**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA SUB -REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 5 OF 2022**

*(Originating from Land Application No. 27 of 2015 before the District Land and Housing Tribunal for Manyara at Babati)*

**KEHA JUMA .....APPELLANT**

**VERSUS**

**ANNA BAHA ..... RESPONDENT**

**JUDGMENT**

04th May & 27th July 2023

**KAMUZORA, J.**

The Respondent herein was the Applicant before the District Land and Housing Tribunal for Manyara at Babati (hereinafter to be referred to as the "Trial Tribunal") where she sued the Appellant claiming land measuring 15 acres located at Basonyagwe village, Hydom Ward within Mbulu district (herein to be referred to as the suit land). The Respondent claimed to be the lawful owner of the disputed piece of land which was allocated to her by her grandfather. It was alleged that the Appellant encroached over the suit land forcing the Respondent to institute a suit before the trial tribunal. It was the Appellant's defence before the trial

tribunal that the suit land is lawfully owned by him after being allocated the same by his father.

The trial tribunal decided in favour of the Respondent by declaring her the lawful owner of the suit land. The Appellant being dissatisfied with the decision Trial Tribunal preferred this appeal on the following grounds: -

1) *That, the trial tribunal grossly erred in law by entertaining application No. 27/2015 while the same is res-subjudice as there was Application No 163 of 2011 between the same subject matter and the parties herein, wrongly struck out by the trial tribunal on 19th March, 2015.*

   *Alternatively, that, the order striking out the application No 163 of 2011 which resulted into Application No 27/2015 was illegally entered since both prosecution and defence already closed their case.*

2) *That, the trial tribunal erred in law and facts by allowing the PW1 to sue and testify on behalf of the Respondent herein based on the power of attorney presented whilst the said power of attorney did not clearly state what kind of sickness(disease) prevented the said Respondent to prosecute her suit.*

   *Alternatively, that, the power of attorney presented by the Respondent before the trial tribunal was defective for not disclosing the relationship between the Respondent and PW1.*

3) *That, the trial tribunal erred in law and fact by deciding in Respondent's favour while she failed to prove the case to the*

*required standard and the evidence of PW1 self-contradicts and the same is based on hearsay evidence.*

4) *That, the trial tribunal's proceedings are nullity for self-contradicting and the parties herein were not afforded an opportunity to accept or reject the successor chairman.*

Hearing of the appeal was conducted by way of written submissions and as a matter of legal representation, the Appellant was ably represented by Mr. Omary Gyunda, learned advocate whereas the Respondent enjoyed the service of Mr. Abdallah Kilobwa, learned advocate. The Appellant abandoned the first ground of appeal and submitted on the remaining grounds.

Submitting in support of the 2nd ground the counsel Appellant argued that despite the fact that the Respondent did not appear and testify before the trial tribunal, still the matter was decided in favour of the Respondent. He contended that the power of attorney used was not tendered during hearing and the same did not disclose or attach any medical proof to the effect that the Respondent was sick and could not be able to attend and testify in court. That, section 110 and 111 of the Evidence Act Cap 6 R.E 2019 requires that he who alleges must prove. The Appellant's counsel was of the view that failure to attach medical proof to the power of attorney renders the power of attorney legally

unacceptable and the same ought to have been rejected by the trial tribunal.

The Appellant's counsel added that the law of evidence prohibits holder of the power of attorney from testifying on behalf of the person issuing the same. For this reference was made to the case of **Oloni Andendekisye Mwantila & another Vs. Pride Tanzania Ltd 2 other,** Land Appeal No 22 of 2011 HC at Mbeya (Unreported).

Alternatively, the counsel for the Appellant submitted that the power of attorney was incurably defective for its failure to disclose the relationship between donor and donee to the power of attorney. That, section 30 of the Land Disputes courts Act Cap 216 R.E 2019 allows representation before the trial tribunal to be either by an advocate, relative or family member but the power of attorney in this matter is silent on the status of the donee. To cement on this issue, reference was made to the case of **Zarina Mohamed Vs. Leonida F. Sakulo,** Land Case No 166 of 2010 HC (Unreported).

Submitting for the 3rd ground the counsel for the Appellant argued that, the evidence by PW1 contradicts itself on the size of the suit land as he alleged that the suit land was 8 acres but later claimed that it was 15 acres. He contended that the said contradiction goes to the root of

the case as the holder of the power of attorney was not familiar with the facts of the case. To cement on this, the counsel cited the case of **Sylvester Stephano Vs. Republic,** Criminal Appeal No. 527 of 2016) [2018] TZCA 306.

On the fourth ground the Appellant faults the trial tribunal for issuing two conflicting orders on 20/8/2019 and 17/9/2019 regarding the person who was responsible to preside over the matter. The Appellant's counsel contended that, parties to the case were also not afforded right to be heard. That, the trial tribunal failed to read and explain to the Appellant in the language he understands before the commencement of the hearing contrary to section 12(1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 GN No. 174 of 2003. He also referred the case **Enerico Kalala Vs. Mohamed Mussa (Administrator of Estate of the Late Ahmed Zahoro Ahmed)** Civil Application No 40 of 2011 CAT (Unreported). It is the Appellant's prayer that the appeal be allowed and the judgment and proceedings of the trial tribunal be quashed and set aside.

Contesting the appeal, the counsel for the Respondent admitted that before the trial tribunal the Respondent was represented by one

Macho Nade under power of attorney. On the argument that the Respondent's sickness was not indicated in the power of attorney he submitted that it was irrelevant as the same was registered as required by the law. He added that the Appellant was unable to state how non-disclosure of the Respondent's disease in the power of attorney has caused miscarriage of justice.

On the argument that the power of attorney did not disclose the relationship between the parties, the counsel for the Respondent submitted that it is not mandatory requirement under the law. That, representation before the trial tribunal is governed by section 30 of the Land disputes Courts Act Cap 216 R.E 2019.

Responding to the third ground on the contradiction of the size of disputed land, the counsel for the Respondent submitted that in the application the size of the land was mentioned as 15 acres. That, similar fact was stated before the trial tribunal by the Respondent and her witness. The counsel for the Respondent was of the view that the contradiction noted is minor and does not go to the root of the case. He referred the case of **Elibariki Kirama Kinyawa and another Vs. John George @ Jimmy,** Civil Appeal No. 183 of 2017 (Unreported).

On the fourth ground of the Respondent's counsel submitted that the law allows a successor chairman to take over where his predecessor ended. He faulted the claim by Appellant that they were not informed on the change on the ground that the same did not occasion to a miscarriage of justice. That, there was fair trial as the Appellant entered defence and presented witness to defend his case. It is the Respondent's prayer that the appeal be dismissed for being meritless.

In a brief rejoinder the Appellant's counsel reiterated his submission in chief and insisted that the evidence of PW1 was hearsay. He referred this court to the case of **Oloni Andendekisye Mwantila & another Vs. Pride Tanzania Ltd & 2 others,** Land Appeal No 22 of 2011 HC at Mbeya (Unreported) and prayed for this court to disregard it.

Pointing at page 11 of the trial tribunal judgment the Appellant's counsel added that, the Appellant never understood the nature of Respondent's claim and it is the reason he testified contrary to what was pleaded in his written statement of defence. He insisted that there was non-compliance of Regulation 12 (1) (2) by the trial tribunal hence, prayed for the appeal to be allowed.

I have gone through the record of the trial tribunal, the grounds of appeal and submissions for and against the appeal. Starting with the 2nd

ground, the Appellant challenges power of attorney for not stating the relationship between the Respondent and a person who was appointed as her attorney and for not stating the sickness which prevented the party to the case from appearing in court. Reading the said power of attorney, it conferred specific power to Macho Nade who is the Respondent's brother-in-law to be the lawful and authorized attorney of Anna Baha in respect of the case before the trial tribunal. The reasons for assigning the said power to Macho Nade was stated to be sickness. In that regard the relationship between the doner and donee was well captured in the power of attorney. Similarly, the reason for appointing Macho Nade as Respondent's representative was stated in the power of attorney. It was however contended that there was no proof of sickness which could have entitled the Respondent to issue power of attorney.

It is unfortunate that the Appellant did not state the provision which enforce power of attorney to be attached with medical evidence proving that the person giving power of attorney is sick. The said power of attorney was dully registered and stamped hence complied to legal requirement. It is clear that the holder of power of attorney has all rights to defend the person giving such power. In doing so that person can also testify in court thus, the holder of power of attorney did not

contravene the law by testifying in court. Therefore, the Respondent's contention that the appointed witness under power of attorney testified on hearsay evidence is unfounded.

Before I deliberate the 3rd ground, I find it pertinent to deal with the fourth ground in which the propriety of the proceedings is challenged. the Appellant claimed that there was contradiction as to the chairman who was supposed to take over the proceedings. That while on 20th August 2019 the order indicates that Hon. Kamugisha was to proceed with hearing on 17th September 2019 the same trial chairman proceeded with the trial.

Going through the records, the case was presided over by three different chairmen before it was concluded. The proceedings started with Hon Wagine but before he could start recording witnesses evidence Hon. Kamugisha took over the proceedings. Before he could conclude the matter was adjourned before two more chairmen; Hon. Mahelele and Hon. Ntumengwa. On 20th August 2019, Hon Hon. Mahelele adjourned the case and recorded clearly that Hon. Kamugisha was to proceed with hearing of two defence witnesses and in fact he was the trial chairman by then. There is no coram for 17th September 2019 but there is coram for 17th September 2021 which indicates that Hon.

Mdachi took over the proceedings and not Hon. Mahelele whom the Appellant claim that he took over the proceedings. This time, Hon. Mdachi recorded the reasons for change of the trial chairman. At page 29 of the typed proceedings, he recorded that Hon. Kamugisha was transferred to Ifakara thus, there was a good reason for his taking over to the proceedings. I therefore find no conflicting orders as alleged by the Appellant. Although Hon Kamugisha did not record the reason while taking over the proceedings, I see no prejudice to any of the parties as hearing was yet to commence. Hearing started when Hon. Kamugisha took over the proceedings and he recorded issues guiding hearing before he proceeded to record witnesses' evidence.

The Appellant contended that they were not accorded an opportunity to be heard on the change of trial chairman. The record shows that the chairman recorded that the change was because the trial chairman was transferred to another station thus the claim that they were no heard on the same is unmerited. I say so because all parties were represented by advocates before the trial tribunal and their advocate were present when the tribunal recorded over the change of the trial chairman. If anyone had a concern, the same could have been raised before hearing commenced. Since the Appellant does not claim to

have raised any issue before the hearing commenced then it cannot be said that he was not accorded right to be heard on the change of the trial charman.

On the argument that the trial tribunals failed to read the application in the language known to the Appellant hence he failed to prepare a sound defence, I find it baseless. In his submission the Appellant contended that the trial tribunal contravened Regulation 12 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 GN No. 174 of 2003. He quoted the provision and I hereby reproduce it;

> *"12 (1) The Chairman shall at the commencement of the hearing, read and explain the contents of the application to the Respondent.*
> *(2) The Respondent shall, after understanding the details of the application under sub-regulation (1) be required either to admit the claim or part of the claim or deny."*

The said provision requires the chairman before commencement of hearing to read and explain the contents of the application to the Respondent and the Respondent after understanding the details of the application is required to respond to the claim. While I agree that the said provision is a mandatory provision, it is my view that the fact that the trial tribunal did not record if the application was read to the

Respondent is an irregularity which does not vitiate the proceedings. Being guided by the decision of the Court of Appeal in the case of **Feliciam Muhandiki Vs. The Managing Director Barclays Bank Tanzania Limited,** Civil Appeal No 82 of 2016 CAT at Dar es Salaam (Unreported) it is my view that the referred procedural irregularity cannot vitiate proceedings as no prejudice has been occasioned to the Appellant. See also the case of **Cooper motors Corporation (T) Ltd Vs. AICC** [1991] T.L.R 165.

Based on the above analysis and authority, it is in my view that Regulation 12 (1) and (2) intended to remind the parties over the dispute before the tribunal and find out disputed facts visa vis undisputed facts. In this case, both parties were represented by advocates and they raised issues before commencement of hearing. The Appellant was the Respondent before the trial tribunal and he successful entered his defence and called witnesses to defend is case. Thus, it cannot be said that he did not understand the nature of the dispute or prepare sound defence. I therefore find this argument baseless hence, ground four is dismissed.

Turning to the third ground which is based on contradiction in evidence and proof of claim, this court will be guided by evidence on

record. Starting with the contradiction on the size of the suit land I find the same not material. The same raised during clarification question by assessors but it was not featured in the pleadings or main evidence by the Respondent and his witnesses which indicated that the suit land was 15 acters and not 8 acres.

Regarding the contradiction in evidence, it is in record that before the trial tribunal the Respondent one Anna Baha did not appear to testify over ownership of the suit land. PW1 Macho Nande Erro was holding power of attorney for the Respondent and he testified that he was lawful owner of the suit land measuring 15 acres as the same was allocated to him by his grandfather. When he was asked clarification questions by assessors, he mentioned that the suit land belonged to the Respondent. The trial tribunal considered that contradiction minor and proceeded to hold that the evidence intended to prove that the suit land belonged to the Respondent. I however see that fact differently because, PW1 being a holder of power of attorney ought to know clearly that he was not the owner of the suit land. His evidence in chief was material to determine the witness understanding over the ownership of the suit land. In the absence of clarification questions, PW1's evidence stands that he was the one claiming ownership over the suit land.

Again, in his evidence PW1 was trying to convince the court on how he acquired title over the suit land thus, he had nothing material to prove how the Respondent acquired the suit land. The evidence which related to the Respondent is that of PW2. The question is whether such evidence proved that the Respondent was the owner of the suit land. In his evidence PW2, Yacobo Siima Aishi claimed that the suit land was allocated to the Respondent Anna Baha by her grandfather one Erro Amnay. This contradict the evidence by PW1 who claimed that the land was allocated by the same Erro Amnay who was his grandfather in the year 1986.

In this I agree with the Appellant that the evidence of PW1 was contradictory on the owner of the suit land and being the person trusted to know the fact of the case, his evidence cannot be qualified by that of PW2 and in fact it contradicted each other. The contradiction in my view is material to the case rendering the evidence by PW1 not dependable.

This is opposed to clear evidence of the Appellant and his witnesses. The Appellant testified that his father was the first person who occupied the suit land. When he moved to another village, he gave the suit land the Appellant. That, the Respondent was married to Safari Nade but since at the time of marriage she was pregnant, their customs

prohibited them from staying in the family land. The Appellant was asked if he could give them a place to build a temporary shelter and he agreed by allowing them to stay in that land for one year. That evidence was supported by other two witnesses. From their evidence it is also clear that the Respondent's husband was buried in the disputed land as he died before the time allowed for him to go back to the family land. That, it was a local taboo for a man who had married a pregnant woman to stay in the family land. When the Respondent's husband died, they had no option but to bury him in the land he had acquired shelter. It is also in evidence that after her husband's death, the Respondent moved to another village living the Appellant in full occupation of the suit land until to date.

From the above analysis it is clear that DW1's evidence revealed the history of acquisition of land by his father and how the same was transferred to him. He also testified how the Respondent's husband occupied the land and how he was buried in the same land. His evidence was clearly supported by his witnesses and it make logic that the Appellant's evidence was more convincing as opposed to that of the Respondent. The trial tribunal considered the fact that since the Respondent's husband was buried in the suit, it proved ownership. I

however decline from falling on the same footsteps. He himself admitted that the grave in the suit land does not necessarily prove ownership. The Appellant's witnesses clearly explained the circumstances that led the Respondent's husband being buried in the suit land. That being the case it cannot be said that being buried in the suit land, gave the Respondent title over the suit land.

To the contrary, I find that the Appellant's evidence was strong proving that his father was the original owner of the suit land and he transferred ownership to the Appellant. The evidence by DW2 and DW3 who were government leaders by then supported the Appellant's evidence that he was allocated the suit land by his father who acquired the same way back in 1980's. The Appellant's evidence reveals that he was at all times in full occupation and use of the suit land save for the time when the Respondent's husband was allowed to use part of the suit land. In that regard, I find merit in the third ground of appeal and the same is allowed.

From what I have endeavoured to discuss above, the appeal is merited. I therefore proceed on quashing and setting aside the decision of the trial tribunal. The Appellant is declared lawful owner of the suit land. In the upshot, the appeal is allowed with costs.

**DATED** at **ARUSHA** this 27th July, 2023.


D.C. KAMUZORA

JUDGE