IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 30 OF 2022

(C/F Application No. 84/2018 District Land and Housing Tribunal of Rombo at Rombo)

CATHERINE GASPER ..... APPELLANT

VERSUS

DAFROSA MONGULA MTANA..... RESPONDENT

JUDGMENT

Last Order: 21st June, 2023
Judgment: 27th July, 2023

MASABO J,:-

The appellant herein had filed Application No. 84 of 2018 before the District Land and Housing Tribunal of Rombo at Rombo against the respondent. She claimed to be the lawful owner of a ¾ acre of land she which was allegedly bequeathed to her by her deceased mother, one Agnes Gasper, through an oral will. In vindication of her right, she prayed a for a declaratory order that she is the rightful owner of the suit land, a permanent injunction against the respondent, exemplary damages for any loss occasioned on the suit land and for costs of the suit.

The application proceeded to a trial after which the tribunal had to determine who was the rightful owner of the suit land and the remedies to which each of the partiers was entitled to. In support of her case, the appellant testified as PW1 and called two other witnesses; PW2, Victoria Dominick and PW3, Joseph Martin. The appellant testified that

she was the daughter of one Agnes Gasper who, through an oral will, bequeathed her the suit property. She testified that, in total the land was I acre but the deceased gave a ¼ acre of it to the respondent as remuneration having worked for her as her maid over a long period of time and she was handed ¾ acres of land. The said Agnes demised in 2008 and her death certificate was received as exhibit 1. Thereafter, the appellant successfully applied for letters of administratrix before the Primary Court of Rombo District at Mengwe, a ruling of which and the letter of administration were received as exhibit-2. As for the trespass, she deponed that the respondent trespassed into her land in 2018.Her testimony was corroborated by PW2 who told the tribunal that the suit land was bequeathed to the appellant. PW3 had a slightly different story. He narrated that the late Agnes Gasper bequeathed the suit land to the appellant and respondent whereas the respondent was given ½ acre of land. He also stated that the appellant informed him that the respondent had trespassed the land she was bequeathed in 2018.

The defence case was led by the respondent who stood as DW1. She called two witnesses; DW2, Benedina K. Assenga and DW3, Living Sebastian. DW1 testified that she was married by the said Agnes Gaper in 1973 and that the said Agness Gsper paid dowry to her father so she could live with the Agnes and bear sons for her as she had none. She bore her 4 children and lived with her since then and the said Agnes gave her land to live there with the children. One of her children also died and was buried in the said land. DW2, the brother-in-law of the appellant explained that indeed the respondent was brought by his mother-in-law so he could bear children for her. The respondent bore 4

children for her and that she gave the respondent land to live with her children whereas the appellant was given land by her grandmother one Maria Maole. DW3, explained that the respondent was married in 1973 by Agnes and had 4 children and was given land by Agnes.

Upon weighing the evidence of both parties, the trial tribunal found that the appellant had failed to prove her claim and her application was denied with costs. Aggrieved by such decision, she has filed this appeal on the following four grounds of appeal;

1. That the honourable Trial Tribunal erred in law and fact on declaring the respondent to be the lawful owner of the suit lane.
2. That the honourable Trial Tribunal erred in law and fact by failing to consider the Appellant ought to inherit part of her mother's land.
3. That the trial tribunal erred in law and in fact by failing to consider evidence adduced by the appellant during trial.
4. That the judgment of the trial tribunal lacks legal reasoning which is required by law.

The appeal was heard in writing whereas the appellant was represented by Mr. Willence Shayo and the respondent by Mr. Gideon Mushi both learned advocates. In support of the appeal, Mr. Shayo consolidated the 1st and 3rd grounds of appeal and abandoned the 2nd ground. Prior to arguing the consolidated ground of appeal, Mr. Shayo raised the issue that the testimony of all witnesses at the trial tribunal was not given under oath which meant that the same was fatal a stance he supported

with the case of **National Microfinance Bank PLC vs Alice Mwamsojo** Civil Appeal No. 235 of 2021 (unreported) CAT.

On the consolidated grounds, Mr. Shayo averred that the appellant's witness duly testified on the issues and consistently stated that the appellant was given the suit land by the Deceased Agnes while allocating a neighboring piece of land to the respondent. He proceeded that, whereas the respondent and her witnesses testified that the respondent was married to Agnes, they did not state how the respondent came into possession of the suit land and therefore failed to prove ownership or possession of the suit land. Citing the case of **Hemed Saidi vs Mohamed Mbilu** [1984] TLR 113, he submitted that the standard of proof in civil proceedings is balance of probabilities and the appellant's evidence was heavier than that of the respondent thus, the evidence ought to be decided in the appellant's favour.

On the fourth ground, Mr. Shayo averred that the judgment of the trial tribunal did not contain clear legal reasoning as the trial chairman referred to the evidence of the respondent that they proved that she was married but he did not address how he was convinced that she proved her ownership of the suit land against the appellant. He concluded his submissions by praying that the decision of the tribunal be quashed and set aside and the appellant be declared as lawful owner of the suit land.

On his part, Mr. Mushi submitted that the standard of proof in civil cases is on balance of probabilities as stated in section 110 of the Evidence Act Cap 6 RE 2019. He who has heavier evidence will win the suit as stated

Hemedi Said vs Mohamed Mbilu (supra). He then argued that, the respondent's evidence was heavier as she proved that the late Agnes approached her father and paid dowry so that she could bear him sons to inherit her estate. The respondent lived in the suit land and bore four (4) children with one Anthony Mkubwa whereas one is now deceased and was buried on the suit land which was given to the respondent by the late Agnes Gasper all within the knowledge of the appellant who is trying to grab the same under the umbrella of being an administratrix of the estate of the late Agnes.

Mr. Mushi submitted further that the respondent had been living in the suit land from 1973 until 2018 when the appellant instituted the suit before the trial tribunal hence 45 years had lapsed. Thus, the suit is time barred given that the late Agnes did not sue the respondent all those years but the appellant came to only claim the same after her death. He contended that it is the duty of the court or tribunal to receive evidence from both parties together with their respective witnesses, assess the credibility of each witness and make a finding. He supported his argument with **Stanslaus Rugaba Kasusura and AG vs Phares Kabuye** [1983] TLR 334 and **Nkungu vs Mohamed** [1984] TLR 46. He then argued that, the evidence of the respondent was heavier compared to the appellant's which was weak and fabricated. He amplified that, Benadina Assenga the in-law of the appellant and Living Sebastain Lyakurwa both explained how the family of the late Agnes Gasper paid dowry for the respondent to bear sons for her and that the respondent was given the suit land while the appellant was given land by one Bibi Maria Maole. He added that, if the trial tribunal failed to

properly analyze the evidence of the parties, this court can step into its shoes to re-assesses, rea-evaluate and make a finding on the said evidence as was held in **Deemay Daati and 2 others vs Republic** [2005] TLR 132.

On the issue of administration of oath, Mr. Mushi contended that the same was not a ground of appeal and he prayed that it be disregarded. He argued that all witnesses gave their evidence on oath and hence the issue is baseless and an afterthought. He referred the court to the 2nd page of the typed judgement where it was stated that after the applicant had closed its case, the defendant started to defend himself on oath.

In alternative, Mr. Mushi drew my attention to section 45 of the Land Disputes Courts Act Cap 216 RE 2019 and argued that I should not accord much weight to the irregularities in admission of evidence before the trial tribunal as the irregularities in proceedings, impropriety in admission or rejection of evidence does not vitiate the proceedings as they do not occasion any miscarriage of justice. Lastly, he reiterated the prayer that the appeal be dismissed for lack of merit.

I have dispassionately considered the submission of both parties alongside the tribunals record which I have thorough read. Following the abandonment of the 2nd ground of appeal and the consolidation of the first and third grounds of appeal, there are now two grounds awaiting determination by this court, namely the consolidated first and third grounds of appeal and the 4th ground of appeal. Before delving into these two grounds, I will deal with the irregularity in the admission of

evidence as raised by the appellant's counsel in the course of his submission. Both parties agree and it is certain that, the irregularity was not among the grounds of appeal. Hence, it was wrongly raised contrary to the provision of Order XXXIX rule 2 of the Civil Procedure Code, Cap 33 RE 2019 which prohibits parties from arguing a point that was not set out in the memorandum of appeal save where there is a court leave to that effect. It states thus;

> 2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule: Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

Accordingly, and since no leave was either sough or obtained prior to raising the additional issue in the course of the submission, it is obvious that the submission on the said point was offensive of the law. The respondent's counsel has argued me to ignore this point for the reason that it offends the law. Much as his argument has merit, I desist from the temptation to turn a blind eye to this point. Rather, considering the nature of the irregularity complained about and the fact that both parties had an opportunity to make their respective submission in respect of it, I strongly feel that it is in the interest of justice to consider it and make a determination. Needless to say, evidence is a backbone of any court decision. Thus, an irregularity in its admission is a serious matter that any court of law cannot ignore more so when, such as in the case at hand, the irregularity complained regards admission of evidence

in the absence of an oath or affirmation. In such circumstances it both, prudent and incumbent, for the court to interrogate the record and see whether such irregularity exist and if it does, whether it is a material irregularity or just a minor and negligible.

In the foregoing, I have scrutinized the tribunal's record to ascertain whether the evidence of witnesses was procured under oath. In the end, I have observed that, the record is silent on whether the witnesses were sworn or affirmed before giving their testimony. The record only bears the profile of each witness (name, age, tribe and religion) followed by their respective testimonies, which presupposes that indeed, the evidence was admitted without oath or affirmation. Mr. Mushi has drawn my attention to page 2 of the typed judgement where the trial tribunal suggests that the respondent gave her evidence on oath.

It is trite that, court record should not be easily impeached as it presumed to accurately reflects what transpired in court. This principle has been expounded in numerous cases and there is plethora of authority to it. For instance, in **Alex Ndendya vs Republic** (Criminal Appeal No. 207 of 2018) [2020] TZCA 202 [Tanzlii] the Court of Appeal held that;

> "It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."

On the strength of this authority and since the presumption has remained unrebutted, it is safely concluded that, the record of the

proceedings accurately depicts what transpired at trial tribunal and for that reason, I respectfully decline the invitation by the counsel. Accordingly, the question as to whether the irregularity exists is answered in the affirmative.

Lastly, with regard to the degree of the irregularity and its consequence, I will stand guided by the decision of the Court of Appeal in **National Microfinance Bank PLC vs Alice Mwamsojo** (supra). In that case, the arbitrator at the Commission for Mediation and Arbitration (CMA) omitted to administer oath/affirmation to some of the witnesses. The Court found the omission fatal, nullified the proceedings and ordered the remission of the case back to the CMA for rehearing of evidence of the witnesses whose evidence was not taken on oath. The Court instructively reasoned that;

> "It is, therefore a mandatory requirement that before giving evidence the witness has to take an oath or affirmation accepted from the witness, this includes witnesses before the CMA."

Cementing the importance of giving evidence on oath/affirmation for witnesses appearing before the CMA and other quasi-judicial bodies, the Court of Appeal in **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphania Mkunde Athanase**, Civil Appeal No. 404 of 2020 [2020] TZCA 1890 [Tanzlii] applied the provisions of the Oaths and Statutory Declarations Act, Cap 34 RE 2002 and stated that,

> "Under s.2 of Cap. 34, the word court has been defined to include every person or body of persons having authority to receive evidence upon oath or affirmation."

The court further stated:-

> "Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so viatiates the proceedings because it prejudices the parties' case. - See for example, the cases of **Nestory Simchimba v. Republic,** (supra) cited by the appellant's counsel and **Hamis Chuma @ Hando Mhoja and Another v. Republic,** Criminal Appeal No. 371 of 2015 (unreported)."

In the foregoing authorities and in the light of section 2 and 4 of the Oaths and Statutory Declarations Act which provide that;

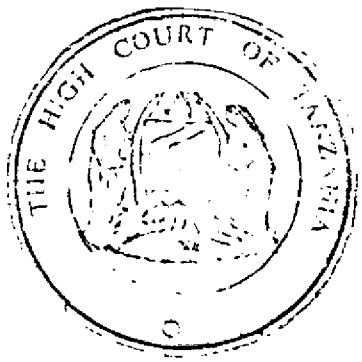
> 2. In this Act, unless the context otherwise requires-
> "court" includes every person or body of persons having by law or consent of parties authority to receive evidence upon oath or affirmation but does not include a court martial established under the National Defence Act;
>
> 4. Subject to any provision to the contrary contained in any written law, an oath shall be made by-(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;

I am of the settled view that, much as the Land Disputes Courts Act. Cap 216 RE 2019 and the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 are both silent on the requirement to administer oath, it is mandatory that the witnesses be examined upon oath. The omission was a fatal irregularity as it rendered the testimonies of all witnesses non-existent henceforth vitiated the entire proceedings of the trial tribunal.

Consequently, I invoke the revisional powers bestowed in this court, nullify the proceedings and judgment of the District Land and Housing Tribunal of Rombo at Rombo in Application No. 84 of 2018 and subsequently order the remission of the casefile to the trial tribunal for trial ***De Novo***.

As for the costs, given that the error was occasioned by the trial tribunal and the same was not set out in the memorandum of appeal, I refrain from awarding costs so that the parties can share the same by each of them shouldering its respective costs.

Dated and delivered at Moshi this 27th day of July, 2023.



J. L. MASABO

JUDGE