IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

LAND APPEAL NO. 42 OF 2022

(Original Application No. 03/2019 of the District Land and Housing Tribunal of Iringa before Hon. A.J. Majengo, Chairperson)

ALLY KIKUNGA ..... **APPELLANT**

VERSUS

EMILIO CHUSI ..... **RESPONDENT**

JUDGMENT

16th May & 15th June, 2023

I.C. MUGETA, J:

The dispute between the parties to this appeal is the ownership of $1^1/_4$ acres of land situated at Malendi area, Ilula Sokoni in Kilolo District. As a result, the appellant sued the respondent before the District Land and Housing Tribunal (DLHT), among others, for an order restraining the respondent from conducting farming activities in the suit land. The DLHT was convinced that the applicant failed to prove his claims. It declared the land in dispute the property of the respondent and ordered the appellant to pay costs to the respondent. The appellant seeks to challenge the said decision based on the following grounds:-

Mugeta

1. *That, the Hon. Chairman erred in law to entertain the application while the suit premise was not described properly.*
2. *That, the Hon. Chairman erred in law to entertain the application while the tribunal was not properly constituted.*
3. *That, the Hon. Chairman erred in law for failure to explain to the assessor the duty to give opinion of the case.*
4. *That, the Hon. Chairman erred in law for failure to append signature at the end of witnesses' testimony.*

The appellant enjoyed legal representation by Watson Kimbe, learned advocate whereas the respondent was represented by his legal representative, Ashraf Chusi. Before the hearing of the appeal commenced, the court *suo moto* questioned the propriety of the respondent's representation by Ashraf as there is no power of attorney in the tribunal's record. Ashraf argued that he filed his power of attorney before the DLHT.

The appellant's counsel disputed this fact as it is not reflected in the proceedings. On that account, I ordered him to produce his copy of the power of attorney. On presentation of the copy thereof, the appellant's advocate argued that the power of attorney shows that it was filed on

15/4/2019 but since the filing is not reflected in the proceedings, Ashraf Chusi had no locus standi to prosecute the case on behalf of the respondent. In his view, such a representation violated Order III Rule 2 of the Civil Procedure Code [Cap. 33 R.E 2022]. On his part, Ashraf contended that he cannot be faulted by the tribunal's negligence to file it. Upon hearing the parties arguments, I decided that the decision on the issue raised shall be given in this judgment.

I have examined the power of attorney at issue it shows that it was filed on 15/04/2019 before hearing of the matter began. The proceedings are silent about Ashraf's representation by power of Attorney. However, since the said Power of Attorney was properly filed and contains the stamp of the tribunal, the respondent cannot be faulted for the negligence of the tribunal chairman to acknowledge the representation in the proceedings. There is no dispute that Ashraf has been prosecuting the case for the respondent since when he filed his registered power Attorney. By virtue of the filed power of Attorney, I hold, Ashraf's representation of the respondent is proper. I will, consequently, proceed to determine the appeal on merit.

The appeal was disposed of by way of filing written submissions.

In supporting the appeal, the appellant's counsel abandoned the 2nd ground. He argued on the 1st ground by submitting that the suit property was not properly described contrary to Regulation 3(2)(b) of the Land Disputes Court (the District Land and Housing Tribunal) Regulations, G.N No. 74 of 2003 (the Regulations). He argued further that it is trite law that a land in dispute should be sufficiently described so as to differentiate it from other adjacent pieces of land to allow the court to make certain and executable orders. To support his argument, he cited the cases of **Romuald Andrea v. Mbeya City Council & Others**, Land Case No. 13 of 2019, High Court – Mbeya (unreported) and **Fereji Said Ferej v. Jaruma General Supplies Limited & Another**, Land Case No. 86 of 2020, High Court, Land Division – Dar es Salaam (unreported). In his view, the application before the DLHT was incompetent because the land was merely described as located at Malendira, Ilula Sokoni Village, Nyalubu Ward Mazombe in Kilolo district. In his view, the description was insufficient as no boundaries were stated.

Arguing the 3rd ground, he submitted that the Chairman did not require the assessors who sat with him to prepare and give their opinion to be read before the parties. This is contrary to section 23(1) & (2) of the

Mugeta

Land Disputes Courts Act, [Cap. 216 R.E 2019] (hereinafter referred to as the LDCA) read together with Regulation 19(1) & (2) of the Regulations. He submitted further that the omission renders the proceedings a nullity. To support his submission, he cited the case of **The Registered Trustees of Evangelistic Assemblies of God – Mapanda & 4 Others v. Registered Trustees of Seventh Day Adventist Church** – Mapanda, Land Appeal No. 2 of 2022, High Court – Iringa (unreported).

On the last ground, he contended that the trial Chairman failed to append his signature at the end of the testimony of PW2 and DW2. He added that, DW3 testified without being sworn. The failure to append signature violated Order XVIII Rule 10 of the Civil Procedure Code [Cap. 33 R.E 2019] which requires a Judge or Magistrate to append signature at the end of every witness's testimony. He cited the cases of **Iringa International School v. Elizabeth Post**, Civil Appeal No. 155 of 2019, Court of Appeal – Iringa (unreported) and **John Fortunatus Makoko v. GPH Industries Limited**, Civil Appeal No. 108 of 2018 (unreported). In his view, the omission vitiated the proceedings and cannot be cured by section 45 of the Act.

In reply, the respondent resisted the appeal. He submitted on the 1st ground that the respondent cannot be faulted on the failure to describe the suit property as it is the appellant who instituted the suit before the DLHT, thus, he cannot benefit from his own wrong. He distinguished the **Romuald Andrea** and **Fereji Said Ferej** cases cited by the appellant with the present case as in the present case it is the appellant who instituted the application.

He contended that the 3rd ground has no merit as the assessor's opinion was read in the presence of both parties as required. The assessors' opinion in his view need not be written in the proceedings, they are found in the tribunal file as it was the case in the present matter. On the 4th ground, he submitted that the only authentic proceedings are the handwritten ones and not the typed proceedings.

I start with the first ground of appeal. Indeed, the appellant who instituted the dispute in the DLHT had not described the suit land sufficiently. However, when PW3 was testifying in court she gave the description of the land by stating its boundaries. This notwithstanding, it is the appellant who filed the application. He is the one who was supposed to describe the dispute land. He cannot, therefore, be heard on appeal

complaining that the land was not properly described. As argued by the respondent, the cited cases are distinguishable because in this case it is the appellant who is complaining about his own description of the dispute property. The complaint has no merits.

The complaint in the 3rd ground is that the Chairman failed to require the assessors to give their opinion. However, the record shows that upon the closure of defence case the matter was scheduled for assessors' opinion on 10/03/2022 where the assessor's opinion was read. In the proceedings of the said date the Chairman recorded: '*Maoni yamesomwa*'. Since only one assessor sat from the beginning to the end of the case, it is her opinion which was read. The written opinion is reflected in the tribunal records. The law does not presuppose that the assessors' opinion ought to be recorded in the proceedings. It only requires the assessors' opinion to be in writing as it was in the present case. This ground too lacks merit.

Lastly, are the complaints that signature was not appended after the testimony of PW2 and DW2 and that DW3 testified without being sworn. While the typed proceedings show that DW3 was not sworn, I have checked the handwritten proceedings, they show that he was sworn. Regarding the signature after evidence of PW2 and DW2 was recorded,

indeed the Chairman did not append his signature at the end of the testimonies of not only the said witnesses but also the testimonies of all witnesses. Order XVIII Rule 5 of the CPC mandatorily requires a the trial Judge or Magistrate to append signature at the end of witnesses' testimony. In **Baraka Imanyi Tyenyi v. Tanzania Electricity Supply Company Limited**, Civil Appeal No. 38 of 2019, Court of Appeal – Mwanza (unreported) the court emphasized this mandatory requirement of appending signature and held that failure to do so vitiates the proceedings.

The said provisions of the Civil Procedure Code are applied to land matters by virtue of section 51 of the LDCA. However, one should be careful when interpreting the said section. This is because subsection (1) applies to the High Court and subsection (2) applies to the DLHT exclusively. According to subsection (2) the CPC applies to DLHT only where there is inadequacy in the Regulations. The Regulation does not provide for a manner of recording evidence, therefore, the manner provided in the CPC under the said order applies.

It is my view, however, that the application of the CPC in land cases is subject to the provisions of section 45 of the LDCA which provides:-

Mwgeta

"No decision or order of a 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".

The purpose of appending a signature after recording of evidence is authenticity of the evidence. However, due to human fallibility, one can forget to append the signature. Therefore, unless there is a complaint from a party that the evidence is not authentic, the omission is curable under section 45. The parliament, in its wisdom, intended this section to cure such human errors.

Counsel for the appellant has said, without giving reasons, that the error is incurable under section 45. I find his statement to be general for failure to state the injustice occasioned. While I admit the irregularity, I hold that the same did not vitiate the proceedings. The **Baraka Imanyi** case (supra) is distinguishable for two reasons. Firstly, the Court of Appeal

Angeta

did not consider the application of the CPC in the light of the provisions of section 45 of the LDCA. Secondly, that case originated in the High where the CPC, in terms of section 51(1) of the LDCA, applies fully. Unlike the **Baraka Imanyi** case (supra), this case originates in the DLHT where in terms of section 51(2) of the LDCA, the application of the CPC is limited. The CPC has no similar provision like 45 of the LDCA. The complaint lacks merits too.

In the event, I find the whole appeal without merits. I hereby dismiss it with costs.

I.C. MUGETA

JUDGE

15/6/2023

Court: Judgment delivered in chambers in the presence of the appellant in person and the respondent through his representative Ashraf Chusi.

Sgd. I.C. MUGETA

JUDGE

15/6/2023