

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 19 OF 2023

*(C/f Application No.47 of 2017 in the District Land and Housing Tribunal for Arusha
at Arusha)*

VICTORIA LUCIA CHIWANGU APPELLANT

Vs

ELINAMI RUMISHAEL TEMU.....1ST RESPONDENT

HILLARY TEMU.....2ND RESPONDENT

JUDGMENT

Date of last order: 4-7-2023

Date of judgment:17-7-2023

B.K.PHILLIP,J.

Aggrieved with the judgment of the District Land and Housing Tribunal for Arusha at Arusha (Henceforth "The DLHT"), the appellant herein lodged this appeal on the following grounds;

- (i) That the trial tribunal erred in law and in fact in holding that exhibits P1, P2, P3, P4, P5, P6 and P7 lack evidential value and do not prove the appellant's ownership of the disputed land.*
- (ii) That the trial tribunal erred in law and in fact in holding that it was important for the land register or its part to be brought before the trial tribunal.*

- (iii) *That the trial tribunal erred in law and fact in holding that Leopold Mutembei's case could not be used in the circumstances of the appellant's case.*
- (iv) *That in the absence of any evidence to the contrary the trial tribunal erred in law and in fact in holding that the appellant is not the owner of the disputed land.*
- (v) *That the trial tribunal erred in law and in fact in holding that there is no concrete evidence to prove appellant's ownership of the disputed land.*
- (vi) *That the trial tribunal erred in law and in fact by not finding that the respondents have trespassed into the disputed land.*

A brief background to this appeal is as follows; The appellant herein instituted a case at the DLHT against respondents herein vide Application No.47 of 2017 , claiming that she is the lawful owner of land identified as Plot 313 Block "F" located at Njiro within Arusha Municipality, with Certificate of Title No.9045, (Hereinafter to be referred to as " the suit property"). According to the contents of the applicant's amended application, it was the appellant's case that she purchased the suit property on the 15th September 2009 from one Magreth Ololoisolo who was the administratrix of the estate of her late husband Abraham Ololoisolo, the original owner of the suit property. After being appointed as the administratrix of the her late husband's estate, Magreth Ololoisolo transferred the ownership of the suit property into herself and thereafter she sold the same to the appellant in her capacity both as the administratrix of the estate of the late Abraham Ololoisolo as well as the beneficiary of the deceased's estate. After purchasing the suit property the appellant successfully

transferred the ownership of the same into her name. Upon obtaining a building permit from Arusha Municipal Council, she started effecting developments on the suit property by building a fence and connecting water facilities. The process for transfer of the ownership of the suit property was completed in 2011. In 2010 the respondents who are consanguinity relatives trespassed into the suit property. They demolished the fence she had built therein and constructed a residential house, and are staying there claiming that they purchased the suit property from one Elifas Banana Mollel who had been issued with a Certificate of Title No.25293, L.O.No. 333307 which was found out to be fake/ unauthentic. She made a close follow up on the respondents' intrusion into the suit property and several meetings were held at the Police Station, Arusha Municipal Council and the office of the Assistant Registrar of Titles. After several correspondences between the parties herein and the Government officials dealing with land matters including the Assistant Registrar of Titles, the Land officer issued a declaration to rectify the Land Register and nullified the Certificate of Title No.25293,L.O No.333307 issued in the name of Elifas Banana Mollel. Consequently, the Land Register was rectified and she was recognized as the lawful owner of the suit property. The respondents were aware of the whole process which led to the rectification of the Land Register. Out of courtesy she served the respondents with a thirty (30) days notice to vacate from the suit property and demolish the structures they have built therein, but they did not heed to her notice thus , she lodged the aforestated Application No.47 of 2017 praying for the following reliefs;

- i) That declaration that she is the lawful owner of the suit property.*
- ii) An Order for demolition of the any structure and or house thereon and eviction of the respondents and all their belongings and relatives.*
- iii) Permanent injunction order be issued against the respondents, relatives, agents or any other persons acting on their instructions.*
- iv) Costs of the suit.*
- v) Any other relief the Hon Land Tribunal deems fit.*

In their joint written statement of defence the respondents vehemently denied to have trespassed into the suit property and alleged as follows; That the 1st respondent is the lawful owner of the suit property having purchased it from one Elifas Banana Mollel who had been issued with Certificate of Title No.25293, L.O. No.333307 evidencing his ownership of the suit property. The investigations conducted by Arusha Municipal Council officials and the Assistant Registrar of Titles were biased, and they were not involved. The 1st respondent was never served with any notice by the Assistant Registrar of Title as required under the law. The letter from the office of the Registrar of Titles , Moshi dated 12th October 2010 addressed to Arusha Municipal Council indicates that there was a mistake made by the Arusha Municipal Council by double allocating one plot to two different people. The current search on the ownership of the suit property reveals that the records of the Registrar of Titles in Moshi shows that

the applicant is the lawful owner of Plot No. 313 Block "E" Njiro area , Arusha. The respondents prayed for the dismissal of the appellant's application with costs. In proving her case the appellant testified as PW1 and one Alex Joseph Shita testified as PW2 whereas the 2nd respondent testified as SU1. The learned Advocates Duncan Joel Oola and Elibariki Happy Maeda testified as SU2 and SU3 respectively. The hearing of the case proceeded ex-parte against the 1st respondent because he did not enter appearance before the DLHT.

Upon receiving evidence from both sides the chairman of DLHT (Henceforth " the chairman) dismissed the appellant's application on the following grounds; **One**, the appellant's testimony and the contents of exhibit P1 (the sale agreement) are contradictory to what is pleaded in the appellant's amended application in particular on the date of purchase of the suit property.**Two**, exhibits P1 and P2 were contradictory to each other since exhibit P1 indicates that suit property's purchase price was Tshs 800,000/= whereas exhibit P2 (the transfer forms) indicates that the purchase price was Tshs 300,000/=. Exhibits P3,P4,P5,P6 and P7 lacked evidential value in proving the appellant's case because they were dependent on exhibits P1 and P2.**Three**,the appellant's failure to tender before the DLHT the Land Register allegedly rectified by the Land Officer to reflect the nullification of Certificate of Title issued to the respondent is fatal.**Four**, the appellant's failure to bring before the DLHT the person who witnessed the sale agreement in respect of the suit property is fatal pursuant to the provisions of section 70 of Evidence Act. The chairman cited the case of **Asia Rashid Mohamed Vs Mgeni Seif, Civil Appeal No.128 of 2011** (unreported) to support his findings.

The appeal was disposed of by way of written submissions and the same were timely filed as ordered. The learned advocates John F. Materu and Elibariki H. Maeda prepared and filed written submissions for the appellant and respondents respectively. Submitting for the 1st ground of appeal, Mr. Materu argued that the Chairman erred to disregard exhibits P1, P2, P3, P4, P5, P6 and P7. He conceded that the date of purchase of the suit property indicated in the amended application is different from the one indicated in exhibit P1 and stated by appellant in her testimony. However, he was quick to point out that the leave to amend the application that was granted to the appellant by DLHT was specifically for the rectification of the name of the 1st respondent only. He contended that the amendment on the date of purchase of the suit property was done inadvertently since the amendment which was allowed by the DLHT was on the rectification of the 2nd respondent's name only thus, the chairman was supposed to ignore the amendments done beyond what he allowed. To cement his arguments he cited the case of **Jovent Clavery Rushaka and another Vs Bibiana Chacha, Civil Appeal No. 236 of 2020** (unreported). Moreover, he argued that the chairman had no justification of basing his decision on the contents of the amended application which he did not allow. In the alternative, Mr. Materu argued that even if one decides to take into consideration the contents of the amended application, the truth is that the crux of the dispute that was before the DLHT was not based on the date of purchase of the suit property rather the legality of ownership of the suit property. He contended that it is evident that the appellant proved her ownership over the suit property since in her testimony she gave a detailed narration on how

she acquired the suit property, the process she went through until the ownership was transferred into her name and her evidence was backed up with the evidence of PW2, the Land Officer who proved that it is the appellant's name which is registered in the Land Register.

Moreover, Mr. Materu argued that in their written statement of defence and oral testimonies the respondents did not plead existence of fraud in the acquisition of the suit property by the appellant. There was no dispute that the suit property was previously owned by the late Abraham Ololoisolo, nor was it disputed by respondents that the ownership of the suit property reverted to her wife, Magreth Ololoisolo after her husband's death. Despite the variance between the appellant's testimony and the contents of exhibit P1 on the date of purchase of the suit property one hand, and the contents of the amended application, the same did not affect the appellant's ownership since it was the ownership of the suit property which was the epicentre of the dispute between the parties and not the date of purchase of the suit property, contended Mr. Materu and in cementing his arguments he cited the case of **James Funke Ngwagilo vs Attorney General (2004) TLR 161, CAT**. He insisted that the issue in dispute was not on the date of purchase of the suit property nor was it on the sale agreement rather, it was on whether the appellant was the lawful owner of the suit property. He contended that his reasoning stated herein above caters for the Chairman's findings that the appellant's testimony was at variance with the pleadings.

Mr. Materu faulted the chairman for discarding exhibits P1 and P2 on the reason that they were contradictory to each other since they

indicated different purchase prices in respect of the same property. He contended that the purchase price had no bearing in the appellant's ownership of the suit property. He added that once a person is issued with certificate of title the transfer forms ceases to apply.

Furthermore, Mr. Materu faulted the Chairman's findings that the testimonies of PW1 and PW2 were contradictory on the capacity of the seller of the suit property. He contended that the same was misconceived because both PW1 and PW2 testified that Magreth Ololoisolo sold the suit property in two capacities, first as the administratrix of the estate of the late Abraham Ololoisolo and second as a beneficiary. He was of the view that a wife can be both a beneficiary and administratrix of the deceased estate. He was emphatic that notwithstanding the fact that the appellant had transferred the suit land into her ownership, subject to operation of the law as per section 71 of the Land Registration Act, Cap 334 (R.E 2019) she was capable of selling it in her own capacity since it was registered in her name however, in the transfer form she indicated that she transferred the suit land into the appellant in her capacity as the personal legal representative of late Abraham Ololoisolo.

With regard to the chairman's findings that the appellant's failure to summon material witnesses, including the seller of the suit property and learned Advocate W.A. L. Mirambo who attested exhibit P1(the sale agreement) is fatal, Mr. Materu pointed out that DHLT's records show that on 28th April 2020 after the appellant had testified her advocate informed the DLHT that the appellant was intending to summon two witnesses. On 19th October 2020, PW2 gave his

testimony, but he did not complete giving his evidence because the document he sought to tender before the DLHT was objected to thus, by consensus the hearing was adjourned so that the appellant's advocate could comply with the proper procedure for tendering documentary evidence. The case was fixed for hearing on 1st December 2020 of which PW2 was supposed to continue giving his testimony. However, on 1st December 2020 when the case was called for hearing the appellant did not enter appearance before the DLHT on expectation that her advocate would appear before the DLHT and continue with the hearing of the case scheduled. Unfortunately, the appellant's advocate did not enter appearance before the DLHT without any notice. Consequently, the 2nd respondent moved the Chairman to mark the appellant's case closed. The 2nd respondent's prayer was granted and the Chairman marked the appellant's case closed reserving only the right for the 2nd respondent to cross examine PW2. Consequently, no other witnesses from the appellant's side were allowed to give their testimony before the DLHT. Mr. Materu contended that the appellant intended to summon the persons who signed exhibit P1 to testify before the DLHT but her right to bring them was curtailed by the DLHT. He was emphatic that the provisions of section 70 was not contravened because the DLHT denied the appellant the opportunity to summon all her witnesses. He pointed out that the case of **Asia Rashid Mohamed** (supra) relied upon by the chairman in his judgment cannot be applicable in the case at hand because in that case there was allegations of fraud. Moreover, Mr. Materu contended that the holding in that case is to the effect that the absence of the evidence of the attesting witnesses is not fatal if there are explanations for the failure to summon him/her. He insisted

that in the case at hand there are explanations behind the appellant's failure to summon the person who attested exhibit P1. Thus, the Chairman had no justification to discard the exhibits tendered by the appellant which were admitted in evidence without any objection from the 2nd respondent.

In rebuttal, Mr. Maeda started his submission by challenging the admission of exhibits P1,P2,P3, P4, P5, P6 and P7.He contended that they were wrongly admitted as exhibits because they were not annexed to the amended application. Mr Maeda argued that the aforementioned exhibits were annexed to the original application which was abandoned by the appellant upon filing the amended application. He was of the view that by filing the amended application, the original application ceased to exist and had no legal effect. The DLHT was not supposed to consider the documents which were annexed to the original application as part of the DLHT's records. To cement his arguments he cited the case of **Airtel Tanzania Ltd Vs Ose Power Solutions Limited, Civil Appeal No. 206 of 2017** (unreported).

Moreover, Mr. Maeda was in agreement with the findings of the Chairman that exhibits P1, P2, P3, P4,P5,P6 and P7 lacked evidential value and did not prove the appellant's ownership of the suit property. He contended that the analysis of the appellant's evidence made by the Chairman was correct since the amended application shows that the suit property was purchased on 15th September 2015 whereas the sale agreement (exhibit P.1) indicates that the suit property was purchased on 3rd September 2015.Mr. Maeda refuted Mr. Materu's argument that the chairman was supposed to ignore the amendment on the date of

purchase of the suit property indicated in the amended application because the same were made without the leave of the DLHT. He insisted that parties are bound by their pleadings and a party to a case is not allowed to depart from his/ her pleadings. To cement his arguments he cited the case of **Yara Tanzania Limited Vs Ikuwo General Enterprises Limited, Civil Appeal No. 309 of 2019** (unreported). Similarly, Mr. Maeda argued that the difference on the purchase price in exhibits P1 and P2 pointed out by the Chairman in his judgment is fatal since the purchase price is vital in establishing the appellant's ownership of the suit property.

As regards the application of section 70 of the Evidence Act and the case of **Asia Rashid Mohamed** (supra), Mr. Maeda contended that the same are relevant in this case since in the absence of the testimony of the learned Advocate W.A.L. Mirambo who attested the transfer form tendered before the DLHT as exhibit P2, the same is incompetent evidence in proving the appellant's ownership of the suit property in terms of section 70 of the Evidence Act. Moreover, he refuted Mr. Materu's argument that the appellant was curtailed by the Chairman from summoning all her witnesses because she was given opportunity to summon them but failed to do so. He insisted that the fact that the documentary evidence tendered by the appellant were admitted as exhibits without any objection does not make them credible or attain more evidential value.

In rejoinder, Mr. Materu raised a legal issue couched as follows; *whether the counsel who appeared in court and drafted the reply submission for the respondents, acted within the professional conduct of an advocate.*

Referring this court to pages 47 to 51 of the typed proceedings of the DLHT, Mr. Materu contended that Mr. Maeda was the 2nd respondent's witness in application No. 47 of 2017 at the DLHT, the subject of this appeal and on 29th May 2023 he appeared before this court as the Advocate for the respondents. He was of the firm view that there is clear breach of the Advocates (Professional Conduct and Etiquette) Regulations, which governs Advocates' conduct alongside with the Advocates Act Cap.341 (R.E. 2019). He contended that Regulation 96(7) of the Advocates (Professional Conduct and Etiquette) Regulations, G.N. No. 118 of 2018 strictly prohibits an Advocate who appeared in a case as a witness to act as an Advocate once such case goes for an appeal. He cited the case of **Jaferali and Another Vs Borrisow and Another (1971) 1EA 165**, to bolster his arguments and urged this court to expunge from the court's records the reply submission filed by Mr. Maeda on the ground that the same has been filed in blatant violation of the law. He was of the view that this appeal should be determined ex-parte and implored this court to issue appropriate orders to remedy the deliberate infringement of the law committed by Mr. Maeda.

Furthermore, Mr. Materu reiterated his submission in chief. He insisted that the amendment made in the amended application beyond what was allowed by the DLHT were not supposed to be taken into consideration by the Chairman in his judgment.

With regard to Mr. Maeda's contention that exhibits P1, P2, P3, P3, P4, P5, P6 and P7 were wrongly admitted as exhibits, Mr. Materu contended that the same is misconceived because all exhibits admitted by the DLHT

featured in paragraph six (6) of the original application. He distinguished the case of **Airtel Tanzania** (supra) cited by Mr. Maeda from this case on the ground that in case of **Airtel Tanzania** (supra) there was objection to the admission of the exhibit in question whereas in the appeal at hand the exhibits in question were admitted without any objection thus, raising an objection on their admission at this stage is pure afterthought.

In addition to the above, Mr. Materu argued that the issue on the admission of exhibits P1 –P7 inclusive was not raised and determined at the trial before the DLHT, therefore the same cannot be raised at this stage since the law bars this court from entertaining new issues which were not dealt with at the trial. To cement his arguments he cited the case of **Raphael Enea Mngazija (Administrator of the estate of the late Enea Mngazija) Vs Abdallah Kalonjo Juma , Civil Appeal. No.240 of 2018** (unreported). Moreover, he pointed out that the respondent did not challenge the decision of the DLHT by way of a cross appeal. Thus, challenging it at this stage on the basis of admission of exhibits is nothing but an afterthought.

Having analyzed the rival arguments raised by the learned advocates appearing herein in respect of the 1st ground of appeal, I have noted that there is a preliminary issue which I am supposed to deal with before embarking on the determination of the merit of the 1st ground of appeal, to wit; *whether this court should expunge from the court's records the reply submission prepared and filed in court by Mr. Maeda on the ground that the same was prepared in contravention of the law governing the legal practice and Advocates' conducts since Mr. Maeda*

was a witness for the respondent in Application No.47 of 2017 at the DLHT, the subject of this appeal. However, for the reasons which shall be put into light later in this judgement, I shall not deal with the preliminary issue stated herein above.

It is a common ground that the appellant's case was closed by the order of the chairman. The proceedings of the DLHT at pages 23 -30 inclusive, reveal that on 19th October 2020 when PW2 was giving his testimony he prayed to tender before the DLHT a documentary evidence. His prayer was objected by the 2nd respondent on the ground that the document intended to be tendered in evidence was different from the copy of the document that was served to him (2nd respondent). The Chairman sustained the objection. The advocate for the appellant prayed for adjournment of the hearing of the case so as to comply with the legal procedures by serving the 2nd respondent with a copy of the document intended to be tendered in evidence. The prayer was granted and the hearing of the case was scheduled to continue on 1st December 2020 and 28th January 2021. On 1st December 2020, when case was called for continuation of the hearing of the appellant's case, the appellant and her advocate were absent. The 2nd respondent informed the Chairman that he was not served with any document by the appellant's advocate. He prayed for an order for closure of the appellant's case. Thereafter the Chairman made the following orders; **One;** the appellant's case marked closed but subject to cross –examination and further re-examination, if any, and inquiries of the assessors to PW2. **Two,** hearing of the defence evidence on 28th January 2021. When the case called for hearing on 28th January 2021, the appellant's advocate, informed the chairman that he had already filed an application for

setting aside the DLHT's order made on 1st of December 2020, in which it ordered the closure of the appellant's case. Consequently, the hearing of the case was adjourned to 22nd February 2021 to await the decision of the application for setting aside the order for closure of the appellant's case. According to the DLHT's records, the appellant's application for setting aside the DLHT's order made on 1st December 2020 was application No.323/2020. The DLHT's records reveal that the hearing of the case was adjourned several times to await the determination of the appellant's application aforesaid up to 15th July 2022 when hearing of the case resumed and PW2 was summoned to appear before the DLHT for cross examination and re-examination as ordered by the chairman on 1st of December 2020, and on the same day the defence case was opened. The 2nd respondent started giving his testimony.

At this juncture, it is opportune time to explain the glaring and fatal irregularities in the proceedings of the DLHT. The DLHT's proceedings are silent on whether the appellant's application for setting aside the Chairman's order for the closure of the appellant's case was determined. Since the hearing of the case had been adjourned for a long period to await the decision of the aforesaid application and the same had a great bearing in the determination of the case, in my considered opinion it was imperative for the Chairman to state the outcome of that application in the proceedings if at all the same was determined. Going by the DLHT's records, I can safely say that the appellant's application aforesaid was not determined since the DLHT's record is silent on the same. Thus, under the circumstances, it is obvious that the DLHT erred to continue with the hearing of the case

while the appellant had already moved it vide application No.323/2020 to set aside its order so that she can bring before the DLHT all her witnesses to give their testimonies.

For the sake of argument, assuming that the appellant's application aforesaid was heard and dismissed, and the DLHT continued with the hearing as it did, in my considered view the dismissal order would be irregular and erroneous. To my understanding, the right to be heard which entails a fair hearing by allowing all parties to a suit to bring their witnesses in court/tribunal among other things, is fundamental. [See the case of **Mbeya –Rukwa Autoparts and Transport Ltd Vs Jestina Mwakyoma (2003) TLR 251** and **Nuta Press Limited Vs Mac Holdings & Foam Industries Limited , Civil Appeal No.80 of 2016 (unreported)**]. In the case at hand the DLHT's proceedings reveal that the appellant's case was scheduled to continue for hearing on 1st December 2020 and 28th January 2021. The pertinent question here is; why did the Chairman issue an order for closure of the appellant's case on 1st December 2020 whereas the appellant's case was scheduled to be heard for two days, to wit; on 1st December 2020 and 28th January 2021. Be it as it may, the Chairman's order for closure of the appellant's case leaves a lot to be desired. Having in mind that the right to a fair hearing is fundamental, I am of a settled view that there was no any justification for closure of appellant's case on 1st December 2020. The hearing of the appellant's case was supposed to be adjourn to 28th January 2021 since the same was reserved for the hearing of the appellant's case as per by the order of the chairman made on 19th October 2020.

In addition to the above, it was illogical for the Chairman to close the appellant's case on 1st December 2020 and adjourn the hearing of the case to 28th January 2021 for cross examination and re-examination of the PW2 only, and deny the appellant opportunity to bring her remaining witnesses on the date which was scheduled for the continuation of the hearing of her case.

To cap it all, in his judgment the Chairman blames the appellant for failure to bring before the DLHT witnesses whom he believes were important in proving the appellant's case whereas, he is the one who closed the appellant's case and denied her the opportunity bring all her witnesses before DLHT. I wish to point out that I am alive that the Chairman of the DLHT have powers and is obliged to control the proceedings , but the same should be done properly in such a way that it does not occasion miscarriage of justice. In the case of **Gurmit Singh Vs Meet Singh and Arjan Construction Ltd, Civil Appeal No.256 of 2018**, (unreported), the Court of Appeal had this to say on the need to control proceedings fairly in order to avoid miscarriage of justice.

"...Whilst we agree with Mr. Mughwai on the need of the court to control proceedings, we hold the view that such control should done in such a manner that promotes and facilitates orderly and smooth conduct of cases within the ambit of Article 13 (6) of the Constitution.."

From the foregoing, it is the finding of this court that the proceedings of the DLHT are tainted with fatal irregularities. Under the circumstances, I cannot determine the merit of this appeal. Consequently, I do not see any plausible reasons to embark on the determination of the preliminary issue mentioned at the beginning of this judgment as well as the

grounds of appeal. I have noted that this is a protracted litigation. The original case was filed at the DLHT in 2017. It's a pity that this case has been in litigation for such long period. However, guided by the observations made by Court of Appeal in the case of **Gurmit Singh** (supra), in which it said the following;

*"We wish to preface our discussion with acknowledging the obvious but unpalatable fact that the suit remained undetermined in the High Court for as many as 16 years and four months to the date it was dismissed. We appreciate that anyone in the shoes of the High Court judge would have reason to be seriously concerned with the time the suit took in court. Nevertheless, as the court expressed itself in **Nyanza Road Works Ltd Vs Giovanni Guidon , Civil Appeal No.75 of 2020** citing **Independent Power Tanzania Limited & another Vs Standard Chartered Bank (Hong Kong) Limited, Civil Revision No.10 of 2009** (unreported), there must be a balance between expeditiousness and justice to both parties to the case. This where the old maxims we made reference to earlier on would converge and boil down to " speed is good but justice is better.."*

(emphasis is added)

For the interests of justice, I find myself constrained to nullify the proceedings of the DLHT so that justice can be done to both parties in this case thus, I hereby nullify the proceedings of the DLHT and set aside its judgment. This case shall be tried *de novo* before another Chairman. The case file shall be remitted to the DHLT forthwith. Each party will bear his/her own costs.

Dated this 17th day of July 2023


B.K.PHILLIP

JUDGE.

