IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

LAND APPEAL CASE NO. 62 OF 2022

(Originating from Land Application No. 123 of 2008 of the District Land and Housing Tribunal of Mwanza at Mwanza)

ROBERT MAZIBA SENGEREMA .....APPELLANT

VERSUS

MINZA OMERA NDATURU
*(Administratrix of the Estate of the late Kumalija Sayi)***.....RESPONDENT**

JUDGMENT

19th May & 26th May, 2023

Kilekamajenga, J.

In this case, it is alleged that, the late Kumalija Sayi bought plot No. 67 Block Q at Uhuru Street within Mwanza city from Henry Kiduta in 1997. The process to transfer the offer to a title deed from the name of Henry Kiduta to Kumalija Sayi immediately commenced. On 12th Day of July 2006, Kumalija Sayi acquired the title deed number 033021/32 over the said plot of land. Sadly, in 2020, Kumalija Sayi died leaving behind a widow (respondent) who was later appointed to administer the estates of her husband. The other side of the story shows that, the appellant's father, one John Maziba Sengerema bought the said plot from Ali Salehe in 1980. John Maziba Sengerema died in 1983 leaving behind the offer evidencing title over the land. However, the said offer is in the name of Henry Kiduta. In 1988, the matter for the administration of the estate of John Maziba

Sengerema commenced. In 2008, the appellant being the administrator of the estate of the late John Maziba Sengerema sued Kumalija Sayi in the District Land and Housing Tribunal at Mwanza seeking, *interalia*, a declaration that the said plot is part of the estates of the late John Maziba Sengerema.

During the trial of the case, the appellant testified to have known both John Maziba Sengerema and Kumalija Sayi. In his testimony, the late John Maziba Sengerema was also known as Henry John Madongola, Henry Kiduta and Sengerema Maziba. He used all these names interchangeably hence his names were well known to his relatives and friends. He further testified that, he was appointed to administer the estate of John Maziba Sengerema after the first administrator failed to execute his duties. He insisted that, his father bought plot No. 67 Block Q at Uhuru Street from Ali Salehe in 1980 in the name of Henry Kiduta. By that time, the appellant was just five years old. Simon Msimbi Nindwa (PW2) also informed the tribunal that, the appellant is the son of Henry Kibuta Maziba Sengerema who was known as John Madongola Msingi. The land in dispute belonged to Henry Kiduta Sengerema. PW3 (Victor Mpewa Jamal) further confirmed that the appellant's father was also known as Maziba Sengerema, Kiduta Sengerema and Kiduta Madongola.

In the defence, DW1 (Kumalija Sayi) told the tribunal that, he purchased the plot on 24th January 1997 from Henry Kiduta and the sale agreement was witnessed by the learned advocate Matata Chama and Mzee Kiyumbi Msuma and Henry Kiduta. Thereafter, he went to the Municipal Council to process the certificate of title which was issued accordingly. He tendered the right of occupancy which was admitted as exhibit DE1. At the end of the trial, the tribunal decided in favour of the respondent. Being aggrieved with the decision of the trial tribunal, the appellant approached this court for justice. While armed with eight grounds thus:

1. *That the trial court (sic) erred in law to hold that the name of Henry Kiduta was not the name being used by the late John Maziba Sengerema;*
2. *That in absence of Henry Kiduta/his administrator or advocate Chama Matata being brought in court as witness, the whole decision turns out to be wrongly decided.*
3. *That the court erred in law by refuting (sic) to accept a court order dated 1984 and a transfer of occupancy dated 19/03/1980 tendered to prove appellant case (sic) relying on wrong principle of law.*
4. *That in absence of assessors' opinion being reflected on the record the whole decision is nullity.*
5. *That the whole decision was against the law and evidence in record.*
6. *That the court erred by failure to scrutinize the whole evidence in record.*
7. *That the appellant right to be heard was infringed.*
8. *That the trial court erred to rule that the property in dispute is not part and parcel of the estate of the late John Maziba Sengerema.*

Before this court, the parties were granted the order to dispose of the appeal by way of written submissions. The counsel for the appellant commenced the submission with the fourth ground arguing that, in the absence of the assessor's opinion being reflected on the record, the whole decision is a nullity. In his view, the assessors were not availed the opportunity to give their opinion which is a total violation of the law. The argument was backed up with the case of **Tubone Mwambeta v. Mbeya City Council**, Civil Appeal No. 287 of 2017 (unreported) cited in the case of **Edina Adam Kibona v. Absolom Swebe** (Sheli) Civil Appeal No. 286 of 2017 (unreported).

On the second ground which he argued together with the eighth ground, failure to summon Henry Kiduta or advocate Chama Matata rendered the whole decision erroneous as stated in the cases of **Hemed Said v. Mohamed Mbilu** [1984] TLR 113 and **Aziz Abdullah v. R.** [1991] TLR 71. The counsel further argued that, the appellant was the son of Sengerema Maziba also known as John Maziba Sengerema, Henry John Madongola and Henry Kiduta. All these names were used interchangeably by the appellant's father. He was known by those names to his friends, relatives and the public. The appellant's father owned several properties including the land in dispute i.e., plot number 67 Block Q Uhuru Street within

Mwanza City. The appellant, being the administrator of the estates of his father, seeks the declaration to include the disputed land in the estate of the deceased after it was transferred to Kumalija Sayi. The counsel pressed for the procurement of the so-called Henry Kiduta and the advocate who witnessed the sale agreement. As the respondent failed to procure those key witnesses, the trial tribunal was supposed to draw an adverse inference. The counsel also argued the first and sixth ground that, in civil cases, both parties cannot tie. The party with heavier evidence deserves a decision in his/her favour. Weighing the evidence at hand, the appellant's evidence was heavier than that of the respondent.

Responding to the issue of assessors, the counsel for the respondent argued that the trial chairman sat with the same set of assessors who were Mr. Methusela and Mrs. Manyanda. However, Mrs. Manyanda retired before the conclusion of the trial hence the trial tribunal considered only the opinion of one assessor which was given in writing. Hence the decision of Tubone Mwambeta (*supra*) is distinguishable from the case at hand. The counsel further invited the court to apply **section 45 of the Land Disputes Courts Act, Cap. 216 RE 2019** and the case of **Yakobo Magoiga Gichere v. Penina Yusuph** [2018] TZCA 222 to cure the anomaly.

On the argument that the respondent failed to summon advocate Matata and Henry Kiduta, the counsel believed the argument was misplaced as the burden of proof lied on the appellant who alleged the existence of illegal transfer of the land. He cemented his argument with the case of **Paulina Samson Ndawanya v. Theresia Thomas Madaha** [2019] TZCA 453 Media Neutral Citation. In this case, the appellant had a duty to prove that his father Maziba Sengerema was also known as Henry Kiduta. The respondent purchased the disputed land from Henry Kiduta and went further transferring the land without any objection. During the trial, the respondent tendered the title deed as proof of ownership. If the transfer was illegally done, the responsible authority ought to be joined in the case. He supported the argument with the case of **Splendors (T) LTD v. David Raymond D'souza and Another** [2023] TZCA 23 Media Neutral Citation. On the first and sixth ground, the counsel for the respondent further insisted that, the appellant failed to prove whether Henry Kiduta was his father. He insisted the stance taken in the case of **Twazihirwa Abraham Mgema v. James Christian Basil** [2022 TZCA 91 Media Neutral Citation. He further insisted that the issues were framed by the trial tribunal and referred the court to the case of **Jaluma General Supplies LTD v. Stanbic Bank (T) LTD** [2013] TLR 269.

In this case, I have carefully considered the grounds of appeal and the submissions from the parties, and I feel obliged to address the grounds of appeal accordingly. On the first ground, the appellant is challenging the decision of the District Land and Housing Tribunal for holding that the name Henry Kiduta was not the name of John Maziba Sengerema. In my view, this is one of the most vital issues for determination in this case. As already revealed above, the appellant is the administrator of the estates of his father John Maziba Sengerema who died in 1983. In 1988, the case for administration of estate was filed in the Primary Court. In that probate and administration cause, plot No. 67 Block G at Uhuru Street within Mwanza city, which is the land in dispute in this case, was mentioned in the list of the deceased's estates.

However, the documents available in the file clearly show that, the land was initially owned by Ali Salehe who transferred the same to Henry Kiduta in 1980. By that time, the only document evidencing ownership was an offer. In 1997, the process to transfer the land from Henry Kiduta to Kumalija Sayi commenced. Finally, Kumalija Sayi secured a title deed in 2006. This dispute arose in 2008, which means eleven (11) years after the process to transfer the land had ensured. In this case, the appellant believes that his father John Maziba Sengerema also used the names of Sengerema Maziba, Henry John Madongola and also Henry

Kiduta. His father owned several properties including the disputed land which he owned in the name of Henry Kiduta. However, there is dearth of evidence proving that the appellant's father (John Maziba Sengerama) was also known as Henry Kiduta. This was the major point moved the trial tribunal to decide in favour of the respondent. I have also carefully considered this matter and read the file and I did not find any evidence to convince the court to declare the disputed land to be among the estates of the late John Maziba Sengerema. The two names are completely distinctive and it actually raises many questions on the reason why one person could have used such three different names at one time. I find this ground devoid of merit and dismiss it.

On the second ground, the appellant challenged the decision of the trial tribunal being reached without the evidence of Henry Kiduta or his administrator of estate or Advocate Chama Matata who witnessed the transfer of the land from Henry Kiduta to Kumalija Sayi. In this case, however, the appellant is the one who dragged the respondent to the tribunal. He prodded the trial tribunal to declare the transaction between Kumalija Sayi and Henry Kiduta unlawful. Under the law, the appellant was legally bound to prove his case. **Section 110 of the Evidence Act, Cap. 6 RE 2022** provides that:

110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The appellant cannot shift the burden to the respondent unless he has discharged it. Furthermore, there is no particular number of witnesses to prove a fact. See, **section 143 of the Evidence Act**. What was pertinent for the appellant is satisfying the standard required in civil cases. Especially, he was supposed to prove that his father John Maziba Sengerema was also Henry Kiduta something, in my view, he failed.

I find no reason to address the third ground because it is hazy and was not argued by the counsel for the appellant. On the fourth ground, the appellant argued that, in absence of the assessor's opinion being reflected on the record the whole decision is nullity. In this point, I am moved to address the rationale of involving assessors in the District Land and Housing Tribunal. The law requires the chairman to sit with not less than two assessors. **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019** provide that:

"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and

(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment".

The above provision of the law is further emphasized in **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** thus:

"19 (1) The tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

(2) 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 opinion in Kiswahili".

Furthermore, the chairman is obliged to consider the assessors' opinions, though he/she is not bound to follow the opinions if he has reasons to depart from. However, he/she must give reasons for the departure as it is provided under **section 24 of the Land Disputes Courts** Act thus:

"24. In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion".

In this case, the typed proceeding does not show the opinion of assessors and it is not clear whether the opinion was read in the presence of the parties. I am aware, failure to record the assessors' opinion may render the proceeding a nullity. The Court of Appeal of Tanzania was confronted with a similar irregularity in the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble,** Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported) and held that:

"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's 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 the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed".

Furthermore, a similar situation occurred in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili,** Civil Appeal No. 154 of 2015 (unreported) and the Court of Appeal of Tanzania had the following to say:

> *"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor 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."*

Similarly, in the case of **Tubone Mwambeta v. Mbeya City Council,** Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported). The Court of Appeal of Tanzania reiterated the above stance that:

> *"…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."*

The Court of Appeal further stated that:

> "*…the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such,* ***their opinion must be on record."*** (Emphasis added).

See also, the cases **of Edina Adam Kibona v. Absolom Swebe (Sheli),** Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa,** Civil Appeal No. 13 of 2012; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali,** Civil Appeal No. 70 of 2017.

However, this case might have a different scenario; the case was presided over by the chairman with the assistance of two assessors namely, Methusela and Mrs. Manyanda. Mrs. Manyanda retired before the conclusion of the trial hence the remaining assessor gave the opinion. The opinion was chronicled and filed, the same is available in the file. When composing the judgment, the chairman considered the assessor's opinion at page nine (9) of the judgment. In my view, it may be improper to nullify the proceeding of the trial tribunal on the mere reason that the assessor's opinion does not feature on record while the same is available in the tribunal's file. Doing so may be too much reliance on technicalities than heeding to justice. Such an error, in my view, and as argued by the counsel for the respondent, may be cured by the application of the overriding object. Also, the application of **section 45 of the Land Dispute Courts Act, Cap. 216 RE 2019** may cure such an error. The section provides:

> *45. 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.

Possibly, the question which begs for an answer is whether failure to record the assessor's opinion occasioned failure of justice. In my view, it may not necessary be so because such opinion does not, so far, bind the chairman.

The fifth and sixth ground impugned the decision of the trial tribunal for failing to consider the evidence on record. I have already revisited the evidence adduced during the trial and I am convinced that, there was no sufficient evidence to enable the tribunal to decide in favour of the appellant. The seventh ground was abandoned by the counsel and I do not find any reason to address it. On the eighth ground, the counsel for the appellant argued that the trial tribunal erred to decide that the property is not part of the estates of the late John Maziba Sengerema. However, I have already addressed this point when discussing the first ground.

In conclusion, the appellant advanced several grounds but his major point is whether John Maziba Sengerema was also known as Henry Kiduta. In my view, as

argued above, there is no cogent evidence proving the appellant's allegation. Also, there was an irregularity on the recording of the assessors' opinion in this case. As stated above, one of the assessors retired and the remaining assessor gave his opinion which is in the court file. I find it injustice to nullify the proceeding of the trial tribunal for the mere reason that the assessor's opinions were not on record which the same is available in the court file and was considered by the tribunal chairman. I have gone further to consider whether the recording and reading of the assessor's opinion would have changed the decision of the trial tribunal. In my view, it would not have brought justice to the appellant because his evidence was weak. Generally, the grounds of appeal advanced by the appellant lack merit; I hereby dismiss the appeal with costs. It is so ordered.

DATED at **Mwanza** this 26th day of May, 2023.

Ntemi N. Kilekamajenga.
JUDGE
26/05/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

Court:

Judgment delivered this 26th May, 2023 in the presence of the respondent only.

Right of appeal explained.

Ntemi N. Kilekamajenga.
JUDGE
26/05/2023