IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CONSOLIDATED LAND CASE APPEAL 49 & 55 OF 2022

(Appeal from the judgment and decree of the District Land and Housing Tribunal for Moshi at Moshi in Land Application No. 69 of 2020 dated 30th day of August 2022)

MICHAEL KONDEKI LAIZER ..... APPELLANT

VERSUS

MELAU N. LUKUMAY .....1ST RESPONDENT

MAILOYA SILONGOI .....2ND RESPONDENT

JUDGMENT

25th May. & 26th July 2023

A.P.KILIMI, J.:

This is a cross appeal whereby initially Michael Kondeki Laizer filed this appeal after being aggrieved by the decision of Moshi District Land and Housing Tribunal of Moshi at Moshi in Land Application No. 146 of 2019. At the tribunal it was the Michael Kondeki Laizer filed an application alleging the respondents have trespassed to his land, thus praying for Judgment and decree to the following orders; a declaration that is the legal owner of

suit land, a declaration that the sale between the respondent was null and void, vacant possession of the said suit land, permanent injunctions for respondent not trespass to the suit land, general compensation and costs of the suit.

Having heard both parties on merit, the district land and Housing tribunal in its decision was of the view, both parties possess legal title to the land acquired to them concurrently, thus it failed to ascertain who acquired first, therefore concluded that it was double allocation to them, and ordered that the said suit land be measured by land expert from Hai district then be divided equally between the two, the applicant therein and bonafide purchaser (first respondent).

After the above decision, both parties decided to challenge it before this court. In moving this Court, MICHAEL KONDEKI LAIZER relied on the following grounds of appeal:

1. That, the Honourable Tribunal Chairperson erred in law and fact for failure to act judicially by failing to pronounce the owner of the suit land instead drawn new boundaries and partitioned the suit land in question with a portion for each party among the rival parties inconsistent with the original claim (s) of the Appellant (trespass to land) and in shear disregard that, the Appellant own the whole land in dispute and left the contentious issue of ownership unsolved.

2. That, the Honourable Tribunal Chairperson erred in law and in fact for failure to deal and decide/determine on each and every independent issue framed as a result left the dispute between parties unresolved.
3. That, the Honourable Tribunal Chairperson erred in law and in fact for raising the issue of double allocation suo moto and reached to the conclusion that, there was double allocation of the suit land without affording the parties a right to be heard on that point/issue contrary to the rules of natural justice and Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977.
4. That, the Honourable Tribunal Chairperson erred in law and in fact for holding that, there was double allocation of the suit land made by Donyomuruak Village Government while the suit land was lawfully and solely allocated to the Appellant on 10th April 1998.
5. That, the Trial Tribunal Chairperson erred in law and fact for failure to find out that, the Appellant established his ownership over the suit land and the Appellant's evidence was heavier than that of the Respondents and the Appellant proved the case on the balance of probability as required by the law.
6. That, the Trial Tribunal Chairperson was wrong for failure to find out that the 2nd Respondent had no title to pass to the 1st Respondent as the 2nd Respondent has never owned or been in occupation of the suit land or been a resident of Donyomuruak Village.
7. That, the Honourable Tribunal Chairperson erred in law and in fact for failure to find out that, the 2nd Respondent admitted before clan leaders/elders to have trespassed/ invaded and wrongly sold the suit land to the 1st Respondent and the Appellant refunded the Respondents the purchase price of Tshs. 730,000/= in order to mark the dispute settled.
8. That, the Honourable Tribunal Chairperson erred in law and in fact for failure to find out that, the Appellant has been in ownership and occupation of the suit land since 1998 to date peacefully and uninterrupted.
9. That, the Honourable Tribunal Chairperson erred in law and in fact for failure to evaluate properly the evidence tendered and adduced in court as a result reached in a wrong and unjust decision.
10. That, the District Land and Housing Tribunal erred in law and facts by pronouncing judgment relying on the contradictory evidence of the Respondents and their witnesses.

In part of respondents also being dissatisfied with the decision of the trial tribunal, cross appealed in this court, and in their amended grounds of appeal have detailed the following grounds:

1. That, the Honorable Chairperson erred both in law and fact by his failure to observe, evaluate and analyze the documentary evidence presented before it by the parties to the application and hence reached erroneous decision that there was double allocation.
2. That the Honorable chairperson erred in law and fact when he stated in the judgment that upon visiting the locus in quo what was seen is the park without products or house.
3. That the Honorable chairperson erred in law and fact in relying of weak and contradictory evidence tendered by the applicant in an application No.69/2020 hence reached an erroneous decision.
4. That the Honorable chairperson erred in law and fact for his failure to consider the contradiction in the evidence by the applicant in an application No.69/2020 on the size of the land he claimed it belongs to him.
5. That the Honorable chairperson erred in law and fact for his failure in considering the contradictory evidence by the applicant in the application No.69/2020 on the alleged time of trespass.
6. That the Honorable chairperson erred in law and fact by his failure to consider the applicant's witness evidence which was in favor of the respondents in an application No.69/2020.
7. That the Honorable chairperson erred in law and fact by his failure to consider, evaluate and analyze the documents and evidence by the applicant in an application No. 69/2020 that he took action on the trespass of the land by the Appellant, while the document he so tendered was against his testimony.

8. That, the Honorable chairperson erred in law and fact for his failure to find out that, the 1st respondent established his ownership over the suit land and that the respondents' evidence was heavier than that of the appellant and the respondents proved their case at the standard required by the law.

Both parties basing of the above, prayed this court to allow this appeal by quashing and setting aside the judgment and decree of the tribunal with costs.

When this cross appeal came for hearing before me, the learned counsel Mr. Thomas Kitundu appeared for the appellant hereinabove, while Learned counsel Mr. Losyeku Kilusi appeared for all respondents mentioned above.

Arguing for first ground Mr. Kitundu submitted that, the application was claim for trespass but the tribunal divided the area for two parties and put boundaries which is contrary to the pleading and claim, which is contrary to the issue in dispute, which need to answer, who was allocated the Suitland by village authority between the applicant and second respondent. The counsel further contended that dividing the land in dispute was solomonic Judgment which is not true according to the evidence, since his client was having heavier evidence, to bolster his argument the counsel referred the case of **Hemed Said vs. Mohamed Mbili** (1984) TLR 113

and **Bakari Hussein v. Seleman Bakari** Land Appeal No. 75 of 2018 (unreported)

In regard to second ground, Mr. Kitundu contended that four issues were agreed upon to be dealt by the tribunal, but the decision did not make finding of every issue which is contrary to regulation 20(1) of Land Disputes Courts (District Land and Housing tribunal) Regulations 2003, and the cases of **Alnoor Sharif Jamal v. Barnadil Ibrahim** Civil Appeal No. 25 of 2006 (unreported) and **Hassan Mzee Mfaume vs. Republic** (1981) TLR 167.

Submitting further in respect to ground number three, Mr. Kitundu argued that the tribunal raised the issue of double allocation sua moto but did not invite parties to be heard, therefore denied the parties this fundamental rights. To buttress his stance the counsel referred the cases of **Christian Makondoro vs. TGP and AG** Civil Appeal No. 40 of 2019, **Mic Tanzanial Ltd vs. Mayunga and 4 others** Civil Appeal No. 145 of 2020 and **Exim Bank Tz Limited vs. Trulite Investment Limited and 3 others** Civil Appeal No. 446/16 of 2020. (Both unreported)

In respect to fourth ground of appeal, Mr. Kitundu contended that, according to proceeding the Michael Kondeki Laizer was allocated alone the said land in dispute, no co-ownership, therefore, the tribunal mistakenly said that they were given once together and there was no double allocation.

Submitting in respect to fifth grounds, Mr. Kitundu argued that, the witness tendered by Michael Kondeki Laizer gave the evidence which prove the same as per section 110 of Evidence Act Cap.6 R.E.2022, and prayed this court being the first appeallate court to evaluating evidence afresh and comes to its conclusion. To support his view he referred the case of **Martha Michael Wase vs. AG and 3 other** (1982) TLR 35.

The counsel further argued ground number six and seventh collectively, and submitted that according to evidence of P2, confessed that the area was sold wrongly and money returned to him, this evidence was not refuted in cross examination so it remained intact. He invited me to consider the case **Robert Maziku vs. Pange Mineral** Revision No. 36 of 2013 (unreported)

For ground number eight the counsel said the appellant used the land since 1998 undisturbed therefore by so doing the tribunal was required to declare him owner. In respect to the evidence of certificate with registration no. 298 as argued in ground number nine, the counsel submitted that its stamp was objected by the village chairman but the tribunal did not evaluate it. The counsel concluded arguing ground number ten that there were contradictions of exactly measurements of the land in dispute, Mailoya said it is 5 ½ acres, the certificate he tendered shows 5 acres while Melau said 3 ¾ acres.

In replying further to the grounds of appeal raised in cross appeal, Mr. Kitundu agreed with the argument in ground number one that the tribunal did direct improperly to draw new boundaries to the disputed land. He also partly agreed with ground number seven raised in cross appeal that the tribunal failed to evaluate evidence.

It was then Mr. Losyeku Kilusi for the respondents hereinabove submitted on cross appeal that, for ground number one which also consolidated it with ground number six, said that, the tribunal failed to evaluate documentary evidence in respect to stamps used, if could have

done so, the tribunal could have known the valid one to be D1 and forged stamp is D3.

The counsel argued for ground number two that in respect to the said land it was prohibited to be used by the order issued on 18.01.2021 in application No. 112 of 2020 for almost two years for all parties, therefore that is why the land was not cultivated due to such order.

Mr. Losyeku further consolidated ground No. 3, 4 and 5 and submitted that, there were contradictions, first to the size of the land in dispute, whether is 3 acre or 3 ¾ acre. Second time of trespass at trial it was said is in 2002 while leading stated 2015, the counsel urged this court to take these as doubts which becomes advantage to adverse party. To buttress his point, he has referred the case of **Jeremial Shenweta v.R** 1985 TLR 228.

In regard to the document marked A2, the counsel contended in ground seven that the same was contradicted by the applicant at the tribunal, since the sane stated about the applicant refusal to attend the ward tribunal which is different to what he alleged in the pleading that the

said document informed the tribunal that it had no jurisdiction. The Counsel in ground number eight concluded that whoever alleges must prove, and standard of prove in land cases is the balance of probabilities, He therefore see the evidence of two respondents together with their witnesses were heavier than the evidence of the Applicant at trial, and prayed this court to refer the case of **Magambo J. Masata and 3 other v. Ester Amos Bilay and 3 other** Civil Appeal No. 199 of 2016 CAT at Dsm (Unreported).

I have considered the submissions on grounds raised by both learned counsels, I have noted they have common claims in respect to the tribunal decision on the following; First, both alleges that the tribunal did direct improperly to draw new boundaries to the disputed land. Second, both alleges the tribunal did not evaluate each and every issue agreed in determination of the dispute. And third, the allege the tribunal to raise an issue sua moto but failed to invite them to respond on the said issue raised.

In my view, the above three point of common claims by the parties, will also be my starting point in deliberating this appeal before me. Commencing with failure of the tribunal to resolve issues framed, it is an

elementary principle of pleadings that each issue framed should be resolved. See cases of **Joseph Ndyamukama vs N.I.C Bank Tanzania Ltd & Others** Civil Appeal no. 239 of 2017 (unreported) and **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid,** [2005] T.L.R. 61. In the case of **Sheikh Ahmed Said** (supra) it was held that:

> *"It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect"*

Also, in the case of **Wilfred Maro vs. Sarah Lotti Mbise & others** Civil Appeal No. 64 of 2020 CAT at Dsm. (Tanzlii), the court insisted on the legal aspect of framing issues and observed that;

> *"Framing of issues in civil matters is a requirement of law. In terms of Order XIV rule 1(5) and 3 of the Civil Procedure Code, [Cap 33 R.E.2019], the trial court is required after ascertaining matters of facts and law to which the parties are at variance, frame issues which are to be recorded, on which the decision of the case concerned would be based. This is intended to narrow down the controversy at issue to enable the parties confine themselves on it when adducing their evidence and thereby guide the court in reaching to its decision. In other words, the purpose of framing issues is to narrow down the matter in controversy so that the parties*

may lead evidence which is confined to issues on which the right decision of the case would depend."

At the tribunal as at appears at page 4 of the typed proceeding, on 1st day of September, 2020 parties agreed on the following grounds;

1. *"Who was allocated the suit land by village authority between the Applicant and 2nd Respondent.*
2. *Whether the sale agreement of the suit land between Respondent was lawful.*
3. *Who has been in physical occupation of the suit land since 2001.*
4. *To what relief(s) are parties entitled to."*

According to the judgment delivered the tribunal totally failed to direct itself in respect to ground issue number one, two and three. Instead proceeded to observe that there was criminality in respect of issuing certificate of owning the said land, but despite of observing so, the tribunal continued to rule out notwithstanding. For easy reference, hereunder I reproduce the very part in such respect when the trial tribunal judgment stated;

"Hati aliyopewa mdai mesainiwa na ina namba ya usajili wa kijiji kwa Na. 294.

Hati aliyopewa Meiloya Silongoi imesaiwa ina namba ya usajili 298.

Namba imepingwa no Mwenyekiti wa Kijiji wa sasa aliyekuja kutoa ushaidi akieleza kuwa namba sahihi ni 294 ya mdai.

Hata hivyo hati zote hazielezi mipaka ya eneo aiilopewa muhsika hivyo kuleta utata juu ya uhalali wa hizi hati. Ni wazi kwamba hali hii inaonyesha Kamba kuna hali ya jinai ndani yake kwani hati zimetolewa siku moja kisheria eneo moja kupewa watu wawili tofauti (double allocation) Katika hali hii wanaoathirika ni wadaawa na wanaobeba iawama za jambo hili ni Serikali ya Kijiji cha Donyomuruak kinachoonyesha kilitoa hati mbili tofauti kwa wakati mmoja."

Accordingly, after saying the above, the tribunal decided to divide the land in dispute without considering the above stated issues. Since, it is cardinal principle in our jurisdiction that the decision of the court must be based on the issues framed by the court and agreed upon by the parties and that failure to do so may have the effect of miscarriage of justice. This court cannot step into the shoes of the trial tribunal and determine the issue that was not determined by it except on the issue which is based on a point of law. (See **Hood Transport Company Limited vs. East African Development Bank,** Civil Appeal No.262 of 2019 (unreported).

The three issues skipped above by the trial tribunal need to be ascertained by evidence, therefore are not points of law as envisaged above, thus cannot be dealt at this level, and I think the rationale is that the trial tribunal had wide opportunity to receive evidence and demeanors of witnesses than this court had. In view thereof, I wish to fortify this stance by referring the case of **Mantra Tanzania Ltd vs. Joaquim Bonaventure** (Civil Appeal No.145 of 2018) [2020] TZCA 356; (17 July 2020) where the Court of Appeal observed that: -

> *"On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an* ***appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter."***
>
> [Emphasis added].

In the circumstances, I am settled that failure to resolve the three key issues raised for determination vitiated the impugned decision and it has left crucial points agreed to be resolved. I thus find this ground raised by both parties meritorious and sustained.

The second ground which also was raised by both appellant and respondents, is the act of the tribunal to raise an issue *sua moto* but failed to invite to respond on it. For easy reference I wish to reproduce the part of the Judgment of the tribunal raised new issue;

> *"Kwakuwa hiio kosa* ***(double allocation) lilifanyiwa siku moja kuna ugumu wa kujua ni nani alipewa kwanza,*** *hivyo natoa hukumu kama ifuatavyo:-*
> *- Kwakuwa eneo la mgogoro mdai anadai ni ekari 3 ½ na mdaiwa Na. 1 anadai ni ekari 5½ hata hivyo hati yake inaonyesha ni ekari 5, eneo lote la mgogoro Kusini mwa barabara Ilplmwe no mtaalam toka Halmashauri ya Wilaya ya Hai kisha ligawanywe nusu kwa nusu kati ya mdai na mdaiwa Na.1 (mnunuzi)"*
>
> [Emphasis added].

In my view of the above, I subscribe to both counsel when argued that the issue of double allocation as shown above was raised sua moto by the trial tribunal, and according to the reasoning above of the tribunal said it was difficult to know who was given first the land from the village counsel. I think this was a misdirection as rightly said by the learned counsel. In my view the findings, may be, could have been different if the tribunal could have allowed the same be addressed by the parties in dispute, moreover, I

think it cannot be said they were issued at the same time with those different registration numbers, I thinks prudent dictates the tribunal could summoned even court witness from Government Authority whom I think is the custodian of village registration register to ascertain which of the two number was true. Therefore, proceeding without hearing them, in my opinion amounted to the fundamental breach of the right to be heard.

I wish to bolster the above by guidance in the case of **Scan-Tan Ltd v. The** Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported) when the court observed that;

> *"If the court amends an issue or* ***raises an additional issue, it should allow a reasonable opportunity to the parties*** *to produce documents and lead evidence pertaining to such amended or additional issue..."*
>
> [Emphasis added].

In the instant case, it is apparent the parties were not accorded the right to be heard, by failure of the tribunal to invite them to address in respect to introduced new issue of double allocation. Therefore, by doing so this was gross misguided which cause the decision arrived by the tribunal to

fatally defective. I wish to buttress this stance by the case of **Abbas Sherally and Another v. Abdul S. H. M. FazaI boy,** Civil Application No. 33 of 2002 (unreported) the Court observed that:

> " *The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified,*** *even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.* "
>
> [Emphasis added].

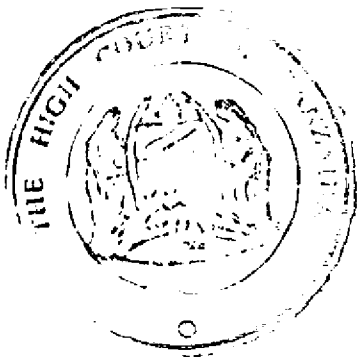
(See also Article 13 (6) (a) of the **Constitution of the United Republic of Tanzania, 1977**).

In the premises, I find such omission amounted to a fundamental breach which occasioned a miscarriage of justice to the parties. Furthermore, I find that the determination of these two grounds of appeal are sufficient to dispose of this appeal and thus I find no need to consider and determine the remaining grounds of appeal.

In conclusion thereof, on account of what we have endeavored to discuss hereinabove, I am settled in my mind that the decision of the trial Tribunal is a nullity and consequently I quash the entire proceeding and order that, the matter be remitted back to the District Land and Housing Tribunal for resolution of the dispute between the parties before another Chairman and another set of assessors. In the circumstances, I make no order for costs.

It is so ordered.

DATED at MOSHI this 26th day of July 2023.



A. P. KILIMI

JUDGE