contention by the Appellant that, there was an err because the opinion was not recorded in the proceedings lacks merit because I don't think if it is the correct interpretation of Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 made by the cited cases above. This concludes the first ground which I find to be unmerited.

Reverting to the second ground, the complaint by the Appellant that the appeal was dismissed on the ground the suit was time barred has no basis because, the Chairman mentioned the same when he was referring the time the Respondent has been in possession of that suit land without interruption. However, that did not form the basis of the decision and hence, this ground also lacks merit.

The third ground also should not detain me. The records of the trial tribunal show that the case was presided and determined by four members who were Editha Jasson as chairperson, Festo Kaiza, Angelica Gozbert and Dominick J. Kateme. From the listed names, it is evident that two among them were women which is in compliance with the requirement of section 11 of the Land Disputes Courts Act. Besides, the issue of absence of coram disclosing names of members on each sitting date is not fatal to the extent

of vitiating the proceedings as it was stated in the cases of **Yakobo Magoiga Gichere v. Peninah Yusuph** [2018] TZCA 222 TanzLII and **Zahara Mingi v. Athumani Mangapi** [2023] TZCA 212 TanzLII considering that, according to the proceedings, the presiding members fully participated by asking questions to the witnesses. Thus, the third ground is unmerit.

In respect of the fourth ground concerning failure to re-assess and re-evaluate the evidence of the trial tribunal, it is trite law that, the first appellate court has a duty to re-consider and re-evaluate the evidence and draw its own conclusion. See the case of **Domina Kagaruki v. Farida F. Mbarak and 5 Others** [2017] TZCA 160 TanzLII. In the case at hand, it is evident that, the appellate tribunal as the first appellate court re-evaluated the evidence of the trial tribunal properly as reflected from page 4 to 5 of the judgment. Besides, this being the second appeal, it is settled law that, a court of second appeal will not routinely interfere with the findings of the two courts below except where there has been a misapprehension of evidence, a miscarriage of justice or violation of some principles of law or procedure. This was stated in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v A. H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31. In this matter, I find nothing to interfere with the

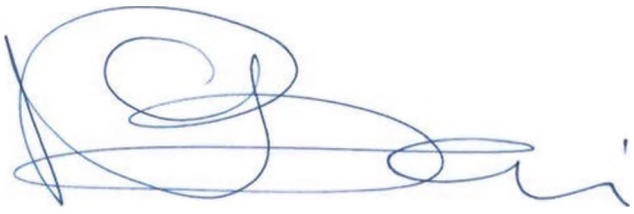
concurrent findings of two tribunals below on matters of evidence. Thus, the fourth ground also lacks merit.

For those reasons, I find nothing to fault the decisions of both tribunals below and I hereby uphold them. Consequently, the appeal is dismissed with costs for want of merit.

It is so ordered.

I. K. BANZI
JUDGE
02/06/2023

Delivered this 2nd day of June, 2023 in the presence of the Appellant and the Respondent both in person. Right of appeal duly explained.



I. K. BANZI
JUDGE
02/06/2023