IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 8 OF 2022

(C/F Land Application No. 173 of 2018 of the District Land and Housing Tribunal for Moshi at Moshi)

LILIAN NJAU..... APPELLANT

VERSUS

YOHANA FRANCIS SEMMBA..... RESPONDENT

JUDGMENT

07/06/2023 & 10/07/2023

SIMFUKWE, J.

The appellant was aggrieved by the decision of Moshi District Land and Housing Tribunal (trial tribunal) in Land Application No. 173 of 2018. Briefly, the respondent herein instituted the matter before the trial tribunal praying the Tribunal to declare him the sole owner of the house located at Msaranga Ngambo (disputed house). He asserted that he bought the said property in 2009 and the appellant herein signed the sale agreement as a witness. That, after he had bought the said land, he built a residential house and shifted there in 2010 together with his wife and children. That, he was transferred to Mwanza and left the appellant residing in the said house. That, the appellant on several occasions alleged that the disputed house belonged to her.

On the other hand, the appellant herein averred that she was cohabiting with the respondent as husband and wife. She contended that, she was the one who purchased the disputed plot but found it proper for her husband to write his name in the sale agreement.

After full trial, the trial Tribunal decided that the respondent herein was the owner of the disputed house. However, the Tribunal decided further that the appellant herein should be compensated 20% of the value of the disputed house as her contribution towards acquisition of the said property. Aggrieved, the appellant preferred this appeal on the following grounds:

1. *That the trial tribunal misdirected itself on point of law and fact and thus erred to weigh and analyse the tendered evidence during trial.*
2. *That the tribunal erred in law and in fact by regarding the appellant as the tenant without any legal proof hence arrive (sic) into a shoddy and awkward decision allowing award of 20% of the value.*
3. *That the tribunal erred in law and in fact on the judgment by failing to articulate the whole trial proceeding.*
4. *That the tribunal misdirected itself by wrongly framing the issue of ownership solely in favor of the plaintiff.*
5. *That the tribunal erred in law and in fact by reaching into conclusion basing on the contradictory evidence adduced by the respondent during trial.*
6. *Whereas on 21st of October 2021 the trial tribunal visited the locus in quo, the tribunal erred in fact and law to*

disregard the outcome of the said visit which overwhelmingly depicted plaintiff's contradictory statement as to identifications on the house in dispute. (sic)

7. *That the finding of tribunal condone and promote irregularities that contravened the law pertaining to land disputes resolutions. (sic)*
8. *That the trial tribunal erred in law and in fact by failing to consider evidence adduced by the appellants and her witnesses, i.e., bank statements, affidavit of marriage, photos.*

The hearing of the appeal was conducted *viva voce*, whereas the appellant was represented by Ms. Angel Mongi and Joan Peter learned counsels while the respondent was represented by Mr. Mruma, learned counsel.

Ms. Angel argued the first and eighth grounds of appeal jointly. She submitted among other things that during the proceedings at the trial tribunal the appellant stated that she cohabited with the respondent as husband and wife since 2007. That, the appellant proved that in their relationship they managed to buy a plot of land. That, the money for buying the said plot was withdrawn from NBC bank account of the appellant one day before buying the said plot as per page 42 of the typed proceedings.

Further to that Ms. Angel submitted that the appellant proved that she was the wife of the respondent through a loan which the respondent secured from Akiba Commercial Bank in which the appellant signed as the wife of the respondent. That, the same was proved by the affidavit of marriage. That, such fact was corroborated by DW3 a loan officer from

Akiba Commercial Bank. DW3 identified the appellant as the spouse of the respondent as found under paragraph 39 of the typed proceedings. DW5 the branch Manager of Akiba Commercial Bank also corroborated evidence of the appellant. That, the appellant correctly showed the source of the money used to buy the disputed land as shown at page 42 of the proceedings. The respondent despite his allegation that the disputed land belonged to him he could not prove that he bought the said land and how he raised the money for buying the said plot.

Moreover, the appellant managed to prove that she was cohabiting with the respondent as husband and wife through the affidavit of marriage as shown at page 67 of the typed proceedings of the trial tribunal. Also, the photos which were tendered as exhibits showed them attending various events. It was submitted further that, the loan application forms also reveals that the appellant and the respondent were husband and wife as found at page 50, 54 and 62 of the proceedings.

Ms. Angel argued the 2nd and 5th grounds of appeal together. She explained that in the whole proceedings of the trial tribunal, there is no evidence to show that the appellant was a tenant at the disputed land. That, the respondent failed to show any tenancy agreement between him and the appellant. His evidence was not supported by any of his witnesses. That, on the other hand, all the witnesses supported the fact that the appellant was the wife of the respondent. That, even neighbours acknowledged that the appellant and the respondent were cohabitating as husband and wife and not a tenant. She was of settled mind that the trial tribunal erroneously ordered the appellant to be paid 20%.

The learned counsel referred to the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113** which held that contradictory evidence may occasion miscarriage of justice. She argued that in the present case, there was contradictory evidence of the respondent as the respondent was mentioning the appellant by various terms. That first, he said the appellant was a family friend, then he said that the appellant was a broker who assisted him to acquire a plot without any proof. There was a time he said the appellant was a tenant without corroboration from any witness. Ms. Angel was of the view that evidence of the respondent before the trial tribunal was contradictory and lacked corroboration from his witnesses. Thus, the respondent failed to prove his case as per **section 111 of the Evidence Act, Cap 6 R.E 2019.**

Ms. Angel argued the 3rd and 4th grounds of appeal which concerns wrongly framing issues jointly. She stated that the first issue was whether the applicant was the sole owner of the disputed land, and the second issue was what reliefs were parties entitled to. That, the parties concentrated to prove the two framed issues. Surprisingly, a new issue was framed in the judgment which was not raised by the parties. That, the said new issue was in favour of the respondent which caused the judgment to be in favour of the respondent.

Ms. Angel elaborated that the law is very clear in respect of formulating or amending issues in any case. She cited the case of **Registered Trustees of Vignan Education Foundation Bungalow India and Another vs National Development Corporation, The Hon. A.G and 6 Others**, in which the Court of Appeal observed that, issues are very important in guiding both sides of the case and principles of framing issues

were outlined. That, issues should be framed at the commencement of the trial and not in the judgment. In this case, Ms. Angel submitted that issues which were raised in the judgment were different from the agreed issues framed at the commencement of trial. She believed that the same occasioned grave injustice in the entire judgment.

Furthermore, the learned counsel submitted that failure to consider the outcome of the site visit occasioned injustice. She argued that evidence of the respondent contradicted with the evidence tendered before the court including failure to mention the number of the rooms of the disputed house as shown at page 73 of the proceedings.

On the 7th ground of appeal which concerns failure to comply to the law pertaining to land disputes resolutions and promote irregularities, Ms. Angel submitted that this ground was supported by the submission in respect of framing of issues, visit to the locus in quo and the award of 20% to the appellant. She argued that all that contravened the law pertaining to dispute resolution.

In her conclusion, she prayed the court to quash the decision of the trial Tribunal and order that the said disputed property was owned jointly with the appellant and the respondent as husband and wife and that the appellant's contribution exceeded that of the respondent as she is the one who invited the respondent. She also prayed for costs.

In reply, the learned advocate for the respondent contested the raised grounds of appeal jointly. He submitted that before the trial tribunal, two issues were framed to wit:

1. *Je mdai ni mmiliki halali wa eneo lenye mgogoro?*

2.Nafuu nyingine wanazostahili wadaawa.

That, these issues were raised according to the prayers advanced before the trial tribunal whereas the applicant prayed for four reliefs:

1. *Declaration that the applicant was a lawful owner of the suit land*
2. *Eviction of the respondent from the suit land*
3. *Costs of the suit.*
4. *Any other reliefs that may deem fit and just to be granted by the tribunal.*

Mr. Mruma went further to submit that in resolving the raised issues, the tribunal considered the evidence of both parties and was satisfied that evidence of the applicant proved the first issue. That, it was stated in the judgment that evidence of other witnesses of the applicant corroborated evidence of the applicant that he had purchased the suit land and the appellant was a witness in that purchase. That, the tribunal reached at that correct decision by relying on exhibit P2 (Sale agreement) the evidence which was heavier than that of the appellant herein. That, the appellant instead of proving ownership of the suit land, she alleged that she was the wife of the applicant without tendering any exhibit to prove ownership of the suit land. That the tribunal relied on the case of **Hemed Said vs Mohamed Mbilu** (supra) in which Hon. Sisya J (as he then was) held that:

> *"According to law, both parties to the suit cannot tie. But the person whose evidence is heavier than that of the other is the one who must win."*

Mr. Mruma alleged that in this case evidence of a sale agreement which proved purchase of the suit land was heavier than the evidence of the appellant which was proving marriage instead of ownership of the suit land. It was the opinion of the learned counsel that if the appellant wanted to prove that she had a share in the suit land as a wife of the respondent, she should have proved by tendering judgment of the court proving that she was a wife of the respondent. Unfortunately, the appellant failed to prove her share or joint ownership of the suit land. That, the respondent tendered a marriage certificate which was admitted as exhibit P1 which shows that Nesta Mzava was the wife of the respondent. Therefore, the appellant should have proved her marriage with the respondent before a court of competent jurisdiction and not a Land Tribunal.

Concerning the issue that the respondent did not state the source of income for buying the suit land, Mr. Mruma submitted that, such issue was not among the raised issues before the trial tribunal. He argued that since the respondent stated before the trial tribunal that he was a police officer then it is hard to believe that a Police Officer cannot earn Tshs 4,000,000 for buying land.

Furthermore, Mr. Mruma contended that the appellant tendered a bank statement showing cash withdrawal which is not proof that the withdrawn money was for buying the land. In that regard, it was the opinion of Mr. Mruma that the trial tribunal was correct to reach at its decision which was backed up by the evidence of the respondent.

Regarding the issue that the tribunal raised an issue *suo motto* without giving parties an opportunity to submit on the raised issue, Mr. Mruma explained that at page 8 of the judgment of the trial tribunal 2nd

paragraph, the tribunal ordered the appellant to be paid compensation at the tune of 20% of the disputed house after valuation. Thus, the trial tribunal did not raise a new issue, but it issued an order. Mr. Mruma was of the view that the said order was unlawful as the awarded relief was not pleaded. That, the said order contravened the law which provides that a party cannot be awarded what he has not prayed for. That, it is obvious that after the trial tribunal had declared the respondent as a lawful owner, it should have not ordered compensation to the appellant as it was contrary to the law. Reference was made to the case of **New Drop Co. Ltd vs Ibrahim Simwanza, Civil Appeal No. 244 of 2020** (CAT) at page 11 of the judgment, 1st paragraph, 4th line where it was held that:

> *"It is trite law that, as a general rule, reliefs not founded on the pleadings, and which are not incidental to the specific main prayers sought in the plaint should not be awarded."*

Also, the learned advocate for the respondent supported the above principle by referring to the case of **Simac Limited vs TPB Bank PLC, Civil Appeal No. 171 of 2018**, CAT at page 7, second paragraph where it was held that:

> *"We are of the considered view that, it was improper for the High Court to grant a relief on specific performance of the contract which was not sought by the appellant."*

It was insisted that in the instant matter the impugned relief was not pleaded neither in the application nor in Written Statement of Defence of the appellant.

It was contended further that the third relief sought by the respondent herein before the trial tribunal was costs of the case. However, no cost was granted to the respondent herein. That, at page 8 of the judgment the trial tribunal awarded six reliefs while the prayed reliefs were two only. Thus, other warded reliefs were null.

Mr. Mruma concluded that the decision of the trial tribunal was correct to the extent of the declaration of the owner of the suit land only. That, since there is no submission to the effect that there were irregularities in the proceedings of the trial tribunal, this court has powers to correct the said decision to the extent explained herein above. That, in the alternative, this court may order the case file to be remitted back to the trial tribunal so that the judgment may be composed afresh pursuant to the adduced evidence as per the case of **Andreas Komsimbili vs Adreas Kibantula, Land Appeal No. 24 of 2017** High Court at Mbeya, at page 6, third paragraph to the 4th paragraph.

In rejoinder, Ms. Joan submitted inter alia that before the trial Tribunal the issue was whether the applicant was a sole lawful owner of the suit land. According to the said framed issue, that's why during the trial the appellant based her evidence in proving joint ownership. That, she adduced exhibit like a bank statement showing where the money came from. That, the said money was withdrawn one day before the purchase of the suit land. Thus, the learned counsel opposed the allegation that it was not correct to tender a bank statement since the appellant was proving that she was a joint owner of the disputed landed property.

Also, the appellant went further by tendering loan documents showing that she was a wife of the respondent. One of her witnesses came from the Bank who did the evaluation of the disputed house.

Concerning the allegation that there were issues which were disregarded, Ms. Joan submitted that the issues were framed wrongly as the trial tribunal misdirected itself on the issue whether the disputed property was owned solely or jointly.

On the 3rd ground of appeal, it was cemented that the tribunal failed to gather all the evidence during trial. All the exhibits tendered by the appellant together with evidence of her witnesses could have resolved the first issue whether the disputed property was owned solely or jointly.

Regarding the argument that the appellant had not faulted the proceedings of the trial tribunal, Ms. Joan stated that it was not true since they had raised that issue in the grounds of appeal.

Concerning the issue of compensation of 20%, it was stated that they raised the same as ground of appeal and not relief.

Ms. Joan insisted that the appellant was regarded as a tenant by a trial tribunal without any legal proof, which led to an awkward decision.

Responding to the prayer of remitting the file back to the trial Tribunal, it was stated that such prayer should be dismissed as this court is not bound by the decision of the High Court.

On the issue of reliefs, Ms. Joan explained that they did not submit on the same in their submission in chief. She prayed the said issue to be disregarded.

In her conclusion, Ms. Joan prayed the court to quash and set aside the decision of the trial and allow the appeal. She insisted that they did not pray the appellant to be the owner of the suit land.

I have keenly considered the the grounds of this appeal, submissions by the learned counsels of both parties and trial Tribunal's records. I am aware that this being the first appellate court, the court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact if necessary. This position was held in the case of **Future Century L.T.D v. Tanesco, Civil Appeal No.5/2009** in which the Court of Appeal held that:

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.*

The first ground of appeal is in respect of evaluation of evidence and exhibits tendered before the trial tribunal. In resolving this ground, I will be guided by the ever-cherished principle of law that in civil cases the standard of proof is on the balance of probabilities. In the case of **Ernest Sebastian Mbele vs Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168** [TANZLII] at page 8, the Court of Appeal stated that:

> *"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its*

existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6."

Also, in the case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama (Civil Appeal No. 305 of 2020) [2021] TZCA 699 (29 November 2021) [Tanzlii]** at page 14 the Court of Appeal observed that:

"It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

Before the trial Tribunal, the issue for determination was whether the applicant/ respondent herein was the sole owner of the disputed property.

It was the duty of the respondent to prove on balance of probabilities that indeed he was the sole owner of the disputed property. To make it clear, the respondent cannot shift the burden of proof to the appellant, until he discharges his burden.

The trial tribunal at page 7 of its judgment was of the view that the disputed property belonged to the respondent herein since his evidence was supported by the witnesses and sale agreement (Exhibit P2). On part of the appellant, the trial Chairman faulted her evidence on the reason that there is no evidence to support that the appellant was the purchaser but there is evidence that she was the witness of the purchaser.

I have revisited the entire proceedings and I am of considered opinion that the trial Tribunal did not properly evaluate evidence of the appellant.

Therefore, as stated earlier this court is bound to re-evaluate the entire evidence and come up with its own findings.

Before the trial tribunal, the applicant/the respondent herein called nine witnesses whose evidence was to the effect that the respondent was the one who purchased the said property as per **exhibit P2.** In addition, the witnesses testified that the respondent was in the company of the appellant who signed the sale agreement as a witness.

On part of the appellant herein, she tendered a bank statement to support her evidence that one day before the sale, she withdrew the money for the purpose of buying the said plot. The respondent did not tender any exhibit to substantiate the source of the money he used to buy the said plot.

From the entire evidence, I have discovered that the appellant and the respondent had some sort of relationship though I am not concluding that they were husband and wife. This is evidenced by DW3 and DW5 whose evidence was to the effect that the respondent herein took a loan from Akiba Commercial Bank and the appellant witnessed the said loan as a spouse. That, they knew the appellant as the spouse of the respondent herein. DW4 testified that she is a pastor who was invited to bless the plot in 2009. Also, **exhibit D2** are pictures which show that the appellant and the respondent attended some occasions together particularly the respondent's graduation.

Apart from the above evidence, some of the respondent's witnesses testified that since 2013 the appellant resides at the disputed plot. During cross examination at page 14 of the typed proceedings, AW5 stated that

he used to see the parties going to the disputed property during construction.

The above noted evidence of the appellant cannot be ignored at all in proving the fact that the appellant is joint owner of the disputed property. The respondent tried to assert that the appellant was the tenant of that house. However, he contradicted himself by stating that the appellant was a family friend. Apart from that, no lease agreement was tendered to support the allegation that the appellant was a tenant. At page 6 of the typed proceedings the respondent admitted that they had a union agriculture with the appellant. At this juncture, I wish to declare that it sounds funny and interesting that a tenant was awarded 20% of the value of the house.

With due respect, although the learned trial Chairperson was not bound by the opinions of the two assessors who presided with him, it seems the lady assessors captured very well evidence of both parties. Ms Sarah Lukindo (assessor) in her opinion stated inter alia that:

> *"- Baada ya kuanza taratibu za ujenzi na kukamilika 2010 akahamishiwa Mwanza alimwacha mjibu maombi akiishi hapo Pamoja na Godfrey Semmba na walisimamia hakuna mwanamke mwingine aliwahi kuishi hapo.*
>
> - *Kuna picha za kuthibitisha urafiki wao ulikuwa wa karibu sana na alimtambulisha kwenye sherehe na kwa wazazi wa mleta maombi inaelekea walikuwa na malengo ya kuishi kama mume na mke."*

Ms Sarah E. Mchau (assessor) among other things was of considered opinion that:

"– Ni wazi kua kulingana na Ushahidi uliotolewa na pande zote mbili unaonyesha wazi kua wadaawa ni watu wenye mahusiano ya karibu sana na nyumba inayogombaniwa kulingana na Ushahidi inaonyesha kupatikana kwa juhudi na nguvu zao wote wawili.

- *Pia mjibu maombi anaonekana kuimiliki na kuishi kwenye nyumba hiyo kwa miaka mingi zaidi ya mwombaji tena bila ya kulipa kodi."*

Based on the above findings, I hereby quash and set aside the judgment of the trial Tribunal. My scrutiny of evidence as the first appellate court finds that the respondent failed to prove that he was the sole owner of the disputed property. Thus, I allow this appeal with costs.

It is so ordered.

Dated and delivered at Moshi this 10th day of July 2023.

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

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

10/07/2023